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Agriculture, Fisheries and Forestry Legislation Amendment (Export Control and Quarantine) Bill 2006

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Law and Bills Digest Section

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Agriculture, Fisheries and Forestry Legislation Amendment (Export Control and Quarantine) Bill 2006

Date introduced: 15 June 2006

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: The formal provisions commence on Royal Assent. Amendments to the *Export Control Act 1982* commence 28 days after Royal Assent and amendments to the *Quarantine Act 1908* commence the day after Royal Assent.

Purpose

To amend the *Export Control Act 1982* and the *Quarantine Act 1908* in order to:

- provide a legal basis for the recovery of fees for quarantine services provided under the Quarantine Act to other Commonwealth bodies
- clarify the Commonwealth's authority to regulate the sourcing of fish intended for export
- create four new offences in the Export Control Act, including two strict liability offences, in relation to the preparation of goods for export, and
- amend the regulation-making power within the Export Control Act to allow fees to be charged for services provided by the Secretary or the Secretary's delegate.

Background

The Export Control Act sets up a regime for the export inspection of prescribed goods. These goods include meat, fish, fresh fruit and vegetables, dairy produce and grains. Inspection is conducted by authorised officers of the Australian Quarantine and Inspection Service (AQIS). The purpose of the inspection is to ensure that the goods which are to be exported meet the strict requirements set out in the orders made pursuant to the regulations made under the Export Control Act. These requirements are aimed at ensuring fitness for human consumption, quality and accurate trade description of the goods.

Successive Governments have taken a serious view of malpractice in the export food industry.¹ They have argued that any malpractice that may endanger the reputation of Australia's export industries and jeopardise overseas markets for Australian goods must be strongly deterred. The Export Control Act includes penalties for false declarations and

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trade descriptions, and grants extensive regulation-making power to the Governor-General including penalties for offences against the regulations. This Bill creates four new offences, including two strict liability offences, to deal with those people who fail to ensure that goods are prepared for export in accordance with the legislation. In her second reading speech, the Parliamentary Secretary said that:

The creation of four new offence provisions is in response to a serious gap in the Export Control Act. Currently, the offence provisions in the Act focus on persons involved with goods in the post-preparation phase with the result that persons who are the occupiers of establishments where the preparation of the goods occurs are immune from the serious penalties that apply to other offenders under the Act. The new offences focus on the person responsible for the preparation of the goods for export.²

The Bill also extends the definition of ‘preparation’ to include fish and clarifies that the Commonwealth has appropriate legal authority to regulate the sourcing of fish for export. According to the Explanatory Memorandum, the authority to regulate the sourcing of fish is necessary to ensure ongoing access for exported fisheries products into overseas markets and to protect consumers by ensuring that fish, including shellfish are harvested from areas that do not contain pathogenic organisms, biotoxins and chemical contaminants at levels that may represent a threat to consumer health.³

Australian Fishing Industry

Australia is a relatively small producer and exporter of fisheries products. According to information published by the Australian Bureau of Agricultural and Resource Economics (ABARE) in March 2006,⁴ Australian exports of fisheries products fell by 7 per cent to \$1.5 billion in 2004-05, continuing the recent trend of declining export values for Australian fisheries products. Over the four years to 2004-05 the total value of exports fell by 36 per cent, from a peak of \$2.4 billion in 2000-01. Both edible and nonedible exports declined in value over this period, by 35 per cent and 36 per cent respectively.⁵ The main exported products in terms of value were rock lobsters (28 per cent of gross value of fisheries exports), pearls (19 per cent), abalone (17 per cent), whole tuna (11 per cent) and prawns (11 per cent).

Of the \$2.1 billion of fisheries products produced in Australia in 2004–05, wildcaught fisheries accounted for \$1.4 billion or 70 per cent. Major aquaculture species in Australia include southern bluefin tuna, pearls, Atlantic salmon, prawns and oysters. These five products accounted for 82 per cent of the value of total aquaculture production in 2004–05.⁶

Australian Quarantine and Inspection Service (AQIS)

AQIS is part of the Department of Agriculture, Fisheries and Forestry and its broad objective is to protect Australia’s animal, plant and human health status and maintain market access through the delivery of quarantine and export services.⁷ The cost of AQIS

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programs in 2004–05 was \$316.185 million.⁸ AQIS' activities are primarily funded by a combination of cost-recovery (industry charges) and government appropriation. Revenue recovered through fees and charges contributed \$150.370 million or 48 per cent of total revenue. Revenues from the Australian Government contributed \$153.299 million (also approximately 48 per cent), while the remaining \$12.516 million or approximately 4 per cent was received from other sources, such as interest earned on reserve accounts.⁹

