

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

**SCRUTINY BY THE COMMITTEE OF THE EXPORT INSPECTION
AND MEAT CHARGES COLLECTION REGULATIONS**

ONE HUNDRED AND THIRD REPORT

JUNE 1996



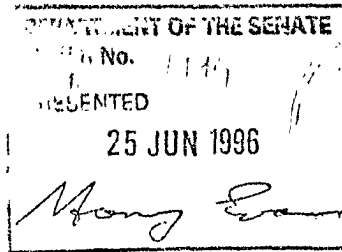
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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

Senator Bill O'Chee (Chairman)
Senator Mal Colston (Deputy Chairman)
Senator Kim Carr
Senator Sue Mackay
Senator Kay Patterson
Senator John Tierney

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

- (a) *that it is in accordance with the statute;*
- (b) *that it does not trespass unduly on personal rights and liberties;*
- (c) *that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and*
- (d) *that it does not contain matter more appropriate for parliamentary enactment.*

Introduction

The Committee's scrutiny of the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No 257**, was one of its most important actions in 1995, the Committee resolving formally to recommend that the Senate disallow the Regulations unless the Minister gave an undertaking on that day to amend the Principal Regulations to meet its concerns.

The Committee's concerns related to lack of external merits review of decisions made by a public official to refund or remit charges. The matter was of particular importance because the Committee had referred the question of review of these specific discretions to the Administrative Review Council, a statutory body whose functions include making recommendations to the government as to whether administrative decisions should be the subject of review. The ARC agreed with the Committee that, in this case, the decisions should be reviewable by the Administrative Appeals Tribunal. In these circumstances the Committee felt that it was appropriate for an undertaking to be given to amend the Regulations to provide for this. Fortunately the Minister gave the Committee such an undertaking thereby avoiding the need for it to recommend disallowance.

This Report describes not only the actions of the Committee in respect of these amending Regulations, but also its scrutiny of the 11 sets of Regulations which comprise the Principal Regulations, illustrating the types of matter which concern the Committee and the method of its operation.

The Committee is pleased to present this Report as an instance of how it carries out its mandate from the Senate to ensure that delegated legislation is of the highest quality.

CHAPTER 1

The Principal Regulations

The sets of Regulations which comprise the Principal **Export Inspection and Meat Charges Collection Regulations** were made under the enabling *Export Inspection and Meat Charges Collection Act 1985*. The purpose of the Regulations was to provide for the collection of charges imposed by the following Acts:

- *Domestic Meat Premises Charge Act 1983*
- *Export Inspection (Establishment Registration Charges) Act 1985*
- *Export Inspection (Quantity Charge) Act 1985*
- *Export Inspection (Service Charge) Act 1985*.

The Principal Regulations included the following sets of Regulations:

- the **Export Inspection Charge Collection Regulations, Statutory Rules 1985 No 145**, made under the then enabling *Export Inspection Charge Collection Act 1985*, which was assented to on 22 May 1985 and which commenced on 1 July 1985. Those Regulations, made on 21 June 1985, also relied on section 4 of the *Acts Interpretation Act 1901*, which provides that such Regulations may be made under provisions of Acts which have not commenced, although such Regulations may not commence until the enabling provision or Act commences. Subsequently, the *Export Inspection Charges (Miscellaneous Amendments) Act 1985*, which came into operation on 1 January 1986, amended the short title of the enabling Act, which was thereafter cited as the *Export Inspection Charges Collection Act 1985*.
- the **Export Inspection Charge Collection Regulations (Amendment), Statutory Rules 1985 No 363**, made on 19 December 1985 and expressed to come into operation on 1 January 1986. These Regulations, which also relied on section 4 of the Acts Interpretation Act, provided, among other things, for a change in citation of the Principal Regulations consequent upon the change in the citation of the enabling Act.
- the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1987 No 253**, made on 29 October 1987 and expressed to come into operation on 1 November 1987.
- the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1988 No 23**, made on 18 February 1988. Although not expressed to rely on section 4 of the Acts Interpretation Act the Regulations provided that they would come into operation on the same day as amendments of the enabling Act made by the *Statute Law (Miscellaneous Provisions) Act 1987*, which were proclaimed to commence on 1 March 1988. Several provisions of those Regulations related to

amendments made by that Act; four out of the six amendments expressly provided for matters to be prescribed.

- the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1989 No 406**, made on 21 December 1989 and expressed to rely also on section 4 of the Acts Interpretation Act. Those Regulations commenced on the same day as the *Export Inspection (Establishment Registration Charges) Amendment Act 1987*, which was proclaimed to commence on 15 February 1990.
- the **Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No 251**, expressed to be made on 21 July 1992 under the *Export Inspection (Charges Collection) Act 1985* and to commence on 1 August 1992. The brackets around the words 'Charges Collection' in both the Regulations and the enabling Act were an oversight, but probably had no effect upon validity. Subsequently, the *Export Inspection Charges Laws Amendment Act 1993*, which commenced on 1 January 1994, amended the short title of the enabling Act, which was thereafter cited as the *Export Inspection and Meat Charges Collection Act 1985*.
- the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1993 No 376**, made on 22 December 1993, were expressed to rely on section 4 of the Acts Interpretation Act and to commence on 1 January 1994. Among other things those Regulations amended the citation of the Principal Regulations to reflect the new citation of the enabling Act.
- the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 65**, made on 15 March 1994. Two of those regulations commenced retrospectively on 1 January 1994 and the other four on gazettal on 22 March 1994.
- the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 124**, made on 26 April 1994, which commenced on gazettal on 3 May 1994.
- the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 369**, made on 25 October 1994, which commenced on gazettal on 1 November 1994. There was a small mistake in the Notes to these Regulations, which advised that Statutory Rules 1993 No 374, but not the correct Statutory Rules 1993 No 376, were included in the Principal Regulations.
- the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No 257**, made on 22 August 1995, which commenced on gazettal on 29 August 1995.

CHAPTER 2

Action by the Committee

The Committee scrutinised the first set of Regulations, the **Export Inspection Charge Collection Regulations, Statutory Rules 1985 No 145**, in which the only provision of interest to it was the form of a warrant under which a Justice of the Peace could grant an authorised person power to enter premises during specified hours, with such assistance as is necessary, and if necessary by force, for the purposes of the enabling Act. Usually the Committee would prefer that such warrants be authorised by a judge, but in this case the enabling Act expressly provided for a Justice of the Peace to do so, doubtless because the warrants may be needed in remote areas where it would not be possible to apply to a judge. Therefore, the Committee did not raise any aspect of these Regulations with the Minister.

The second set of Regulations, the **Export Inspection Charge Collection Regulations (Amendment), Statutory Rules 1985 No 363**, included six substantive regulations, four of which provided for a change in the citation of the Principal Regulations consequent upon the change in citation of the enabling Act, (noted in Chapter 1), while one dealt with a matter which amendments of the enabling Act provided should be declared by the Regulations. The remaining regulation provided an effective discretion for the Secretary to refund a specific proportion of a charge where the registration of an export establishment lapses, is revoked or suspended. The Committee would normally prefer that the drafting of such a provision should be mandatory rather than permissive, since it reflects an intention that a payment should be made in respect of an objective set of circumstances. However, in this case the Committee did not raise the matter with the Minister, because the possibility of any injustice appeared remote.

