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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES



SCRUTINY BY THE COMMITTEE OF INSTRUMENTS
ADMINISTERED THROUGH THE PORTFOLIO OF
PRIMARY INDUSTRIES AND ENERGY

NINETY-FIFTH REPORT

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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

Senator Stephen Loosley (Chairman)
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mai Colston
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

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 has traditionally reported on aspects of delegated legislation which overlap all or most agencies, and which are equally applicable to all of them. For instance, the Committee might comment on strict liability offences, as an example of its mandate to protect personal rights; or on comparisons of tribunals which review administrative decisions, to illustrate its responsibilities in this area. This approach has the advantage of emphasising broad concerns which should be addressed across all agencies and, as such, it will remain the basis of the Committee's activities.

However, as part of its general supervision of Commonwealth delegated legislation, the Committee decided that it would be useful to initiate a series of reports on all such delegation made through a single agency or a single portfolio. This 'vertical' approach complements the more usual 'horizontal' approach of the Committee.

This Report examines the delegated legislation made under Acts administered through the portfolio of Primary Industries and Energy and tabled in the Senate in 1992. The Committee is grateful to the Minister for Primary Industries and Energy, the Hon Simon Crean MP, and the then Minister for Resources, the Hon Alan Griffiths MP, for their cooperation with the Committee in its scrutiny of these instruments.

CHAPTER 1

THE PARENT ACTS

During the 1992 Autumn and Budget parliamentary sittings 131 disallowable instruments of delegated legislation made under Acts administered through the Department of Primary Industries and Energy were tabled in the Senate. This legislation was made under the authority of 43 different parent Acts, set out in the following Table. The number after each Act indicates the number of instruments made under that Act.

TABLE

<i>Agricultural and Veterinary Chemicals Act 1988</i>	1
<i>Australian Horticultural Corporation Act 1987</i>	3
<i>Australian Meat and Live-stock Corporation Act 1977</i>	13
<i>Australian Wool Corporation Act 1991</i>	6
<i>Australian Wool Industry Council Act 1991</i>	1
<i>Australian Wool Realisation Commission Act 1991</i>	3
<i>Coal Research Assistance Act 1977</i>	1
<i>Coarse Grains Levy Act 1992</i>	2
<i>Dairy Produce Levy (No.1) Act 1986</i>	3
<i>Deer Slaughter Levy Act 1992</i>	1
<i>Export Control Act 1982</i>	8
<i>Export Inspection (Charges Collection) Act 1985</i>	1
<i>Export Inspection (Establishment Registration Charges) Act 1985</i>	1
<i>Export Inspection (Quantity Charge) Act 1985</i>	1
<i>Export Inspection (Service Charge) Act 1985</i>	1
<i>Fisheries Act 1952</i>	31
<i>Fisheries Administration Act 1991</i>	1
<i>Fisheries Legislation (Consequential Provisions) Act 1991</i>	2
<i>Fisheries Levy Act 1984</i>	8
<i>Fisheries Management Act 1991</i>	1
<i>Fishing Levy Act 1991</i>	1

<i>Grain Legumes Levy Act 1985</i>	1
<i>Horticultural Export Charge Act 1987</i>	6
<i>Horticultural Levy Act 1987</i>	6
<i>Horticultural Research and Development Corporation Act 1987</i>	1
<i>Laying Chicken Levy Act 1988</i>	1
<i>Live-stock Slaughter Levy Act 1964</i>	1
<i>Meat Chicken Levy Act 1969</i>	1
<i>Meat Inspection Act 1983</i>	3
<i>Meat Research Corporation Act 1985</i>	2
<i>Oilseeds Levy Act 1977</i>	1
<i>Pasture Seed Levy Act 1989</i>	1
<i>Pig Slaughter Levy Act 1989</i>	1
<i>Primary Industries and Energy Research and Development Act 1989</i>	7
<i>Primary Industries Levies and Charges Collection Act 1991</i>	16
<i>Quarantine Act 1908</i>	4
<i>Rice Levy Act 1991</i>	1
<i>Sugar Cane Levy Act 1987</i>	2
<i>Wool Tax Act (No.1) 1964</i>	1
<i>Wool Tax Act (No.2) 1964</i>	1
<i>Wool Tax Act (No.3) 1964</i>	1
<i>Wool Tax Act (No.4) 1964</i>	1
<i>Wool Tax Act (No.5) 1964</i>	1

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Most instruments were made under one parent Act, or under a parent Act together with section 4 of the *Acts Interpretation Act 1901*, which provides that delegated legislation may be made under provisions of Acts which have not yet come into operation. However, four instruments were made under three parent Acts and 11 under two parent Acts. Therefore, the number instruments listed in the Table is greater than the number of individual instruments.