The majority of AQIS' non-cost-recovered activities comprise large-scale community service obligations, the costs of which are met by Government. Examples include compliance, and activities conducted under the Northern Australia Quarantine Strategy. AQIS undertakes cost-recovery to assist with meeting the costs of thirteen programs.¹⁰ The Australian Government's requirements have changed since cost-recovery was first introduced for AQIS in 1979. Initially AQIS was required to recover 50 per cent of the cost of providing services. It was required to recover 60 per cent of costs from 1 July 1988, and 100 per cent from 1991 until August 2001. In August 2001, the Government reduced the recovery amount for AQIS export programs to 60 per cent of costs.¹¹ The Government provides the remaining 40 per cent. Import programs are still required to recover 100 per cent of their costs from clients. Details of AQIS' fees and charges are to be found on their [website](#). In 2000 and 2003, the Australian National Audit Office examined the accuracy and effectiveness of the cost recovery systems employed by AQIS.¹²

Financial implications

The Explanatory Memorandum states that this Bill is not expected to have any financial impact on the Government. Any extra revenue raised by AQIS as a result of the Bill will come from other Commonwealth agencies, so the net result to the Government will be nil.

Main provisions

Amendments to the *Export Control Act 1982*

Items 1 to 5 of Schedule 1 amend definitions in section 3 of the Export Control Act. **Item 1** inserts a new definition of the word 'fish' that includes all aquatic vertebrates, such as crocodiles, and all aquatic invertebrates such as prawns, mussels and scallops. **Item 2** extends the definition of 'premises' to include places in or on the water. The extended definition is necessary because of the extension, in **item 3**, of the word 'preparation' to include the capturing or taking of fish, whether from the wild or from stocks maintained using aquaculture. According to the Explanatory Memorandum, the amendments proposed by **items 1 to 3** remove any doubt that the Commonwealth has a level of control over the sourcing of fish intended for export.¹³ **Item 4** inserts a new definition of the expression

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‘registered establishment’. This expression replaces the term ‘registered premises’ which is repealed by **item 5**.

Part 2 of the Export Control Act regulates the export of prescribed goods and imposes penalties for non-compliance with its provisions, including for malpractice and fraudulent behaviour. In 2001, Parliament passed the *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001* that revised the criminal offence provisions in legislation administered by agencies within the Agriculture, Fisheries and Forestry portfolio in order to harmonise the provisions with the principles of criminal responsibility set out in Chapter 2 of the *Criminal Code Act 1995*.¹⁴ The principles of criminal responsibility are divided into physical elements and fault elements. The physical elements of an offence are matters such as conduct, the circumstances in which conduct occurs or the result of the conduct. Fault elements relate to a person’s state of mind, for example, intention, knowledge, recklessness and negligence. For each physical element of an offence, the prosecution must prove that the defendant had the requisite fault element, if proof of a fault element is required.

Item 6 inserts four new offence provisions that will apply to a person or entity who is in control of the preparation of goods that are exported and who has not ensured that the goods have been prepared in accordance with the conditions and restrictions set out in regulations. The offence provisions fall into two general categories: one category, **new section 8A**, deals with offences that have no strict liability elements, and the other category, **new section 8B**, deals with two offences each of which has three strict liability elements. The offences within each category are identical in all respects, except that the first offence in each category deals with the export of goods to any place and the second offence in each category deals with the export of goods to a particular place. This arrangement mirrors the way in which certain offences are already dealt with in the Export Control Act. Strict liability means that the prosecution does not have to prove a fault element in relation to all or some of the physical elements of the offences, only that the defendant engaged in the relevant physical elements of the offence. The maximum penalty for the two offences in **new section 8A** is imprisonment for 5 years. The maximum penalty for the two offences in **new section 8B** is 60 penalty units (\$6,600) for an individual, or five times this amount for a company. According to the Explanatory Memorandum,¹⁵ the level of penalty for the first two offence provisions is consistent with the penalties for existing offences in section 7A and 8 of the Export Control Act. The level of penalty for the second two offences is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.¹⁶

Items 7 to 16 make technical amendments that are minor and required as a consequence of the replacement of the expression ‘registered premises’ with ‘registered establishment’ throughout the Export Control Act.

Item 17 inserts a new paragraph in subsection 25(2) that will empower the Governor-General to make regulations and orders imposing fees for the performance of a service by the Secretary or a delegate of the Secretary, and for the remission of fees so imposed.