The third set of Regulations, now cited as the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1987 No 253**, included only one substantive regulation, which amended one provision in a manner which did not concern the Committee. The fourth set of Regulations, **Statutory Rules 1988 No 23**, provided mainly for statistical returns by exporters. Again, the Committee did not have cause to write to the Minister. The fifth set, **Statutory Rules 1989 No 406**, included two substantive provisions, one for the payment of charges and one for the refund of charges. The provision for refunds repealed the refund provision in **Statutory Rules 1985 No 363**, replacing it with a provision which did not include a discretion. This new provision, which provided for refunds where an export establishment ceases to be registered, or where a charge is reduced, merely provided that an application may be made for a refund of charges, thereby apparently contemplating that a refund would be automatic in the objective circumstances for which the regulation provided. The Committee therefore did not raise these Regulations with the Minister.

The sixth set of Regulations, and the first set about which the Committee wrote to the Minister, were the **Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No 251**. As noted in Chapter 1, the first brackets in the citation were an oversight, but one which probably did not affect validity. The Regulations provided for the payment of charges and for statistical returns; and repealed the existing refund provision.

After considering a report on the Regulations by the Committee's Legal Adviser, Emeritus Professor Douglas Whalan AM, the Chairman wrote to the Minister about these and a related set of Regulations as follows:

"17 September 1992

The Hon Simon Crean MP
Minister for Primary Industries
and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to *Export Inspection (Service Charge) Regulations (Amendment)*, Statutory Rules 1992 No 249 and *Export Inspection (Charges Collection) Regulations (Amendment)*, Statutory Rules 1992 No 251, which the Committee considered at its meeting of 17 September 1992.

In respect of Statutory Rules No 249, the Committee notes the provision in new regulation 6 (inserted by regulation 5.1) for three-level progressive increases in charges for exemption from the requirements of Export Control Orders in a 12 month period. There is no indication whether any of the three levels reflects the actual cost of processing of the applications. If not, the Committee is concerned that the imposition of a graduated scale of charges for exercising what is a right conferred by legislation is in the nature of a penalty and may breach personal rights or impose liabilities.

In respect of Statutory Rules No 251, the Committee notes firstly that new regulation 2B (inserted by regulation 5.1) provides for the payment of charges. The Explanatory Statement mentions that the Australian Quarantine and Inspection Service will generally require payment in advance or at the time of the service 'for all but regular clients with a good record of payment on time'. This relaxation may be reasonable in business terms, but it is a valuable financial concession and there is no reference in the Explanatory Statement to there being any opportunity to challenge the exercise of this apparent discretion.

Secondly, regulation 6 (see regulation 11.1) is omitted and, as the Explanatory Statement states, 'AQIS will not refund charges in the future'. No explanation is offered for this change to the rights of clients.

Thirdly, there is a reference in the Explanatory Statement (under the explanation of regulation 2B) stating that:

'regulation 2B(2) provides that no refund of this charge is to be made regardless of the outcome of the application'.

Regulation 2B(2) is not in the regulations available to the Committee. There appears to be only regulation 2B without any division into subsections.

Finally, the regulation inserted immediately before regulation 2B is numbered regulation 2A(1) even though it, too, has only one subsection.

The Committee would appreciate your comments on the matters raised.

Yours sincerely

Stephen Loosley
Chairman"

The Minister replied to the Committee as follows:

"12 November 1992

Senator Stephen Loosley
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Loosely

I refer to your memorandum ac/1/2104 dated 17 September 1992 to the Hon Simon Crean MP, Minister for Primary Industries and Energy, in which you raised a number of queries relating to the *Export Inspection (Service Charge) Regulations (Amendment)*, Statutory Rules 1992 No 249 and *Export Inspection (Charges Collection) Regulations (Amendment)*, Statutory Rules 1992 No 251. As the matters raised in your letter fall within my responsibilities as Minister for Resources it has been referred to me for reply.

Dealing firstly with Statutory Rules No 249, the three tier charges imposed under new regulation 6 reflect, as accurately as is practicable, the actual costs incurred by AQIS in processing such requests from export establishments as follows -

- i. Generally, infrequent users of the exemption provisions generally require consideration of matters peripheral to the regulation of export products, such as printing errors on labels, broken seals on export containers, etc. Consequently, such matters can generally be processed by relatively junior officers within regional offices. Such checks as are conducted in these cases are minor in nature and are only required in order that should the request be repeated for future consignments, the legitimacy of the application and the wider policy issue can be considered. Consequently, in the costing of

this exercise, these latter costs are seen to be more appropriately attributed to regular users of the provisions.

- ii. Where export establishments utilise the exemption provisions more than once in any 12 month period, it becomes necessary to raise the issues as policy matters regarding both the appropriateness of the Order from which exemption is sought, and the bona-fides of the requests being lodged as departures from that regulation. On that basis, reference to AQIS Senior Regional Management, and to Canberra Office (Head Office) subject experts is required, and consequently, the costs to AQIS of processing these requests is correspondingly more per half hour.*
- iii. In those comparatively rare cases where export establishments routinely utilise the exemption provisions in the production of product for the export market, the highest level of individual scrutiny of the issues raised is necessary, requiring the frequent involvement of Senior Central Office Program Managers on technical and policy implications and of Regional Management in the policing of the determination. In addition, accrued costs incurred by AQIS under (i) above are considered to be entirely attributable to this class of operator, and have been included in the costing accordingly.*

On that basis, it can be seen that the graduated scale of charges validly reflects AQIS costs of processing requests for exemption from the provisions of the Export Control Orders. Furthermore, it needs to be clarified that such exemptions are not a right conferred by legislation. Rather they are a discretion to be exercised by the Secretary in limited and defined circumstances. In the event that the applicant is dissatisfied with the Secretary's exercise of that discretion, recourse to the Administrative Appeals Tribunal is available.

Under Statutory Rules No 251, the new Export Inspection (Charges Collection) regulation 2B was inserted by regulation 5.1 to enable AQIS to progressively develop its systems to emulate commercial practice. In this context you may know that from 1 July 1993 AQIS will be operating on a Group 2 Trust Account. This move will require AQIS to employ full accrual accounting systems, including provisions for bad and doubtful debts. Clearly, the costs of such provision accounts will have to be passed on to AQIS' clients in the form of higher charges. AQIS' current proposal is to minimise such provisions by requiring payment at time of service or in advance if the cost of the service can be calculated. Although consultation with AQIS' clients and industry bodies will be taking place over the next six to eight months on this matter, early indications are that most will be in favour of such an approach. This is not surprising as the alternative would be a provision for bad and doubtful debts in the order of some \$4 million per annum to be passed on to industry in higher charges.

Essentially, AQIS is looking to develop systems where payment in advance or at the time of service becomes normal practice, with payments by account only in those cases where payment in advance or at the time of the service cannot be administratively achieved. In the interim, payment by account, with a due date of the twenty-eighth day of the month following the month in which the service is provided (as under the previous provisions of the Collection Act) continues to be the predominant mode of collection.

The development of policy for the equitable administration of debt collection and credit facilities will, as is indicated above, proceed in the closest consultation with industry, and in the recognition that decisions of AQIS management in this connection are subject to review through various mechanisms, but notably under the Administrative Decisions (Judicial Review) Act 1977.

In response to your query regarding the omission of Regulation 6, achieved by regulation 11.1, the provision for refunds was eliminated for a number of reasons. AQIS registration charges are predominantly calculated to cover the costs of infrastructure services, including the negotiation of conditions of access to overseas markets for products which are almost without exception seasonal commodities. Consequently, the charge represents a fixed cost for services which are utilised by the industry principally during the operating season, but also throughout the year in the form of advice regarding maintenance, refurbishment and other matters during the 'off-season'.

