

The Senate

Rural and Regional Affairs and
Transport Legislation Committee

Provisions of the Agriculture, Fisheries
and Forestry Legislation Amendment Bill
(No. 1) 2002

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ABBREVIATIONS

ACS	Australian Customs Service
AFFA	Department of Agriculture, Fisheries and Forestry Australia
AFGC	Australian Food and Grocery Council
APL	Australian Pork Limited
APS	Australian Public Service
AQIS	Australian Quarantine and Inspection Service
AWI	Australian Wool Innovation Limited
CPSU	Community and Public Sector Union
FBIA	Food and Beverage Importers Association
FSANZ	Food Standards Australia New Zealand

CHAPTER ONE

THE COMMITTEE'S INQUIRY

Origin of Inquiry

1.1 On 18 September 2002 the Senate referred the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 1) 2002, to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 24 October 2002.¹ The reporting date was subsequently extended to 12 November 2002.

1.2 The primary reasons for referral of the Bill were to examine the effectiveness of changed arrangements for labelling and monitoring imported food proposed in the Bill and to examine the operation of border control arrangements, which has involved expanding the AQIS contract employment pool arrangements.²

The Committee's Inquiry

1.3 Following the referral of the Bill, the Committee wrote to key stakeholders to invite submissions, including the Department of Agriculture, Fisheries and Forestry (AFFA), the Australian Quarantine and Inspection Service (AQIS), Food Standards Australia New Zealand (FSANZ), the Community and Public Sector Union (CPSU), Australian Pork Limited (APL), Australian Wool Innovation Limited (AWI), the Australian Food and Grocery Council (AFGC), the Department of Transport and Regional Services (DOTRS) and the Customs Brokers and Forwarders Council of Australia (CBFCA).

1.4 The Committee received six submissions. A list of written submissions is included at Appendix 1.

1.5 The Committee held a public hearing on the provisions of the Bill on Friday 18 October 2002 and heard evidence from representatives of the Department of Agriculture, Fisheries and Forestry, the Australian Quarantine and Inspection Service and the Community and Public Sector Union. A list of witnesses who appeared at the hearing is included at Appendix 2.

1.6 Published submissions and the *Hansard* of the Committee's hearing are tabled with this report, together with all supplementary material provided to the Committee. The *Hansard* of the hearing is available at the Hansard site on the Parliament House homepage on the Internet (www.aph.gov.au).

1.7 The Committee met on 11 November 2002 to consider its report.

1 Extract from *Journals of the Senate*, No. 32, 18 September 2002.

2 *Selection of Bills Committee, Report No. 8 of 2002*, 18 September 2002

Acknowledgments

1.8 The Committee acknowledges the assistance provided to its Inquiry by those who prepared written submissions at short notice. The Committee also acknowledges the assistance provided by all witnesses who attended the public hearing and the prompt provision of supplementary information requested by the Committee.

1.9 The Committee also appreciates the assistance of the Department of the Parliamentary Reporting Staff in providing the *Hansard* transcript of proceedings within a very short time-frame.

CHAPTER TWO

BACKGROUND

Introduction

2.1 The following chapter outlines the purpose of the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002.

Background

2.2 During the 2001-02 financial year, the Government committed an additional \$596.4 million (over four years) to increase the capacity of the Department of Agriculture, Fisheries and Forestry (AFFA) and the Australian Customs Service (ACS) to respond to quarantine risks - particularly the threat of foot and mouth disease.¹

2.3 A significant amount of this funding has been directed towards increased border protection activities. \$281.4 million has been provide to AFFA over four years (for AQIS) and \$238.8 million has been provided to ACS. Funding has also been provided for modifications to international mail centres and international airports. AFFA was also provided with an additional \$1.7 million to strengthen risk management arrangements and to provide for rapid foot and mouth disease testing.

2.4 In response to the Government's commitment to increased border protection, AQIS has varied its staffing mix and has increased its use of contractor staff. AQIS has employed contract staff to perform lower level duties and provide support to fully trained quarantine inspectors. AQIS is now proposing these contract staff be fully authorised under the *Quarantine Act 1908*.