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According to the Explanatory Memorandum, '[a]s the Secretary and delegates of the Secretary also perform services under the Export Control Act which would normally attract fees if performed by authorised officers, this amendment will enable the Australian Quarantine and Inspection Service to recover appropriate costs for such services'.¹⁷

Amendments to the *Quarantine Act 1908*

Item 1 of Schedule 2 inserts a **new section 86EA** in the Quarantine Act.

New subsection 86EA(1) imposes a notional liability on the Commonwealth to pay fees specified in a determination made under existing subsection 86E(1B) of the Quarantine Act for quarantine services. **New subsections 86EA(2)-(3)** empower the Finance Minister to give such legally-binding written directions as are necessary or convenient for carrying out or giving effect to this new notional liability, including the transfer of money between or within Commonwealth financial accounts. The intent of these amendments is that, under the Finance Minister's directions, AQIS will have the legal authority to require payment from agencies and other Commonwealth bodies for quarantine services provided, and those agencies and bodies will have the legal authority to make payments to AQIS for quarantine services.

The Finance Minister's written directions are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* (**new subsection 86EA(4)**) which means that they are not liable to disallowance by Parliament.

Item 2 provides that **new section 86EA** will apply to quarantine fees that are incurred on or after the commencement of this Schedule, that is, the day after this Act receives Royal Assent.

Endnotes

1. The current Act arose out of events in the early 1980s. In August 1981 discoveries were made in the United States of horse meat having been substituted for beef by an Australian meat export establishment. The reputation of the Australian meat industry was severely tarnished. (See Royal Commission into the Australian Meat Industry, *Report*, 1982). In response to the 'meat substitution scandal' the *Customs (Unlawful Exportation of Food) Act 1982* and the *Meat Export (Penalties) Act 1982* were enacted. These Acts were replaced by the *Export Control Act 1982* which commenced operation on 1 January 1983.
2. Ley, Hon. Sussan, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, 'Second reading speech: Agriculture, Fisheries and Forestry Legislation (Export Control and Quarantine) Bill 2006', House of Representatives, *Debates*, 15 June 2006, p. 1.

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3. Explanatory Memorandum, Agriculture, Fisheries and Forestry Legislation Amendment (Export Control and Quarantine) Bill 2006, p. 4.
4. 'Economic status of fisheries: better times ahead for Australian producers' [paper presented at the National Outlook Conference, *Outlook 2006*, Canberra, 28 Feb-1 Mar 2006, Australian Bureau of Agricultural and Resource Economics, *Australian commodities 2006*, March quarter, p. 5. Available at: http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=miscitem&Criteria=CI TATION_ID:535J6%3B (site visited 5/7/2006)
5. *ibid.*, p. 6.
6. *ibid.*, p. 5.
7. Department of Agriculture, Fisheries and Forestry, *AQIS at a glance*, available online at: <http://www.daff.gov.au/content/output.cfm?ObjectID=637FF0C5-C305-43BD-9216486B57110266> (site visited 6 July 2006).
8. Department of Agriculture, Fisheries and Forestry, *Annual report 2004-05*, p. 354. AQIS has its own set of financial statements in the Department of Agriculture, Fisheries and Forestry Annual Report.
9. *ibid.*
10. Australian National Audit Office, 'AQIS cost-recovery systems follow-up audit: Australian Quarantine and Inspection Service', ANAO, 2003, *Audit Report No. 17, 2003-2004*, p. 22.
11. Hon. Warren Truss, Minister for Agriculture, Fisheries and Forestry, 'Coalition slashes export charges', [*Press Release*], 2 November 2001. The reduction in fees and charges came into effect on 1 November 2001.
12. Australian National Audit Office, 'AQIS cost-recovery systems: Australian Quarantine and Inspection Service', ANAO, 2000, *Audit Report No. 10, 2000-2001*; Australian National Audit Office, 'AQIS cost-recovery systems follow-up audit: Australian Quarantine and Inspection Service', ANAO, 2003, *Audit Report No. 17, 2003-2004*.
13. Explanatory Memorandum, Agriculture, Fisheries and Forestry Legislation Amendment (Export Control and Quarantine) Bill 2006, pp. 3-4.
14. For more details on this Act see James Prest, 'Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001', *Bills Digest No.20 (2001-2002)*.
15. Explanatory Memorandum, p. 6.
16. *ibid.*, p. 6.
17. *ibid.*, p. 7.

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