The application of the then Regulation 6(1) resulted in an increasing trend for operators to only maintain registration during the period in which they required inspection services at their establishment, that being the only time when registration is legally obligatory. Notwithstanding their de-registration and associated refund, such operators would continue to call upon AQIS advisory services in various capacities, and re-register immediately before the next season. This trend, and the refund provision generally were diametrically opposed to the nature of these charges as a fixed cost in any financial year and, if allowed to proceed unchecked, would have either eliminated the Registration Charge as a meaningful avenue for meeting AQIS infrastructure costs or, would have required substantial increases to the charge to allow the relevant costs to be covered by revenue generated during the peak season for each of the industries involved.

Regulation 6(2) on the other hand, was considered to be dysfunctional: firstly, if the rate for the following year were to fall, the regulations provide that a refund was payable in respect of those months of registration left to run on the date on which the new charge became effective. No corresponding provision was made for additional amounts to become payable in those cases where the rate for annual registration rose. Secondly, the provision acted as a distinct disincentive to the reduction by AQIS of Registration charges since any reduction must be determined so as to allow not simply for the reduced AQIS

costs to be covered, but also the amounts to be refunded to operators of establishments.

The reference to Regulation 2B(2) in the explanatory notes is a regrettable administrative oversight resulting from the progressive development of the explanatory notes as versions of the new regulations were produced by the drafter.

Similarly, the Office of Legislative Drafting in the Attorney General's Department has advised that the inclusion of the superfluous subregulation number in respect of regulation 2A(1) was an editing error that occurred in that office.

I trust that the above information adequately addresses the Committee's concerns regarding the recent amendments made to the legislation governing the imposition and collection of the various export inspection charges.

Yours sincerely

Alan Griffiths"

The Committee decided to accept the Minister's explanation and replied as follows:

"30 November 1992

The Hon Alan Griffiths MP
Minister for Resources
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 12 November 1992 on aspects raised by the Committee of Export Inspection (Service Charge) Regulations (Amendment), Statutory Rules 1992 No 249 and Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No 251. The Committee considered your letter at its meeting of 26 November 1992.

The Committee is grateful for your advice, which meets its concerns. However, we assume that the drafting oversights detected by the Committee will be corrected next time the regulations are amended.

Yours sincerely

Stephen Loosley
Chairman"

The seventh set of Regulations, the **Export Inspection Charges Collection Regulations (Amendment), Statutory Rules 1993 No 376**, provided for another change in the citation of the Principal Regulations, consequent upon another change (as noted in Chapter 1) in the citation of the enabling Act; and for aspects of the payment of charges. The Committee did not consider it necessary to write to the Minister about any aspect of these Regulations.

The eighth set of Regulations, now cited as the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 65**, included four substantive regulations, one of which provided for two definitions, two provided for times for payment, and one inserted a new provision for refund or remission of charges. The Committee wrote to the Minister as follows:

"12 May 1994

Senator the Hon Bob Collins
Minister for Primary Industries
and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the following instruments, considered by the Committee at its meeting of 12 May 1994.

Export Inspection and Meat (Establishment Registration Charges)
Regulations (Amendment)
Statutory Rules 1994 No 64

Export Inspection and Meat Charges Collection Regulations (Amendment)
Statutory Rules 1994 No 65

Domestic Meat Premises Charge Regulations (Amendment)
Statutory Rules 1994 No 66

Export Meat Orders (Amendment)
Export Control Orders No 2 of 1994

Statutory Rules 1994 Nos 64 and 66 reduce a number of charges by half. Some of these reductions are quite substantial. For instance, one charge of \$45,040 becomes \$22,520 and another of \$35,385 becomes \$17,685. The Committee welcomes these changes, but would appreciate your advice on the reasons for the reductions.

Statutory Rules 1994 No 65, among other things, provide for the Secretary to defer payment of charges or instalments of charges and, in specified circumstances, to refund or remit charges. The Committee would appreciate your advice on whether these important discretions are subject to AAT review. If not, the Committee would be grateful if you could confirm that the exclusions are within the relevant guidelines of the Administrative Review Council. Also, the

Explanatory Statement advises that the discretions may be exercised by a delegate of the Secretary. The Committee would be grateful if you could advise of the circumstances in which these powers would be exercised by a delegate and of the persons to whom delegations will be made.

Orders 139A.2(b) and 139A.3(c) of the Export Control Orders No 2 of 1994 provide respectively for the Secretary to declare foreign countries for the purposes of the Orders and to approve a system to indicate that an animal has not been treated with HGP. These powers appear to be legislative. The Committee would be grateful for your advice on whether this apparent subdelegation is legally valid and, if so, whether these instruments should be subject to tabling and possible disallowance.

Yours sincerely

*Mal Colston
Chairman"*

The Minister replied to the Committee as follows:

"17 June 1994

*Senator Mal Colston
The Chairman
Senate Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600*

Dear Senator

Thank you for letter of 12 May 1994 raising four matters of concern to the Senate Standing Committee on Regulations and Ordinances relating to Statutory Rules Nos 64, 65 and 66 and Export Control Orders No 2 of 1994. These amend, respectively, the Export Inspection and Meat (Establishment Registration Charges) Regulations, the Export Inspection and Meat Charges Collection Regulations, the Domestic Meat Premises Charge Regulations and the Export Meat Orders.

The Standing Committee has asked why certain charges in regard to export meat establishments and domestic meat premises have been reduced under Statutory Rules Nos 64 and 66. AQIS's charges applying to small premises were significantly reduced from earlier proposals as an interim measure to limit their immediate impact pending the advice of a joint AQIS/industry charging review committee which will consider the most appropriate charging structures for cost recovery.

In regard to Statutory Rules No 65, the Standing Committee has questioned whether decisions made by the Secretary on deferment, refund or remission of charges are subject to Administrative Appeals Tribunal review. There is no express provision that would allow any of these decisions to be referred to the Tribunal for review.

Decisions in regard to the collection of inspection fees or charges are not specified in the Administrative Review Council guideline as matters excluded from Tribunal review. I understand, however, that the list of exclusions made in the guidelines is not intended to be exhaustive.

If provision were made in the Export Inspection and Meat Charges Collection Regulations which would allow recourse to the AAT for review of such cases, there would be scope for exploitation by persons seeking only to delay payment by this means. Any person aggrieved by a decision under Regulations could seek review of the decision under the Administrative Decisions (Judicial Review) Act 1977.

As AQIS operates on a full cost recovery basis, failure to recover its attributable costs would mean, ultimately, that these would need to be recovered from other clients or funded through the budget process.

For these reasons I believe review by the Tribunal would be inappropriate. The Standing Committee has requested details of the circumstances in which the discretionary powers made in Statutory Rules No 65 in regard to deferment, refund or remission of charges would be exercised by a delegate of the Secretary and of the persons to whom such delegation will be made. I am advised that all the discretionary powers are to be delegated and the delegated powers will reside with the occupants of a small number of AQIS Senior Executive Service positions in Canberra.

In regard to the Export Control Orders No 2 of 1994, the Standing Committee has indicated that paragraphs 139A.2(b) and 139A.3(c) appear to confer powers that are legislative. AQIS has now obtained advice from the Office of General Counsel, Attorney-General's Department regarding the validity of suborders 139A.2 and 139A.3 of the Export Meat Orders and a copy is enclosed.