2.5 The National Competition Policy Review of the *Imported Food Control Act 1992* made 23 recommendations aimed at improving food safety inspection at the border which were accepted by the Government. The proposed legislation will allow AQIS to fully implement all the Review recommendations.

Purpose of the Bill

2.6 The Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002 proposes amendments to the *Quarantine Act 1908*, the *Imported Food Control Act 1992*, the *Pig Industry Act 2001* and the *Wool Services Privatisation Act 2000*.²

1 The following section is based on information contained in *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 2.

2 The following section is based on information contained in the *Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002, Explanatory Memorandum* and the Second

Schedule 1 - Proposed Amendments to the Quarantine Act 1908

2.7 Schedule 1 of the Bill proposes amendments to the Quarantine Act which would extend the Act to Christmas Island. The Bill also proposes several changes to improve the arrangements for the payment of fees and broadens the range of persons who can be appointed as quarantine officers. The Bill also proposes a number of clarifying amendments.

Christmas Island

2.8 It is Government policy to bring conditions and standards in the Indian Ocean Territories into line with those of comparable communities in the rest of Australia. The Quarantine Act already extends to the Cocos (Keeling) Islands and the amendments proposed in the Bill will extend the Act to Christmas Island in the same way it has been extended to the Cocos (Keeling) Islands. It is proposed that the Quarantine Act will replace the existing quarantine regime on Christmas Island - the Quarantine and Prevention of Disease Ordinance - a law which was adopted from the Colony of Singapore.

2.9 The proposed amendments would transfer the formal responsibility for animal and plant quarantine functions on Christmas Island from the Minister for Regional Services, Territories and Local Government to the Minister for Agriculture, Fisheries and Forestry. The amendments would also provide for quarantine barriers between Christmas Island, the Cocos (Keeling) Islands and mainland Australia, in recognition of the different pest and disease status of these areas.

Payment of Fees

2.10 The proposed changes in relation to the arrangements for the payment of fees are summarised as follows:

- the amendment of sections 59A and 63 of the Act to put beyond doubt that the liability for fees currently imposed on an agent by those sections is not a tax, the amendment of section 64 of the Act to impose a liability for fees on an agent and the repealing of section 61 because it is a redundant provision;
- clarification that in cases where a fee for service can be calculated in advance of the service being provided, the determination under section 86E may require that the fee be paid before the service is provided and that in such cases a quarantine officer may decide to withhold delivery of the service until pre-payment is made; and
- clarification that a late payment fee may be a fee that is a percentage per annum of the basic fee.

2.11 It is argued that these amendments will improve the arrangements for the payment of fees for quarantine services. The amendments will formalise the practice of AQIS invoicing agents (customs brokers) for the clearance of imported goods rather than invoicing the importer directly. This will avoid AQIS having to seek payment from importers, which AQIS has found is often time consuming, costly and not always successful.

2.12 The amendments are also an attempt to avoid the risk of bad debts arising from an agent refusing to pay AQIS on behalf of an importer. The Bill will amend the Act to impose an obligation on customs brokers (as the agent of an owner/importer) to collect fees payable to the Commonwealth for import clearance services, regardless of whether the agent has received the fees from the owner/importer. Any fees payable will become a debt due to the Commonwealth by the agent and will be recoverable in a court of competent jurisdiction.

2.13 The amendment of section 86E of the Quarantine Act will allow for a fee for service to be calculated in advance of the service being provided. The amendment will also make provision for the fee to be requested prior to service being provided and allow quarantine officers to withhold delivery of the service until pre-payment is made. This amendment is expected to significantly reduce the risk of bad debts.

Contract Staff

2.14 The proposed amendments will broaden the range of persons who may be appointed as quarantine officers and will empower the Director of Quarantine to enter into contracts and to appoint persons covered by those contracts to be quarantine officers.