The 131 instruments included regulations, orders, notices, plans of management, determinations, plans, a declaration and an instrument, each of these types being expressly authorised by its parent Act.

The most common type of delegated legislation was the 70 sets of regulations made under a variety of provisions in 36 different parent Acts. Some of these Acts, usually short Acts such as the *Export Inspection (Service Charge) Act 1985*, provided a brief regulation making power which referred to specified sections of the Act. However, most provided for variations of the standard provision in most principal Acts that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Some Acts, such as the *Fisheries Administration Act 1991*, provided only for this standard provision, while others included some further elaboration of the general power. In some cases, such as the *Australian Wool Corporation Act 1991*, the power was enlarged to provide for specified penalties for offences. In other cases, such as the *Australian Wool Realisation Commission Act 1991*, the power was to provide transitional or consequential provisions necessary, among other things, because of the repeal of another Act. In other cases, such as the *Coarse Grains Levy Act 1992*, regulations could only be made after certain recommendations were taken into account. In others, such as the *Horticultural Levy Act 1987*, specified consultations were required before such recommendations could be made. Other powers were particularly detailed; the *Fisheries Management Act 1991* provided for 20 express areas of power, in addition to the usual regulation making power.

As well as these general provisions, the substantive provisions in the body of most Acts provided for regulations to be made. For instance, under the *Australian Wool Industry Council Act 1991*, the regulations may require the Council to convene industry review conferences and conferences of chairpersons of wool industry statutory bodies.

The next largest type of delegated legislation was the 25 orders made in six series under five parent Acts. The provisions of these five Acts were similar but not identical. For instance, the *Australian Meat and Live-stock Corporation Act 1977* provided for four separate order making powers in the body of the Act, while the other four Acts provided for this power in miscellaneous provisions as part of the regulation making power. All five Acts generally provided that specified provisions of the Acts Interpretation Act applying to regulations applied also to orders. However, all also provided generally that the *Statutory Rules Publication Act 1903* did not apply to orders.

The next largest type of delegated legislation was the 21 notices made under the *Fisheries Act 1952*. Notices are made by gazettal, which is unusual. The Act provided that specified provisions of the Acts Interpretation Act applying to regulations applied also to notices. It also provided that notices were not statutory rules within the meaning of the *Statutory Rules Publication Act*.

Six plans of management and two plans (which were amendments of a plan of management) made also under the Fisheries Act. As with notices, that Act provided that specified provisions of the Acts Interpretation Act applied to plans of management and that such plans were not statutory rules. The two plans were also made under the *Fisheries Legislation (Consequential Provisions) Act 1991*.

The next largest type of delegated legislation was five determinations, four of which were made under the *Quarantine Act 1908* and one under the *Coal Research Assistance Act 1977*. The Quarantine Act provided that determinations were subject to specified provisions of the Acts Interpretation Act. The Coal Research Assistance Act provided that determinations are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act, under which specified provisions of that Act apply to such instruments.

One declaration was made under the *Pasture Seed Levy Act 1989* and one instrument under the *Rice Levy Act 1991*. These Acts provided that such declarations and instruments are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act. The Pasture Seed Levy Act was unusual in that it did not provide for a regulation making power as well as the declaration making power.