The advice indicates neither paragraph 139A.2(b) nor 139A.3(c) constitute an unlawful delegation of legislative power.

The Export Control Orders No 2 of 1994 amend provisions in the Export Meat Orders on national controls on the slaughter of animals treated with hormonal growth promotants (HGPs). The national controls are of major importance to Australia as some countries such as the members of the European Union (EU) have placed bans on the use of HGPs and on meat derived from treated animals. Following a review of these controls by EU officials, it became necessary for the controls to be strengthened if Australia was to retain access

to these markets. The means of strengthening the controls was agreed to through the work of a joint industry/State/AQIS working party. The draft amendment was widely canvassed and has the support of both industry and the States.

The amendment serves to bring into effect the necessary changes to Commonwealth legislation. It also provides the administrative flexibility essential for the controls to work by providing discretionary powers, including those provided by paragraphs 139A.2(b) and 139A.3(c).

Paragraph 139A.2(b) allows for the declaration of countries other than those specified under order 452 of the Export Meat Orders. Order 452 calls up an AQIS publication, Volume 2 of the 'Australian Export Meat Manual' entitled 'Requirements for Overseas Countries'. Volume 2 details those requirements essential for meat to enter a given country. Paragraph 139A.2(b) provides a mechanism to put in place new importing country requirements immediately they become effective in anticipation of a later formal amendment to the entry for that country in the manual.

Paragraph 139A.3(c) serves to accommodate the variation in national controls as applied at the State level. States have, to a varying extent, developed their own control arrangements reflecting existing legislative powers and available resources. It is not practical to legislate precisely for each State system in place, or that could be put in place.

Accordingly, paragraph 139A.3(c) provides for the various forms that the declaration furnished by the occupier may take, namely by means of a written statement using an approved form, by means of an identification tag attached to the animal itself or by another means as may be necessary to approve from time to time.

If a new system of national controls were to be implemented, that system would be the subject of an amendment to the Orders in accordance with established practice.

Yours sincerely

Bob Collins"

The Committee considered the reply and decided that while it would not require further explanation, it would refer the Minister's replies to the Administrative Review Council. The Committee therefore replied to the Minister as follows:

"23 June 1994

Senator the Hon Bob Collins
Minister for Primary Industries and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letters of 9 June 1994 and 17 June 1994 on aspects raised by the Committee of:

- (a) Meat Inspection (Fees) Orders, Meat Inspection Orders No 1 of 1994
- (b) Export Control (Fees) Orders (Amendment), Export Control Orders No 1 of 1994
- (c) Export Inspection and Meat (Establishment Registration Charges) Regulations (Amendment), Statutory Rules 1994 No 64
- (d) Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 65
- (e) Domestic Meat Premises Charge Regulations (Amendment), Statutory Rules 1994 No 66
- (f) Export Meat Orders (Amendment), Export Control Orders No 2 of 1994.

The Committee considered the letters at its meeting of 23 June 1994.

The Committee is grateful for the advice and will remove the notices of disallowance on the instruments. The Committee is concerned, however, about your advice that people would exploit AAT review provisions to delay payment. Accordingly I will refer this aspect of your replies to the Administrative Review Council for comment.

With respect to the advice from the Attorney-General's Department in your letter of 17 June 1994 the Committee noted that the advice was that it was not clear whether Order 139A.3(c) was intended to be used in particular cases or generally and that the power would only be valid if used for particular cases. It may be worthwhile making this clear the next time the instrument is amended.

Yours sincerely

Mal Colston
Chairman"

The Committee wrote to the ARC as follows:

"27 June 1994

Dr Susan Kenny
President
Administrative Review Council
GPO Box 3222
CANBERRA ACT 2601

Dear Dr Kenny

I refer to previous correspondence with the ARC about Ministerial replies to questions from the Committee about administrative review. Mr Stephen Lloyd and Ms Mary Durkin of the ARC staff briefed the Committee on aspects of these replies on 21 October 1993.

In this context the Committee has asked me to refer to the ARC the following letters from the Minister for Primary Industries and Energy, Senator the Hon Bob Collins, for comment and any further action you think necessary.

1. Letter of 9 June 1994 about:
 - (a) Meat Inspection (Fees) Orders, Meat Inspection Orders No 1 of 1994.
 - (b) Export Control (Fees) Orders, Export Control Orders No 1 of 1994.
2. Letter of 17 June 1994 about, among other things, the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 65.

Both letters advise that AAT review of decisions is not provided because there would be scope for exploitation by persons seeking only to delay payment by this means. The letter of 17 June 1994 also comments in paragraphs 3 and 4 on administrative review and the ARC.

I have written to Senator Collins advising that the Committee will refer the letters to the ARC.

Yours sincerely

Mal Colston
Chairman"

The ninth set of Regulations were the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 124**, which provided for the Secretary to delegate all of his or her powers under the Regulations. The Committee normally questions any broad power of delegation. In this case the unreviewable powers of the Secretary to

refund or remit charges could be delegated to any person at all in the AQIS. The Committee wrote to the Minister as follows:

"30 May 1994

Senator the Hon Bob Collins
Minister for Primary Industries
and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 124, considered by the Committee at its meeting of 2 June 1994.

The sole substantive provision of the amendment enables the Secretary to delegate his or her powers under the Regulations to any officer of the Australian Quarantine and Inspection Service, no matter how junior. Given the nature of the operations of the AQIS the Committee accepts that this may be appropriate. Nevertheless, the Secretary has important powers under the Regulations and your advice would be appreciated on the circumstances in which powers will be delegated.

Yours sincerely

Mal Colston
Chairman"

The Minister replied to the Committee as follows:

"17 June 1994

Senator Mal Colston
The Chairman
Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 30 May 1994 raising a matter of concern to the Senate Standing Committee on Regulations and Ordinances relating to Statutory Rules No 124. This amended the Export Inspection and Meat Charges Regulations by providing for delegation of the powers of the Secretary.

The Standing Committee has requested details of the circumstances in which the discretionary powers would be exercised by a delegate of the Secretary and of the persons to whom such delegations will be made. I am advised that all the discretionary powers are to be delegated and the delegated powers will reside with the occupants of a small number of AQIS Senior Executive Service positions in Canberra. Accordingly, none of these discretionary powers would be delegated to junior AQIS officers.

Yours sincerely

Bob Collins"

The Committee decided to accept this advice and wrote to the Minister as follows:

"23 June 1994

*Senator the Hon Bob Collins
Minister for Primary Industries and Energy
Parliament House
CANBERRA ACT 2600*

Dear Minister

I refer to your letter of 17 June 1994 on aspects raised by the Committee of the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 124. The Committee considered the letter at its meeting of 23 June 1994.

The Committee is grateful for the advice, which meets its concerns. Your cooperation is appreciated.

Yours sincerely

*Mal Colston
Chairman"*

The tenth set of Regulations were the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 369**, the sole substantive provision of which provided for a discretion to remit charges, again with no apparent review of the merits of its exercise. The Committee wrote to the Minister as follows:

"1 December 1994

*Senator the Hon Bob Collins
Minister for Primary Industries
and Energy
Parliament House
CANBERRA ACT 2600*

Dear Minister

I refer to the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 369, considered by the Committee at its meeting of 1 December 1994.

New subregulations 6(8) and (9)(added by regulation 2) provide for the refund or remission of charges in specified circumstances at the discretion of the Secretary. There is no indication whether there is a right to review of the exercise of this discretion.