2.15 A result of this amendment would be to allow the Directors of Human and Animal and Plant Quarantine to enter into contracts to create a pool of contract staff. The amendment would also empower the Director of Quarantine to appoint as a quarantine officer a person who is a member of the contract pool and not a Commonwealth, State or Territory employee.

2.16 On appointment, persons from a contract pool would have all the powers of a quarantine officer under the Act except the powers under sections 66AC, 66AE or 66AF (offence related search and seizure power and warrant powers). The amendments would also impose a duty of non-disclosure on a contract pool person who is appointed as a quarantine officer for the purposes of section 70 of the *Crimes Act 1914*. The proposed amendments also state that a person appointed from the contract pool would not be an employee of the Australian Public Service.

2.17 It is also proposed to amend section 11 of the Quarantine Act to clarify that this provision of the Act applies to making arrangements for the appointment of State or Territory officers as quarantine officers and to amend the provisions of the Act dealing with appointments to clarify that State or Territory officers who are the subject of such an arrangement may be appointed as quarantine officers. These amendments also clarify that a State officer may be a Chief Quarantine Officer.

Schedule 2 - Proposed Amendments to the Imported Food Control Act 1992

2.18 Schedule 2 of the Bill amends the *Imported Food Control Act 1992*. The amendments are in response to recommendations arising from the National Competition Policy Review of the Act. Included in the amendments is a statement of objective that will be inserted into the Act to clarify its purpose.

2.19 The Bill also amends the Act to allow for the importation of food that does not comply with Australian food standards (with respect to labelling) but creates an offence to sell that food. This change will provide importers with the opportunity to correct a labelling deficiency before a product is sold. It is intended that the new system would protect consumer interests in a way that is more efficient for industry and the Commonwealth.

2.20 The use of compliance agreements as an alternative to the current system of inspection by officers of AQIS was identified by the NCP Review as a preferred way to promote a co-regulatory approach with industry. The proposed amendments provide legislative support for compliance agreements. To ensure that the integrity of the imported food inspection system is maintained, the amendments provide that a failure to comply with a requirement set out in a compliance agreement that causes a significant risk to public health would be an offence attracting a maximum penalty of 10 years imprisonment.

Schedule 3 - Proposed Amendments to the Pig Industry Act 2001 and the Wool Services Privatisation Act 2000

2.21 The amendments to the *Pig Industry Act 2001* and the *Wool Services Privatisation Act 2000* provide for the research and development bodies for the pork and wool industries - Australian Pork Limited (APL) and Wool Innovation Limited (AWI) - to carry forward claims for eligible research and development expenditure eligible for Commonwealth matching contributions from one financial year to the next.

2.22 The amendments propose that the legislative arrangements under which the Commonwealth matches eligible research and development for the pork and wool industries is consistent with the red meat and horticulture industries, and those research and development corporations and councils operating under the *Primary Industries and Energy Research and Development Act 1989*. The new arrangements would provide APL and AWI with the necessary flexibility to ensure all their year to year expenditure on eligible research and development attracts Commonwealth matching.

CHAPTER THREE

RESPONSE TO THE BILL

Introduction

3.1 As outlined in Chapter Two, it is intended that the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002 amend a number of pieces of legislation, including the *Quarantine Act 1908*, the *Imported Food Control Act 1992*, the *Pig Industry Act 2001* and the *Wool Services Privatisation Act 2000*. The following chapter outlines the response of stakeholders to the amendments proposed by the Bill.

Support for Proposed Amendments

Proposed Amendments to the Pig Industry Act 2001 and the Wool Services Privatisation Act 2000

3.2 The proposed amendments to both the Pig Industry Act and the Wool Services Privatisation Act are designed to correct an anomaly which current exists within the Government's research and development policy framework.