CHAPTER 2

THE DELEGATED LEGISLATION

The 131 instruments of delegated legislation made under Acts administered through the portfolio of Primary Industries and Energy included the following:

- 70 separate sets of regulations made under 36 parent Acts
- 25 orders made under 5 parent Acts
- 21 notices made under 1 parent Act
- 6 plans of management made under 1 parent Act
- 5 determinations made under 2 parent Acts
- 2 plans made under 2 parent Acts
- 1 declaration made under 1 parent Act
- 1 instrument made under 1 parent Act

The 70 sets of regulations, 15 of which were made as principal regulations and 55 as amending regulations, were drafted by the Office of Legislative Drafting in the Attorney-General's Department and published in the statutory rules series. In common with other instruments in that series, their drafting, presentation and access is generally of good quality, being equal in these respects to Acts. This is the standard to which the Committee believes that all delegated legislation should conform. In brief, the legislation made as regulations is part of a uniform series, produced to a common high standard, cited conveniently and easily accessible in both hard copy and ADP editions and in annual bound volumes. Consolidations of principal regulations are also available. In any event, each set of amending regulations sets out clearly all regulations which make up the principal regulations and notifies the date of gazettal.

Largely as a result of actions of the Committee, where the parent Act or other Acts require prior mandatory action before regulations can be made, such as consultations or taking recommendations into account, each set of regulations formally recites that this has been done. Of the 70 sets of regulations, no fewer than 23 include these recitals. For instance, the recital preceding the words making the **Wool Tax (No.1) Regulations (Amendment), Statutory Rules 1992 No.206**, recites that the Governor-General has taken into consideration specified recommendations made to the Minister by the Australian Wool Realisation Commission, an annual general meeting of wool tax payers and an annual general meeting of the Wool Research and Development Corporation; views expressed by the Wool Council of Australia to the Australian Wool Realisation Commission; and further specified recommendations made to the Minister by an annual general meeting of wool tax

payers and an annual general meeting of the WRDC. The recitation is one page long.

Each set of regulations also recites, where applicable, that the regulations are made before relevant provisions of the parent Act have come into operation, under section 4 of the *Acts Interpretation Act 1901*.

The 25 orders were made in six separate series under five parent Acts, as set out below:

- Australian Horticultural Corporation Orders (1)
- Australian Meat and Live-stock Corporation Orders (12)
- Export Control Orders (7)
- Horticultural Research and Development Corporation Orders (1)
- Livestock Export Orders (1)
- Meat Inspection Orders (3)

The Australian Meat and Live-stock Corporation Orders were made under express provisions of the parent Act and cited as one of a number of sub-series. These orders are almost unique among Commonwealth delegated legislation in that they are remade each time an amendment is required. This technique is helpful to users. Indeed, most of the orders are expressed to apply only to a particular period, following which the order ceases to have effect and a fresh one is made, if required. Differences between the old and new orders are set out in the Explanatory Statement. This is in contrast to most other types of delegated legislation, which includes an original principal instrument which is then amended.

The other five series of orders were all made under the authority of regulations made under a parent Act, rather than under express provisions of that Act itself.

The Meat Inspection Orders are made as full consolidations of the principal order each time an amendment is made. This is a second unusual but helpful technique. A note at the start of each order advises users that for a complete set of the orders it is necessary only to obtain the present orders. A table sets out details of previous orders and the Explanatory Statement advises where changes have been made.

The Export Control Orders, cited as one of a number of sub-series, are also made under regulations rather than directly under the parent Act. Some of these orders are made in a third unique but helpful fashion, as part of a loose leaf system which is permanently consolidated. A table sets out details of previous orders with amendments indicated in the body of the instrument including, in one case, notification of a provision which was disallowed by the Senate. Offence provisions are also indicated. Another sub-series is usually, but not invariably, made as a consolidation. Such consolidations include a note advising that users need only obtain that order, and notifications in the body of the order of amendments and, at the instigation of the Committee, of discretions which are subject to review.

The remaining series of orders, the Australian Horticultural Corporation Orders, the Horticultural Research and Development Corporation Orders and the Livestock Export Orders, do not include these innovative drafting practices.

The 21 Fisheries Notices were made directly under the parent Act as one of a number of sub-series. Most of the Notices operated in a “stand alone” fashion, revoking previous notices. A number expressly provided that they were to operate in conjunction with prohibitions with other notices in force.