Earlier this year, the Committee wrote to you about a previous amendment to these Regulations. Statutory Rules 1994 No 65 provided for the payment of charges by instalments and conferred a discretion on the Secretary to remit the charges or to allow payment of instalments at different times from those set out in the Regulations. Your reply of 17 June 1994 indicated that it was not appropriate for there to be AAT review of that discretion.

The Committee would be grateful for your advice on whether the present discretions, which are conferred in somewhat different circumstances from those in the previous amendment, should be subject to AAT review.

Yours sincerely

*Mal Colston
Chairman"*

The Minister replied to the Committee as follows:

"23 January 1995

Mr David Creed
Secretary
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Mr Creed

I refer to your Chairman's letter of 1 December 1994 regarding recent amendments to the Export Inspection and Meat Charges Collection Regulations which provide for the refund or remission of charges in specified circumstances.

The specified circumstances in subregulations 6(8) and (9) relate to the cost recovery situation of programs administered by Australian Quarantine and Inspection Service (AQIS).

The provision for refund or remission of charges in these circumstances is discretionary rather than mandatory because arrangements for the return of revenue, which is surplus to cost recovery requirements, is discussed and agreed with the representatives of the relevant industry groups prior to the exercise of the discretionary power contained in s.6(8) and (9).

In this situation a right to review of the exercise of this discretion is not appropriate or necessary.

Yours sincerely

Bob Collins"

The Committee considered this reply and decided that it should ask for further details. In this context it is not unusual for the Committee to write several times to a Minister in respect of the same instrument. Therefore, the Committee wrote again to the Minister as follows:

"3 February 1995

Senator the Hon Bob Collins
Minister for Primary Industries and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 23 January 1995 concerning recent amendments to the Export Inspection and Meat Charges Collection regulations. These

amendments provide for the refund or remission of charges in specified circumstances at the discretion of the Secretary.

In your letter, which was considered by the Committee at its meeting on 2 February 1995, you state that arrangements for any refund or remission of charges are discussed and agreed with representatives of relevant industry groups prior to the exercise of the discretionary power. You suggest that this procedure makes a non-reviewable discretionary power more appropriate than a mandatory power.

The Committee would appreciate some additional information about this procedure, in particular:

- . the manner in which the discretion would be exercised where there was no agreement between the Secretary and representatives of the relevant industry groups;
- . the manner in which the Secretary would ascertain the views of those persons who might be affected by a decision, but who are not members of relevant industry groups; and
- . whether the amended regulation is capable of possible differential application - for example, a refund following discussions with exporters of chilled meat may be greater than another refund following discussions with exporters of frozen meat.

On Monday 6 February, as a protective measure, notice will be given of an intention to disallow these amendments. The Committee would appreciate your reply to the above concerns.

Yours sincerely

Mal Colston
Chairman"

The Minister replied to the Committee as follows:

"28 February 1995

Mr David Creed
Secretary
Senate Standing Committee
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Mr Creed

I refer to your Chairman's letters of 3 February 1995 regarding recent amendments to the Export Inspection and Meat Charges Collection Regulations and the Export Inspection (Quantity Charge) Regulations.

The amendments to the Export Inspection and Meat Charges Collection Regulations provide for the refund or remission of charges in specified circumstances at the discretion of the Secretary. In the case of the Secretary and representatives of the relevant industry groups not agreeing on the refund or remission arrangements, the Secretary has full discretion as to the course of action.

The Secretary is under no legal obligation to refund or remit over-recovered revenue. The discretionary power gives the Secretary the necessary flexibility to treat each case on its merits and allows factors such as previous years recovery and AQIS's financial position to be considered. In all cases to date, the Commonwealth has reached agreement with industry groups on the format of any refunds or remissions.

The Industry Charging Review Committees consulted regarding arrangements for any refund or remission of charges are, as far as possible, representative of all relevant industry groups. AQIS's impartial role in administering the Committees ensures that the interest of all persons affected by a decision, but who are not directly involved with the industry group, are considered.

The amended regulation is not capable of differential application. Any decision to remit or refund charges after consultation with relevant industry groups will be uniformly applied across a program. Any move to differential application would require legislative amendments.

In relation to the amendment to the Export Inspection (Quantity Charge) Regulations, AQIS has decreased the quantity charge for inspection of bulk grain exports to reflect the reduced AQIS costs and increased industry activity in this program. The same charges were increased significantly in 1989 as part of AQIS's move from 50% to 60% cost recovery. As part of the Government's program of micro-economic reform, AQIS later moved to 100% cost recovery from 1 January 1991.

The current reduction in costs is the result of the implementation of the Government's reform package for AQIS announced late in 1993.

Yours sincerely

Bob Collins"

The Committee did not consider that this reply dealt with all matters of concern and decided to write a third letter. Accordingly, the Committee wrote yet again to the Minister as follows:

"2 March 1995

Senator the Hon Bob Collins
Minister for Primary Industries and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 28 February 1995 concerning recent amendments to the Export Inspection and Meat Charges Collection Regulations, Statutory Rules 1994 No 369. These amendments provide for the refund or remission of charges in specified circumstances at the discretion of the Secretary. The Committee has previously corresponded with you on this issue.

Before concluding the matter, the Committee, at its meeting on 2 March 1995, resolved that it would appreciate some further information on the detail of the process by which these refunds will be made.

Proposed new subregulation 6(8) refers to situations where 'a person' is liable to pay a charge. This would suggest that refunds are to occur on a case-by-case basis. You seem to allude to this in your letter of 28 February, where you indicate that the proposed procedure permits the Secretary to treat each case on its merits. But applying refunds on a case-by-case basis also suggests that they may be applied on a differential basis, with the amount of any refund depending on the person paying, and the amount of, the charge. Alternatively, refunds may be applied to a class of persons, in which case it is less likely that they will be applied differently within that class.

The Committee would, therefore, appreciate some further detail on how charges will be refunded. For example, is it envisaged that the Secretary would, at some point in a financial year, determine that surplus moneys existed; that these should be remitted; and, following consultations with representative organisations, that all those who had paid an establishment registration charge would be entitled to receive a refund of a set percentage of that charge?

In addition, the Committee would appreciate some elaboration of how the 'impartial role' of AQIS in administering the Industry Review Committees ensures that the interests of those not directly represented on those Committees are considered.

In your letter, you note that, in all cases to date, agreement has been reached with industry groups on the format of any refunds. As the current procedure seems to be operating effectively, could you also advise the Committee of the reasons for the new regulatory powers.

Finally, could I draw to your attention a small but significant typographical error in Note 2 to the amending regulations. This Note, which lists all amendments to the primary regulations, refers to amendments made by Statutory Rules 1993 No 374. This should be a reference to Statutory Rules 1993 No 376.

Yours sincerely

*Mal Colston
Chairman"*

The Minister replied to the Committee as follows:

"22 March 1995

*Senator Mal Colston
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600*

Dear Senator

I refer to your letter of 2 March 1995 regarding recent amendments to the Export Inspection and Meat Charges Collection Regulations which provide for the refund or remission of charges in specified circumstances.

The confusion which still remains about the purpose and application of the amendments could probably best be resolved by providing the Committee with some further background information and a practical example of how the amendments are being applied.

The amendments are the mechanism which allows the Australian Quarantine and Inspection Service (AQIS) to return revenue which is surplus to cost recovery requirements to its clients. A similar provision was added to the Quarantine Act 1908 by amendment in late 1994.