3.3 The Committee invited both Australian Pork Limited (APL) and Australian Wool Innovation Limited (AWI) to provide input into the Committee's Inquiry. APL indicated that it was very supportive of the proposed amendments and indicated that they reflected a consensus reached following a long process of consultation and discussion with AFFA representatives. APL also stated that because the outcome of the legislative changes will be beneficial to both APL and the pig industry, it was "anxious to ensure that the legislative amendments were processed as soon as possible".¹

Proposed Amendments to the Imported Food Control Act 1992

3.4 The amendments proposed to the Imported Food Control Act relate to changing arrangements for the labelling and monitoring of imported foods. The two changes to the legislation were originally recommended by the National Competition Policy Review of the *Imported Food Control Act 1992*.

3.5 The first measure is intended to improve compliance with Australian food labelling requirements in relation to food safety. Under the new arrangements, importers would take responsibility for complying with food labelling standards, which would provide them with the opportunity to correct incorrect labelling prior to the food being inspected by AQIS.

1 *Submission 1*, Australian Pork Limited, p 1.

3.6 The second proposal also gives importers increased responsibility for compliance with Australian food safety standards. Importers would enter into co-regulatory arrangements with AQIS and be permitted to perform low risk tasks under a documented agreement and an AQIS auditing regime. The new arrangements allow for accredited importer personnel to monitor low risk food imports rather than AQIS officers having to undertake random sampling.

3.7 Both measures are consistent with AQIS risk management principles and will allow AQIS officers to focus on higher risk activities. The measures also allow importers to more effectively and efficiently fulfil their obligations to ensure the importation of compliant food products².

3.8 The Committee received submissions from Food Standards Australia New Zealand (FSANZ), the Food and Beverage Importers Association (FBIA) and the Australian Food and Grocery Council (AFGC) which provided specific comment on this section of the Bill and indicated support for the proposed amendments to the Act.

3.9 The AFGC described the changes as beneficial to the food industry and the FSANZ noted that the changes were in accordance with the recommendations of the National Competition Policy Review.

3.10 The FBIA indicated its support for importers being given additional responsibility and argued that the new compliance arrangements would not lead to less overall control over imports:

..... rather they will make possible a redirection of AQIS resources from those importers which satisfy AQIS of their capabilities to undertake agreed tasks to where there are higher assessed risks.³

Proposed Amendments to the Quarantine Act 1908

Part 1 - Extension of the Quarantine Act to Christmas Island

3.11 As discussed in Chapter Two, Schedule 1 of the Bill proposes that the Quarantine Act be extended to Christmas Island in the same way as it has been extended to the Cocos (Keeling) Islands.

3.12 The submissions received by the Committee did not address this particular section of the Bill.

Part 2 - Quarantine Expenses and Fees

3.13 As outlined in Chapter Two, this section of the Bill proposes changes to the arrangements for the payment of fees.

2 *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 5.

3 *Submission 5*, Food and Beverage Importers Association, p 2.

3.14 The submissions received by the Committee did not address this particular section of the Bill.

Criticism of Proposed Amendments to the Quarantine Act

Part 3 - Performance of Quarantine Officer Functions

3.15 The amendments proposed in this section of the Bill are designed to broaden the range of persons who may be appointed as quarantine officers. The amendments would also empower the Director of Quarantine to enter into contracts and to appoint persons covered by those contracts to be quarantine officers.

3.16 The submissions provided by both AFFA and the CPSU specifically address the legislative amendments relating to the legal status of contractors employed by AQIS. The Committee notes that the amendments proposed in this particular section of the Bill is the only area of contention.