The six plans of management (“POM”), and the two plans which amended them, were all made directly under the parent Acts, as one of a number of sub-series. The drafting of these sub-series was not uniform. The **South East Fishery (Individual Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**, was drafted as an original principal instrument, with its two amending plans each drafted as an amendment, in the same way as an amending set of regulations amends the principal regulations and the amendments become a part of those principal regulations. The **Management Plans Omnibus Amendment 1992, Plan of Management No.31**, which amended five other POM to accommodation changes in the parent Acts, was also made as an amendment, amending those five existing principal POM. In contrast to these more traditional forms of drafting, the **Bass Strait Scallop Fishery Preliminary Management Plan (Amendment), Plan of Management No.BSS 2**, and the **Southern Shark Fishery Management Plan (Amendment), Plan of Management No.30**, were both helpfully made as part of a loose leaf system. Both these instruments included a table setting out details of the original POM and all amendments, one included notes and explanations of all amendments in the body of the instrument, including a note of all words and phrases defined in the Act, and the other included notes of amendments in the Explanatory Statement. The **Great Australian Bight Trawl Fishery Preliminary Management Plan (Amendment), Plan of Management No.GAB 3**, and the **Southern Bluefin Tuna Management Plan (Amendment), Plan of Management No.32**, were both helpfully made as consolidations of the previous principal POM, as amended by the present amendments. Both included details which assisted users, such as a table of the legislative history of the POM, amendments printed in bold type and notes in the body of the POM.

The four Quarantine Determinations were all made directly under the parent Act. Three out of the four repealed and remade existing determinations, in a similar fashion to the Australian Meat and Live-stock Corporation Orders.

The Coal Research Determination, the Pasture Seed Levy Declaration and the Rice Levy Rates Instrument, were all made directly under the parent Acts as original principal instruments.

CHAPTER 3

ACTION BY THE COMMITTEE

As with every other disallowable legislative instrument tabled in the Senate, the Committee scrutinised the 131 such instruments administered through the portfolio of Primary Industries and Energy which were tabled during 1992. The Committee examined each instrument to ensure that it complied with high standards of parliamentary propriety and personal liberty. Where there were problems with an instrument the Committee wrote to the Minister who made it or, if it was made by another official or by a statutory authority, it wrote to the Minister who administered the Act.

This Chapter sets out the possible defects which the Committee raised with Ministers administering the Primary Industries and Energy portfolio, listed under the four principles against which the Committee scrutinises delegated legislation. These principles, which are included in the Standing Orders, are listed at the start of this and every other Report of the Committee.

Principle (a)

Is delegated legislation in accordance with the statute?

Although this principle is not confined narrowly to technical legal validity, the Committee ensures that, on its face, each instrument was made and operates legally. Every year the Committee questions the validity of numbers of instruments from different portfolios, because it appears evident from the instrument itself or from the Explanatory Statement that they are, or may be, invalid. In such cases the Minister either acknowledges that the instrument is invalid or else, often relying on advice from the Attorney-General's Department, advises the Committee that it is valid. The Committee normally accepts this advice, because only a court can pronounce definitively on contested validity. However, there are other cases where the validity of an instrument is challenged in the courts for reasons which are not evident from the face of the instrument. In such cases the Committee will await the outcome of the court decision. This was the position with the **South East Fishery (Individual Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**, part of which was declared invalid by the Federal Court. Here, the Committee merely noted the report of its independent legal adviser, Emeritus Professor Douglas Whalan, received before the court decision, which advised that, "Much of the plan appears to be based on questions of fact and history.". The Federal Court declared the plan invalid on these questions.

It is essential that references in delegated legislation to parent Acts, other Acts and other provisions of delegated legislation should be accurate. This may not always affect validity, but it is an indication of the general quality of legislation. The **Fisheries Management Regulations, Statutory Rules 1992 No.20**, twice referred incorrectly to a schedule in the regulations, while the **Fisheries Levy (Northern Fish Trawl Fishery) Regulations (Amendment), Statutory Rules 1992 No.13**, referred incorrectly to a provision in an Act. The **South East Fishery (Individual Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**, provided for four incorrect references to provisions of an Act. In all these cases portfolio ministers undertook to amend the instrument.