The amount of surplus revenue is determined once AQIS financial statements for the year are finalised. The 1993/94 financial year was the first in which AQIS's financial reporting was in sufficient detail to analyse the cost recovery performance of each commodity group. It was also the first financial year in which AQIS operated under accrual accounting.

In determining the most appropriate method for returning surplus revenue, AQIS has sought agreement with the relevant industry consultative committees. The industry consultative committees are the established fora for discussions with industry regarding cost recovery arrangements. The industry representatives are drawn from all sectors of that industry. Each affected industry group has been given the opportunity through the consultative process to recommend a process by which funds would be returned to that group of AQIS clients.

In the case of the fishing industry, AQIS advised the Fishing Industry Advisory Committee (FIAC) that there was surplus revenue of approximately \$666,000 from 1993/94. FIAC advised that the industry's preferred method of returning funds was through a partial rebate of a set percentage of annual registration charges in the subsequent year and a product testing program.

The former is being achieved through the remission powers contained in subregulations 6(8) and (9), the latter by administrative arrangement.

AQIS has administered this process in an impartial way by ensuring that industry proposals for the return of surplus funds benefit all participants in the industry.

The current procedure, which you have referred to as operating effectively, has been possible because of the new regulatory powers.

With regard to the typographical error in Note 2 of the amending regulations, I am advised by the Office of Legislative Drafting that the error has no legal bearing and that the necessary correction will be made at the first appropriate opportunity.

Yours sincerely

Bob Collins"

By now the Committee had written to the Minister three times about one set of Regulations. Although not satisfied with the position regarding review of discretions provided by the Regulations, the Committee decided to take no further action until it could consider advice from the Administrative Review Council. Accordingly, the Committee wrote to the Minister as follows:

"28 March 1995

Senator the Hon Bob Collins
Minister for Primary Industries and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 22 March 1995 on aspects raised by the Committee of the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1994 No 369. The Committee considered the letter at its meeting of 23 March 1995.

The Committee is grateful for the advice, which meets its concerns. Your cooperation is appreciated.

Yours sincerely

Mal Colston
Chairman"

CHAPTER 3

Resolution to Disallow

The Administrative Review Council is a statutory body established by the *Administrative Appeals Tribunal Act 1975*, consisting of a President, the Commonwealth Ombudsman and the President of the Law Reform Commission as *ex officio* members, and from 3 to 10 other members. The members are appointed by the Governor-General and must have had extensive experience at a high level in specified areas broadly relevant to its operations. Among other things, its statutory functions are to ascertain and keep under review the classes of administrative decisions which are not the subject of review by a tribunal, court or other body; to make recommendations to the Minister as to whether any of these decisions should be subject to such review and, if so, as to the appropriate body to conduct that review.

The Committee has constructive relations with the Administrative Review Council. The Committee and the ARC, together with the Standing Committees for the Scrutiny of Bills and on Legal and Constitutional Affairs, hold biennial dinners at which matters of mutual interest are discussed. The Committee has also had the benefit of a number of briefings in recent years by the President, the Director of Research and staff of the ARC.

As noted in the previous Chapter of this Report the Committee referred to the ARC the question of review of discretions in the **Export Inspection and Meat Charges Collection Regulations**. While the Committee considered that those discretions should be subject to AAT review, it wished to have the views of the statutory body charged with the responsibility of advising the government on administrative review. The Committee, on the other hand, reports to the Senate, although it raises its concerns directly with the Ministers and obtains from them undertakings or explanations in respect of individual instruments. In the present case the ARC agreed with the position of the Committee, writing to the Minister for Justice, as the Minister responsible for the ARC, as follows:

"14 August 1995

The Hon Duncan Kerr MP
Minister for Justice
Parliament House
CANBERRA ACT 2600

Dear Minister

Review of decisions made under Meat Inspection legislation

In its Annual Report 1993-94, the Senate Standing Committee on Regulations and Ordinances (the Committee) had queried the lack of external merits review of certain (then) proposed decisions concerning the deferment, refund or

remission of charges made under legislation that prescribes charges for the provision of meat inspection services.

The Committee raised its concerns with your colleague, the Minister for Primary Industries and Energy, and has referred the Minister's replies in these matters to the Council. In the Council's view, these decisions (which are now enacted) should be subject to merits review.

Legislative background

1. The decisions in question are made under the:
 - . Meat Inspection (Fees) Orders and the Export Control (Fees) Orders (the Orders); and
 - . Export Inspection and Meat Charges Collection Regulations (the Regulations)
2. The Meat Inspection (Fees) Orders and the Export Control (Fees) Orders are made pursuant to the Meat Inspection Act 1983 and the Export Control Act 1982, respectively. These orders provide for the imposition of charges for meat inspection services provided by officers of the Australian Quarantine and Inspection Service. These inspection services are necessary to ensure compliance with Australian standards in relation to meat for domestic consumption or export.

Decisions of the Secretary

3. The Meat Inspection (Fees) Orders provide that a person who is affected by an initial decision (a decision made under these Orders) may request the Secretary to reconsider the decision or alternatively, seek its review by the Administrative Appeals Tribunal (AAT). Where the Secretary has reconsidered decisions concerning the deferral or remission of the payment of fees, such decisions are not reviewable by the AAT (regulation 31.1).
4. The Export Inspection and Meat Charges Collection Regulations are made pursuant to the Export Inspection and Meat Charges Collection Act 1985 and provide for the collection of charges imposed on export meat establishments and domestic meat premises. The Regulations provide that the Secretary, or the Secretary's delegate, may remit, refund or defer charges. There is no provision for AAT review of these decisions.

Whether such decisions should be subject to review

5. The Council has consistently stated that a decision made in the exercise of a power conferred by an enactment is *prima facie* suitable for merits review if the interests of a person will, or are likely to, be affected by an exercise of the power. The Secretary's decisions made under the Regulations and the reconsidered decisions affecting deferral or remission of fees made under the Orders would affect substantial financial interests. For example,

subsection 3.2 of the Schedule to the Meat Inspection (Fees) Orders provides that the amount of the fee for inspection services allocated on an annual basis is \$67 500 per year.

6. In his replies to the Committee, the Minister explained that the reasons for not providing external merits review of the relevant decisions hinged on the potential for persons to exploit review to delay the payment of fees. The Minister also referred the Committee to the Council's guidelines for determining if a decision made in the exercise of a statutory decision-making power is appropriate for review on the merits. The Minister advised the Committee that the relevant discretions were not specified in those guidelines as matters excluded from AAT review but also noted his understanding that the guidelines were not intended to be exhaustive.

7. The Council does not support the Minister's reasons not to provide external merits review of the decisions. In relation to the argument that the provision of external merits review could allow persons to exploit review to delay the payment of fees, the Council's view is that this does not justify the exclusion of external merits review as there are other more preferable methods to avoid abuse of that nature, such as, by providing that the fees are to be paid regardless of whether an appeal to the AAT is made but that they may be refunded if the appeal were to succeed.

8. While the Council's list of exceptions to its *prima facie* test is not intended to be exhaustive, the Council considers that there is no basis for excluding the Secretary's decisions made under the Orders or the Regulations from merits review.

9. For the above reasons, the Council recommends that decisions concerning the deferment, refund or remission of fees or charges made under the Regulations or Orders, whether or not reconsidered by the Secretary, should be subject to merits review by the AAT.