3.17 The Committee was told that the Government's increased quarantine initiatives have resulted in considerable changes, both to the size of the AQIS workforce and the nature of the work performed. The inspection of sea cargo containers has increased from the examination of approximately 5% of sea containers to 100%, there is a much greater use of x-ray machines and considerably more routine duties performed, such to be as the checking and cleaning of passengers' shoes at airports.⁴

3.18 The increased demand of routine duties has also increased the need for flexibility within the AQIS workforce and the Department has elected to use a contract pool staff employment model. Dr Andrew Carroll explained to the Committee that workloads vary considerably - particularly at seaports - and described the advantages of using a pool of contract staff:

With the staff we use at the ports, and to some extent at other places as well, the demand can fluctuate quite wildly, depending on the flow of trade. It picks up around Christmas, but you can have several vessels arrive at once, and so the demand can go up and down. The capacity to use a labour hire firm means that we can say, 'Today we need 28 and in three days time we will need 12.' It means we do not have to try to manage a pool of employees with uncertain work from within our own small confine. Whereas, from what I can gather, the labour hire firm that has the current contract and others manages across several enterprises. So for them it is moving resources around and so they have an efficiency of scale which we do not have.⁵

3.19 AFFA submitted that the amendments are intended to ensure protection under the law for contractors performing tasks such as placing items into and out of x-ray

4 *Evidence*, RRA & T, 18 October 2002, pp 1-2.

5 *Evidence*, RRA & T, 18 October 2002, p 5.

machines, removing of contamination from the external surfaces of cargo containers and cleaning shoes.⁶

3.20 AFFA acknowledged that the proposed amendments would provide contract pool staff with statutory law enforcement powers, including the power to seize material without a warrant (under s66AD).⁷

3.21 However, AFFA also made the point that despite changes to the legislation, it is unlikely that the duties of contract pool staff will change from those they are currently performing. The Committee was told that AQIS intends to stipulate the specific tasks contract staff will be required to perform with the contract provider and employees will be given only those powers necessary to perform a specific function.⁸

3.22 Employing staff from a contract pool would result in other benefits to Australia's quarantine services, including fully trained quarantine officers being able to concentrate their efforts on risk management and enforcement tasks (rather than performing routine duties). It was also argued that professional quarantine staff support the use of contract pool staff:

Certainly in the conversations that I have had with staff across Australia, our professional quarantine staff - most of whom have degrees or diplomas - have indicated that they do not want to lift bags, do not want to clean shoes and do not want to scrape dirt off the sides of containers. In all the discussions I have had, they have indicated that they have been very comfortable with the regime currently in place. I have only heard positive comments about the regime which is in place.⁹

3.23 AFFA also indicated that the employment of contract staff provided AQIS with greater flexibility, particularly in circumstances of regional emergencies or incursions which require authorities to be able to respond quickly. Under the proposed new arrangements, AQIS would be able to employ local or regional staff in emergencies and to control inter or intra border movements.

3.24 The amendments proposed in the Bill are aimed at ensuring that AQIS is able to respond quickly to smaller, local and regional incursions. AFFA indicated the proposed amendments were unlikely to be used in the event of a major incursion:

In the case of a major exotic pest or disease incursion the amendments to the *Quarantine Act 1908* passed by the Parliament in April 2002 would more likely be used. Those provisions require the Governor-General to declare the

6 *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 1 and *Evidence*, RRA&T, 18 October 2002, pp 1-2.

7 *Evidence*, RRA&T, 18 October 2002, p 3.

8 *Evidence*, RRA&T, 18 October 2002, p 3.

9 *Evidence*, RRA&T, 18 October 2002, p 5.

existence of an epidemic or the danger of an epidemic in any part of the Commonwealth.¹⁰

3.25 It is further proposed that quarantine officers appointed from the contract pool would be quarantine officers for most purposes under the *Quarantine Act 1908* (with the exception of some enforcement powers) and that all limitations and obligations that apply under the Act would apply to them. In the event of any non-compliance with the limitations set out in the Act, AQIS would have the power to take breach of contract action against the contractor. The Director of Quarantine would also have statutory powers to revoke, vary or suspend the appointment of quarantine officers.