The Committee believes that it may be a breach of parliamentary propriety if delegated legislation itself provides for legislative instruments which are not subject to parliamentary scrutiny by tabling and disallowance. The **South East Fishery (Individual Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**, provided for management of a fishery through quotas based upon a specified total allowable catch ("TAC") for different species. The TAC were set by the plan and were thus disallowable. However, the plan provided that the Minister could vary any TAC for any species at any time. The plan provided for such variations to be notified in the gazette, but there was no provision for tabling and possible disallowance. The power to vary any TAC was clearly legislative and had important commercial consequences. Therefore, the Committee suggested to the Minister that variations should be subject to appropriate scrutiny. The Minister replied that the plan only operated until the end of 1992 and undertook that he would not vary any TAC during that time. Also, the Committee's concerns would be fully considered when the new plan was made. The new plan would be subject to full parliamentary scrutiny.

It is a breach of parliamentary propriety if delegated legislation itself provides for delegation of powers to an inappropriate class of persons. The **Management Plans Omnibus Amendment Plan 1992, Plan of Management No.31**, amended five plans of management to reflect provisions in recent Acts. The amendments to the five plans, together with the **Southern Bluefin Tuna Management Plan (Amendment), Plan of Management No.32**, all provided that the important functions of the managing director of the Australian Fisheries Management Authority could be delegated to any person at all. The Committee raised this with the Minister. The Minister advised that at the time that the amendments were made the only position in AFMA was that of the managing director, the structure of AFMA had not been determined and a high turnover of staff was expected. The present procedure was flexible so as to cope with the absence of formal titles and position numbers and with changes in personnel. Persons to whom the functions of the managing director had been delegated were all senior officers who would have been included in the plans as managers had this option been available at the time of the amendments. The Minister attached a list of delegates and the functions which had been delegated to each of them. The Minister undertook that future plans would provide for delegations only to named officers or to the occupants of specified positions. The Committee accepted this advice.

It is a breach of parliamentary propriety if delegated legislation changes the level of taxes, levies or charges without the Explanatory Statement explaining the basis for the change. The **Fisheries Levy (Northern Prawn Fishery) Regulations (Amendment), Statutory Rules 1992 No.358**, increased several rates of levy, decreased others, and changed the dates upon which levy was to be paid, without explanation. The **Fisheries Levy (Southern Bluefin Tuna Fishery) Regulations (Amendment), Statutory Rules 1992 No.340**, increased a levy by considerably more than the CPI, with no explanation. The **Fishing Levy Regulations, Statutory Rules 1992 No.59**, prescribed the amount of a new levy, without explaining the basis of the amount. In all these cases the Minister advised the Committee how the amount of levy was calculated.

Every instrument of delegated legislation should be accompanied by an Explanatory Statement, which sets out the relevant provisions of the Act under which the instrument was made, the reasons why it was made and the effect of each of its provisions. At the request of the Committee, the Minister provided Explanatory Statements for **Fisheries Notices NPF Nos.15 to 21**. The Explanatory Statements which accompanied the **Primary Industries Levies and Charges Collection (Macadamia Nuts) Regulations, Statutory Rules 1992 No.50**, the **Primary Industries Levies and Charges (Apple and Pear) Regulations (Amendment)**, and the **Primary Industries Levies and Charges (Horticultural Export Charge) Regulations (Amendment), Statutory Rules 1992 Nos.146 and 147**, omitted attachments which set out copies of advice to the Minister about the regulations from a statutory authority and a growers association; the Minister provided the attachments.

The Explanatory Statement for the **Australian Horticultural Corporation (Export Control) Regulations (Amendment), Statutory Rules 1991 No.436**, explained that the regulations had been made, among other things, to implement undertakings given to the Committee. However, no such explanation was given by the Explanatory Statement for **Fisheries Notice No.ECF 1**, which also implemented an undertaking.

On the other hand, the Committee noted the good quality of the Explanatory Statements for the **Wool Tax (Nos.1 to 5) Regulations (Amendment), Statutory Rules 1992 Nos.206 to 210**. The Committee also expressly noted the careful and detailed recitals in these regulations. In addition, the Committee noted that the **Meat Inspection (General) Orders (Amendment), Meat Inspection Orders 1991/5**, were particularly helpful to users, being made as a reprint with a table of contents, a table indicating which orders comprised the principal orders, and notes in the body of the instrument indicating which provisions had been amended.

On a lighter note, **Order No. M49/92 under s.16H of the Australian Meat and Live-stock Corporation Act 1977** provided for "Whether Mutton", which the Committee suspected should have been "Wether Mutton". The then Chair of the Committee, Senator Pat Giles, observed that it did not matter whether the whether was whether or whether it was wether, just as long as it was not substituted kangaroo.