10. I have arranged for a copy of this letter to be sent to your colleague, the Minister for Primary Industries and Energy.

Yours sincerely

Dr Susan Kenny
President

Fortuitously, the Committee considered the eleventh set of Regulations, the **Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No 257**, soon after receipt of the advice from the ARC. The one substantive provision of that set of Regulations provided criteria for the exercise of discretions by the Secretary in respect of refund or remission of charges. Normally the Committee would welcome the provision of criteria to limit and guide the exercise of discretions, but in this case, as noted earlier, the discretions themselves were not subject to independent external review of their

merits. In this case, however, the Regulations gave the Committee an opportunity to raise with the Minister the ARC's advice in the context of the Principal Regulations in respect of which the advice was given. Accordingly, the Committee wrote to the Minister as follows:

"22 September 1995

*Senator the Hon Bob Collins
Minister for Primary Industries
and Energy
Parliament House
CANBERRA ACT 2600*

Dear Minister

I refer to the Export Inspection and Meat Charges Collection Regulations (Amendment), Statutory Rules 1995 No.257, considered by the Committee at its meeting of 21 September 1995.

The regulations provide for discretions which are not subject to external merits review. You will recall that there has been previous correspondence between yourself and the Committee about this aspect of the Principal Regulations.

On 23 June 1994 the Committee wrote to you advising that it would refer to the Administrative Review Council for comment your advice that, if AAT review was provided, people would exploit those provisions to delay payment. The ARC has now recommended that decisions concerning the deferment, refund or remission of fees or charges made under the principal Regulations or the Meat Inspection (Fees) Orders and the Export Control (Fees) Orders, whether or not reconsidered by the Secretary, should be subject to merits review by the AAT.

The Committee would appreciate your advice on whether it is intended to amend these instruments to provide for such review.

Yours sincerely

*Mal Colston
Chairman"*

On 23 October 1995, in order to protect its option to recommend disallowance to the Senate the Chairman, on behalf of the Committee, gave notice that, 15 sitting days after that day, he would move for the disallowance of this set of Regulations.

The Minister replied to the Committee as follows:

"28 November 1995

*Senator Mal Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600*

Dear Mal

On 22 September 1995, you wrote to me as a result of amendments to the Export Inspection and Meat Charges Collection Regulations (the Regulations) considered by the Standing Committee on Regulations and Ordinances at its meeting on 21 September 1995. In view of a recent recommendation by the Administrative Review Council, to the effect that decisions concerning the deferment, refund or remission of fees and charges under the Export Inspection and Meat Charges Collection Regulations, the Meat Inspection (Fees) Orders and the Export Control (Fees) Orders should be subject to merits review by the Administrative Review Tribunal, the Committee asked for my advice on whether it is intended to provide such a review.

The amendments which have prompted your present enquiry varied the provisions relating to the matters of which the Secretary must be satisfied or must take into account before remitting some or all of the amount of a charge imposed under the Export Inspection (Establishments Registration Charges) Act 1985, the Export Inspection (Quantity Charge) Act 1985, the Export Inspection (Service Charge) Act 1985 or the Domestic Meat Premises Charge Act 1993. The actual discretion was provided previously, however, in amendments to the Regulations made by Statutory Rules 1994, No. 369.

As I have advised the Committee in response to an earlier query, refunding and remission of charges pursuant to subregulation 6(8) of the Regulations has consequences for cost recovery in relation to programs administered by the Australian Quarantine and Inspection Service (AQIS) on a commercial basis. The quantum of charges is fixed periodically, in close consultation with industry bodies, to reflect and recoup AQIS's operating costs. Having regard to the degree of consultation that takes place when charges are calculated and agreed, the question of remissions or refunds, which are only available under subregulation 6(8) when collections are surplus to cost recovery requirements, should not generally arise. Where, however, an over-calculation of AQIS's operating costs properly referable to industry has occurred AQIS and industry will agree the amount of the refund or remission payable. Any decision is made in close consultation with the relevant industry consultative committees. The industry consultative committees are the established fora for discussions with industry regarding cost recovery arrangements. The industry representatives are

drawn from all sectors of that industry and each affected industry group is given the opportunity through the consultative process to provide input into decisions to return over-recovered revenue to industry.

I am generally supportive of the comments made by the Administrative Review Council and my colleague, the Minister for Justice, in recent correspondence concerning the desirability of external merits review of decisions made under the meat inspection legislation. I must have regard also, however, to the agreements reached with industry and law that might be affected by individual rights of appeal.

More widely, you will appreciate AQIS must make commercial decisions concerning relief from the payment of debts owing to the Commonwealth. I don't think this is appropriately a matter for merit review but rather a matter for the courts.

In the circumstances, therefore, as I have advised previously I do not consider review, by the Administrative Appeals Tribunal of the Secretary's decisions relating to remitting and refunding charges either necessary or appropriate.

A disallowance motion on the Export Inspection and Meat Charges Collection Regulations (Amendment) would be contrary to industry's request. A provision in the Regulations to refund is necessary if AQIS is to administer overrecoveries in line with industry's wishes. AQIS would not be able to meet commitments given to industry groups to refund over-recoveries in the future if the Regulations were to be disallowed.

Although not affected by the amendments to the Regulations considered by the Committee on 21 September, I will comment on review by the Administrative Appeals Tribunal of decisions under subregulation 2B(2) of the Regulations which provision permits the Secretary to specify a later due date for the payment of a charge than the due date prescribed and permit the payment of charges by instalments and also AAT review of decisions under the Meat Inspection (Fees) Orders and the Export Control (Fees) Orders. Decisions under subregulation 2B(2) and the Fees Orders have also been raised by the Minister for Justice and the Administrative Review Council.

In relation to the review of decisions under subregulation 2B(2), I am of the view that the same considerations apply as I have indicated above in relation to decisions concerning the remission or refunding of charges under subregulation 6(8) of the Regulations. As for decisions under the Meat Inspection (Fees) Orders, consideration is being given to amending the review provisions contained in Part 6 of the Orders, in particular suborder 31.1, to take account of, amongst other things, concerns raised by the Minister and the Council. Decisions under the Export Control (Fees) Orders are presently subject to ultimate review by the Administrative Appeals Tribunal by virtue of the application, under order 19 of those Orders, of Part 20 of the Prescribed Goods (General) Orders.

I am writing to the Minister for Justice also in the above terms.

Yours sincerely

Bob Collins"

The Committee considered the Minister's reply at its meeting of 30 November 1995 and unanimously resolved that the Chairman contact the Minister with the intention of obtaining an undertaking to amend the Principal Regulations, failing which the Committee would recommend to the Senate that it disallow the set of Regulations.

The Committee was reluctant to take this final step, but in this case considered that it should move not only in respect of its own view, but also to support the position of the government's own specialist statutory advisory body on administrative review. This unanimity of purpose between the Committee and the ARC on a matter upon which respectively the Senate and a Commonwealth Act imposed responsibility regarding the desirability of review of administrative decisions was an important element in the Committee's decision. In addition, the notice of motion of disallowance of the Regulations given on behalf of the Committee expired at midnight on the same day as the meeting, at which time the Regulations would be deemed to have been disallowed under s.48(5) of the Acts Interpretation Act.

Another option for the Committee, had the time been available, would have been to write to the Minister for Justice, who administered the Administrative Appeals Tribunal Act, asking whether the government intended to accept the advice of the statutory advisory body.