Principle (b)

Does delegated legislation trespass unduly on personal rights and liberties?

As with principle (a), the Committee does not interpret principle (b) narrowly. Rather, it is interpreted in an expanding and evolutionary way to include every aspect of personal rights and liberties.

The **Prescribed Goods (General) Orders (Amendment), Export Control Orders No.4 of 1992**, provided for persons who may be considered “fit and proper” for the purposes of the Act, the regulations or the orders. Under such provisions the Secretary could take into account whether a person had been convicted of any offence at all under the *Crimes Act 1914* or any other Commonwealth, State or Territory law. Also, the Secretary could take into account conduct of associates of that person, defined broadly to include not only reasonably obvious people such as consultants or partners, but also spouses, de facto spouses and even employers and employees of the person or of any corporation of which the person is an officer or in which the person holds shares. An associate was also defined to include people who were associates at some time in the past, but who were no longer in that category. In addition, the provisions referred several times not just to conduct but to alleged conduct. The Committee accepted that all these matters were merely criteria which could be taken into account; they were not conclusive. Nevertheless, the criteria were so broad that they may have breached the personal rights of those affected. The Committee wrote to the Minister suggesting that the criteria may be harsh and unreasonable.

The Minister advised that the order was initially made following a recommendation of the 1982 Royal Commission into the Australian Meat Industry, as one way of protecting Australia's export meat industry from corruption. However, difficulties were experienced in applying the provision in certain situations. Moreover, the provision did not address adequately the involvement of corporations which were unlikely to be considered fit and proper participants in the industry or of people who were influencing the industry through indirect involvement as associates. As a result, the purpose for which the order was originally made was being defeated. The orders were amended to remedy these deficiencies. The fit and proper status of an individual would only be considered for the purposes of the Act, the regulations or the orders; the provision for taking into account all convictions was unchanged from the previous situation; and the references to alleged conduct were a safeguard, to ensure that only conduct which occurred at a relevant time could be taken into consideration. The Minister also pointed out that decisions taken in accordance with the criteria were ultimately reviewable by the Administrative Appeals Tribunal. The Committee accepted this advice.

Among other things, the **Fisheries Management Regulations, Statutory Rules 1992 No.20**, provided that a person may elect to pay an administrative penalty in respect of an offence, instead of having the matter dealt with by a court. The regulations properly provided fundamental safeguards for such persons. Thus, if a person elected to pay such a penalty any liability in respect of the offence was discharged,

further proceedings against the person could not be taken in respect of the matter and the person was not regarded as having been convicted of an offence. The administrative penalty was \$200 while a court could impose a fine of \$1,000 in seven such cases and \$500 in another case.

These safeguards were entirely appropriate. However, their beneficial effect was diluted because there was no requirement for affected persons to be notified of the safeguards. The Committee wrote to the Minister, suggesting that the regulations should be amended to require such notification. In the meantime, the Committee suggested that the Australian Fisheries Management Authority take administrative action to include such information whenever it issued an infringement notice. The Minister undertook to amend the regulations and advised that action would be taken to ensure that all affected persons were made aware of their rights.

The **Export Inspection (Service Charge) Regulations (Amendment), Statutory Rules 1992 No.249**, provided for charges for determining whether an establishment may be granted exemption from the orders. The charges were sharply progressive. The Explanatory Statement advised that this reflected the high costs in processing applications from frequent users of the exemption provision, and was intended as a deterrent to such use. The Committee was concerned that the regulations appeared to penalise persons for exercising a right conferred by legislation.

The Minister advised that the levels of charges reflected the actual costs incurred in processing applications for exemption. Generally, infrequent users of the exemption provisions required only minor processing by relatively junior officers. On the other hand, in the comparatively rare cases where export establishments routinely apply for exemption, the highest level of individual scrutiny is necessary, requiring the frequent involvement of central office staff. In addition, an applicant dissatisfied with a decision may apply for review by the Administrative Appeals Tribunal. The Committee accepted this advice.

The **Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251**, omitted a provision under which refunds of charges were available. The Explanatory Statement merely advised that, "AQIS will not refund charges in the future. The refunds which previously existed have been omitted...". The Committee was concerned that the regulations removed an existing right with no explanation.

The Minister advised that the relevant AQIS charges were intended to cover infrastructure services which were used by the industry throughout the year. However, there was an increasing trend for operators to register at the start of each season and then to de-register and obtain a refund at the end of the season. This trend, and the refund provisions generally, did not reflect the intention that the charges should be a fixed cost throughout the year. If the trend continued, the charge would need to be substantially increased. The Committee accepted this advice.

Principle (c)

Does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

Many instruments of delegated legislation provide for the Minister, statutory authorities or officials to exercise discretions. The Committee ensures that such discretions are as narrow and objective as possible, are guided and limited by appropriate criteria and are subject to appropriate review of their merits by an independent, external tribunal, usually the Administrative Appeals Tribunal.

The **Export Inspection (Charges Collection) Regulations (Amendment), Statutory Rules 1992 No.251**, provided for the payment of certain charges. The Explanatory Statement for the regulations then advised that, in order to reduce bad debts, the Australian Quarantine and Inspection Service would require payment in advance or at the time of the service and before release of the client's documents and goods, "for all but regular clients with a good record of payment on time". The regulations did not provide either for procedures to decide which clients came within this category or for review of an adverse decision. The Committee wrote to the Minister, who advised that the AQIS intended progressively to emulate commercial practice, which included provision in accounts for bad and doubtful debts. Eventually, payment in advance or at time of service would be normal practice, with payment by account only where such normal practice cannot be administratively achieved. In the meantime, the changeover would be made with close consultation between AQIS, clients and industry bodies. The Committee accepted this advice.

Order No.L11/92 made under s.16H of the *Australian Meat and Live-stock Corporation Act 1977*, provided for significant broad discretions, without criteria, relating to approval of exports by the AMLC. The discretions appeared to have considerable commercial importance. The Committee wrote to the Minister about lack of independent, external review of these discretions. The Minister advised that the order was intended to be temporary, to ensure that shipments would meet the requirements of a foreign government. The order was made following a meeting between the AMLC, the Australian Livestock Exporters Association, the Sheepmeat Council of Australia and the Department. The Committee accepted this advice, but inquired further about the length of time that the temporary measure would remain and whether it was intended to make a permanent order. The Minister provided this information. **Fisheries Notice No.NPF 19** provided for discretion to exempt a person from certain prohibitions, with no apparent review. In reply to the Committee, the Minister advised that it was not usual for fisheries notices to provide for discretions and that the notice would be amended either to remove the discretions or to provide criteria. The Committee accepted this advice.

The **South East Fishery (Independent Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**, provided for a register as an important part of the plan. The plan provided in objective detail for the information which the register was required to contain. However, it also provided for the register to include any other information which the manager considered relevant. The Committee noted

that recent provisions relating to a register in the **Southern Shark Fishery Management Plan (Amendment), Plan of Management No.30**, did not include such a broad and subjective power. The Committee also noted that decisions of the manager were subject to AAT review, which was a considerable safeguard. Nevertheless, the Committee raised the matter with the Minister, who advised that the provision was intended to provide flexibility in a new and complex plan. Any additional information would only be minor in nature. If more substantial changes were necessary then the plan would be amended.

On the other hand, the Committee had no comments on the amendments provided by the **Southern Shark Fishery Management Plan (Amendment), Plan of Management No.30**. However, the Committee pointed out to the Minister that the original plan was now more than four years old and asked whether it provided for the same comprehensive rights of review as more recent plans such as the **South East Fishery (Individual Transferable Quota) Management Plan 1991, Plan of Management No.SEF 1**. The Minister advised that the plan would be reviewed shortly and that such rights of review would be provided at that time.

On a lighter note, the **Meat Inspection (New South Wales) Order (Amendment), Meat Inspection Orders No.1 of 1992**, provided for a discretion which may not have been appropriate for review. The orders provided that the owner of an animal that was dead on arrival at an abattoir shall remove the animal or, at the discretion of an official, dispose of the animal at the abattoir. The Committee considered that the delay in waiting for AAT review while the dead animal remained on the premises would not be justified.

Principle (d)

Does delegated legislation contain matter more appropriate for parliamentary enactment?