However, following discussions between the Chairman and the Minister's office, later on the same day a senior adviser of the Minister wrote to the Committee as follows:

"30 November 1995

*Senator Mal Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600*

Dear Senator Colston

Further to Senator Collins letter to you of 28 November 1995 in relation to amendments to the Export Inspection and Meat Charges Collection Regulations I wish to advise that the Minister is now fully agreeable to the recommendations of the Administrative Review Council in respect to these regulations.

Yours sincerely

*Jack Lake
Senior Adviser"*

This letter satisfied the concerns of the Committee and the Chairman replied to the Minister as follows:

"30 November 1995

Senator the Hon Bob Collins
Minister for Primary Industries and
Energy
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

I refer to the letter of 30 November 1995 from your senior adviser on the Export Inspection and Meat Charges Collections Regulations.

The letter met the concerns of the Committee and demonstrated your long standing commitment to its principles of parliamentary propriety and personal rights. The Committee would be grateful if you could arrange for the early amendment of these Regulations to provide for merits review.

Yours sincerely

Mal Colston
Chairman"

The Committee then removed its notice of motion of disallowance in respect of the Regulations. The Chairman, with the concurrence of the Deputy Chairman, Senator Bill O'Chee, had on the previous day indicated to the Senate at giving of notices that the Committee may be taking unusual action. The Chairman gave notice as follows (Hansard, 29 November 1995, p.4123):

"Senator Colston (Queensland)—On behalf of the Standing Committee on Regulations and Ordinances, I give notice that, at the giving of notices on the next day of sitting, I shall withdraw business of the Senate notice of motion No 1 standing in my name for the next day of sitting. I seek leave to make a short statement.

Leave granted.

"Senator Colston—I thank the Senate. On 23 October 1995 I reported to the Senate on the Committee's concern with this instrument, which related to discretions which may not be subject to merits review. The Committee has now received a reply from the Minister, but will not be discussing the reply until its next meeting tomorrow. Tomorrow is the last day on which the notice of disallowance on this instrument can be withdrawn. Accordingly, I have given this present notice as a precaution in case the Committee agrees to withdraw

its notice of disallowance. If the Committee decides to take other action, I will not proceed with the action foreshadowed by my notice of withdrawal."

Following the meeting of the Committee the next day the Chairman again informed the Senate of the actions of the Committee and moved that consideration of its notice of motion of disallowance be postponed till a later hour that day, as follows (Hansard, 30 November 1995, p.4367):

"Senator Colston (Queensland)—I move:

That business of the Senate notice of motion No 1, standing in the name of Senator Colston and relating to the Regulations and Ordinances Committee, be postponed till a later hour this day. I seek leave to make a statement."

Leave granted.

"Senator Colston—Today is the last day on which this matter may be resolved. Yesterday, on behalf of the Senate Standing Committee on Regulations and Ordinances, I gave notice that today I would either withdraw the notice of disallowance in respect of these regulations or, depending on the results of a meeting of the Committee, take other action. The Committee still has serious concerns about the regulations and I have postponed consideration of this motion in the hope that these concerns may be met."

Finally, the Chairman withdrew the Committee's notice of motion of disallowance and advised the Senate that it would present a Report of its actions in respect of the Regulations, as follows (Hansard, 30 November 1995, p.4446):

"Senator Colston (Queensland)—Pursuant to notice given at the last day of sitting, on behalf of the Regulations and Ordinances Committee, I now withdraw business of the Senate notice of motion No 1 standing in my name for today, relating to the Export Inspection and Meat Charges Collection Regulations (Amendment). As usual, I seek leave to have the Committee's correspondence incorporated in Hansard. I have already indicated in the Committee's end of sitting statement that the Committee will present a Report on its scrutiny of these regulations."

CHAPTER 4

Conclusion

The Committee's scrutiny of the **Export Inspection and Meat Charges Collection Regulations** illustrates a number of aspects of its operations.

Firstly, it illustrates that the Committee is willing in suitable cases to recommend to the Senate that it disallow a regulation. In the present case the Committee resolved to recommend disallowance in the absence of appropriate undertakings by the Minister. The Committee's action was particularly emphatic because it did so on the fifteenth sitting day after it had given notice of a motion of disallowance for that time; under s.48(5) of the Acts Interpretation Act, the regulation would be deemed to have been disallowed at the expiration of those 15 sitting days if the Senate has not dealt with the matter. Scrutiny by the Committee is not a mere formality or rubber stamp under which a Minister's explanations are accepted as a matter of course regardless of whether they are convincing. It is, of course, only rarely that the Committee will resolve to recommend disallowance, but the sanction is available and will be used when appropriate.

Next, the case illustrates the non-partisan operation of the Committee, which had a government Chairman, Senator Mal Colston, a non-government Deputy Chairman, Senator Bill O'Chee, with two other government and two non-government members. The decision to recommend disallowance was unanimous, in the tradition of the Committee by which discussions are held and decisions made without regard to party political considerations.

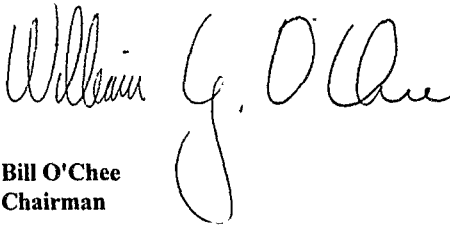
Also, the case illustrates the tenacity of the Committee. The **Export Inspection and Meat Charges Collection Regulations** at first included no provisions at all for refund of charges, then provided a discretion for a refund to be made, then removed the discretion but retained the refund, then removed the refund, then provided again for a discretion to refund, then provided for the discretion to be delegated, then amended the discretion and then amended it again. The Committee kept track of all of these exigencies of the executive government and applied its principles of personal rights and parliamentary propriety to this particular public administration kaleidoscope.

In addition, the case illustrates the variety of concerns which the Committee raises with Ministers. The principal concern of the Committee was the provision of independent external review of the merits of the exercise of discretions by public officials which could affect the livelihood of individuals. However, the Committee also asked about a discretion to delegate decision making powers and about possible breach of personal rights. The Committee also raised several drafting oversights.

The case also illustrates how the Committee keeps the Senate informed of its actions. The Committee gave a number of notices of disallowance during the course of its scrutiny of the Principal Regulations. As usual, when the Committee then withdrew each notice it incorporated in Hansard its correspondence with the Minister in respect of matters which it

had raised. It did this so that the Senate would be aware of the Committee's concerns and of the action taken concerning those matters. More specifically, in the present case Senator Colston, on behalf of the Committee, gave advance notice, on the day before the Committee's notice was due to expire, that the Committee may be taking unusual action in respect of these Regulations. Also, at giving of notices on that last day, when moving that the notice be postponed until a later hour that day, Senator Colston advised the Senate that the Committee still had serious reservations about the Regulations and that consideration was being postponed in the hope that these concerns may be met.

Finally, the case illustrates the thoroughness of the Committee in its operation. The Committee on its own initiative referred the matter to the Administrative Review Council for advice and then took that advice into account in determining its response to the Minister, thus adding to the general persuasion of its case. In addition, in the course of its scrutiny of the five sets of Regulations which it raised with the Minister, the Committee sent or received 22 letters. In the case of one set of Regulations the Committee wrote to the Minister four times.

A handwritten signature in cursive script, reading "William G. O'Chee". The signature is written in dark ink and is positioned above the printed name and title.

Bill O'Chee
Chairman

June 1996