The Committee did not raise this principle in respect of any instrument administered through the Primary Industries and Energy portfolio and tabled in the Senate in 1992. Therefore, the Committee was satisfied that none of the matters provided for in such instruments should have been included in a Bill, which would be subject to all the rigors of parliamentary passage.

CHAPTER 4

CONCLUSIONS

In general, the Committee have few difficulties with the delegated legislation made under Acts administered through the portfolio of Primary Industries and Energy. This applied to the provisions of parent Acts providing for delegated legislation, to the drafting and access of that delegated legislation, and to its actual provisions.

The Committee chose the Primary Industries and Energy portfolio for the first of its audits of agency delegated legislation for a number of reasons.

The 131 instruments made under its portfolio Acts were only 8% of the total number of 1,615 legislative instruments tabled in the Senate during 1992. However, this relatively small proportion obscures their importance in Commonwealth public administration. For instance, while there were 445 instruments made through the Transport and Communications portfolio, 345 of these were made under the *Civil Aviation Act 1988*, almost all dealing with technical aspects of aircraft maintenance and operation. Similarly, of the 333 instruments made through the portfolio of the Prime Minister and Cabinet, 330 were made under the *Public Service Act 1922*, almost all dealing with conditions of service of Commonwealth employees.

However, the instruments made through the Primary Industries and Energy portfolio were more diverse and dealt with a considerable variety of matters. While the 333 instruments administered through the Prime Minister and Cabinet portfolio were made under just four Acts, those in the Primary Industries and Energy portfolio were made under 43 Acts, which provide for matters affecting some of Australia's most important export and domestic industries.

The legislative powers provided for in these Acts were unexceptional. The most important of these powers, the power to make regulations, was provided for in terms which were not unusual by Commonwealth legislative standards. Initially, the numbers of discrete provisions for orders, notices and plans of management in earlier Acts appeared unusual, as such powers are now usually provided for simply as section 46A instruments. However, these were necessary because the umbrella of section 46A was not then available. In accordance with contemporary Commonwealth practice, more recent portfolio Acts have provided for delegated legislation to be made by regulation or section 46A instrument. For instance, the *Coal Research Assistance Amendment Act 1991*, which amended the principal Act for the first time since 1982, provided for both additional regulation making power and for a section 46A determination.

The Committee believes that as much delegated legislation as possible should be

made as regulations or other instruments included in the statutory rules series, which are similar to Acts in the quality of their drafting, presentation and access. In this respect, the portfolio Acts appear to be more acceptable than the average of other such Acts, enabling more than half of portfolio instruments to be made as regulations, compared to less than a quarter of all Commonwealth delegated legislation. In addition, recent portfolio Acts have tended to provide more exclusively for regulations than previous Acts. This emphasis on regulations is one of the strengths of portfolio delegated legislation.

Although the Committee believes that as much delegated legislation as possible should be included in the statutory rules series, the quality of portfolio delegated legislation made in other series was encouraging. The most notable feature of this legislation was the innovative drafting of several series. These innovations included remaking an instrument whenever an amendment was required, making amendments as part of a consolidated reprint of the principal instrument, and making the original principal instrument and all amendments as a permanently consolidated loose leaf system. The result is that those series of delegated legislation are easily accessible by users. In some respects, access is better than that of statutory rules or even Acts. This is another strength of portfolio delegated legislation.

Much of the more recent portfolio delegated legislation has included techniques associated with the "plain English" style of legislative drafting, such as providing notes, references, explanations and examples in the body of an instrument. The Committee supports the use of these techniques, which is another strength of portfolio delegated legislation.

In summary, the delegated legislation made in the Primary Industries and Energy portfolio has no obvious weaknesses and several areas of strength. These strengths are such that they could be used as precedents for series of legislation in other portfolios, for the statutory rules series itself, and even for Acts.

As usual, the Ministers responsible for the administration of the Primary Industries and Energy portfolio cooperated generously with the Committee in its scrutiny of portfolio delegated legislation. The Committee is grateful for this cooperation from the Minister for Primary Industries and Energy, the Hon Simon Crean MP, and the then Minister for Resources, the Hon Alan Griffiths MP.



Stephen Loosley
Chairman

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