3.26 AFFA noted that quarantine officers appointed from the contract pool would be trained to perform the specific duties required of them and that the amendments require that the Director of Quarantine be satisfied that any contract person employed is a suitable person to be a quarantine officer. Contract staff will also be required to comply with the Australian Public Service Code of Conduct.¹¹

3.27 AFFA stressed the importance of those contract staff appointed as quarantine officers in such circumstances being able to perform their duties legally. AFFA cited the example of the 1999 detection of Black Strip Mussel in Darwin in 1999 and advised the Committee it had obtained legal advice which indicated that AQIS did not have the authority under the *Quarantine Act 1908* to appoint the contractors used in this instance.¹²

3.28 In response to questions regarding the issue of contract staff and public liability the Department advised that:

... the proposed amendments to the *Quarantine Act 1908* will ensure that the benefit enjoyed by public service employees of protection given by Section 82 of the Act "Protection from civil proceedings" will be accorded to contractors performing quarantine functions.¹³

Community and Public Sector Union (CPSU)

3.29 The CPSU submission to the Inquiry detailed the union's concerns with Part 3 of the Bill - Performance of Quarantine Officer Functions - which relates to the employment of contract pool staff to perform quarantine functions in the Australian Quarantine Inspection Service (AQIS).

10 *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 4.

11 *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 4.

12 *Submission 4*, Department of Agriculture, Fisheries and Forestry, p 4. (Legal advice provided by MinterEllison in correspondence dated 18 April 2001, advice included as an attachment to *Submission 4*).

13 Response to Questions on Notice, hearing, 18 October 2002. (Correspondence to Committee dated 22 October 2002).

3.30 The CPSU argument is based on the assertion that the significance of individual statutory decisions made by quarantine officers requires the accountability, protection, skill standards and direct control of public service employment. The CPSU also recommended to the Committee that:

... only employees accountable under state or commonwealth public service legislation be appointed as quarantine officers. CPSU therefore recommends that all references to a "contract pool" be removed from the *Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002*.¹⁴

3.31 The CPSU argued that the amendments to the Bill would provide contract staff with statutory law enforcement quarantine powers including:

- (s66AA) enter and search certain premises;
- (s66AD) seize material without offence related warrants in emergency situations;
- (s66AG) search premises and seize material when authorised under a search warrant;
- (s66AK) use force against persons and things to assist in executing a warrant;
- (s66AA) take recordings on premises, order goods into quarantine, trap and destroy animals;
- (s70) board vessels and examine things;
- (s70A) search goods;
- (s70B and s70BB) interview persons and produce documents over goods and use quarantine dogs; and
- (s70D) give directions to passengers.

3.32 CPSU expressed particular concern about contract pool employees being given all the statutory powers of quarantine officers except those under sections 66AC, 66AE and 66AF (those which relate to applying for monitoring or search warrants), without the accountability of public service employment. It was argued that:

Quarantine Officers make hundreds of individual decisions with their statutory powers to clear or seize; goods, containers and vehicles. These decisions can have significant repercussions. A decision to seize goods could create significant loss or damage for an importer. On the other hand, the decision to clear material could have severe consequences for Australia's

14 *Submission 2, Community and Public Sector Union, p 3.*

primary industry, such as our disease free status with foot and mouth disease. Quarantine Officers are directly and individually accountable under the *Public Service Act 1999* for these decisions.¹⁵

3.33 The CPSU also argued that whilst the Bill recognises that providing contract staff with additional powers requires public service standards of accountability (requiring contractors to comply with the APS Code of Conduct in the performance of duties as a quarantine officer) falls well short of public service legislative standards:

Upholding the "APS Code of Conduct" for the "contract pool" would require AQIS suing the contractor for breach of contract in the courts. This would be expensive and time consuming, creating a significant disincentive from upholding the Code for all but the most significant breaches. By comparison the conduct of public servants can be readily investigated by AQIS and disciplinary or termination measures taken without the involvement of the courts. Inevitably the ease of upholding the Code of Conduct impacts on the culture and integrity of quarantine enforcers.¹⁶

3.34 The CPSU also argued that contract staff would not have the protection of the Public Service Act, which raises issues in relation to whistleblowing provisions. It would also mean that staff selection, promotion, discipline, conduct and termination of any staff from the contract pool would not be subject to independent review or Directions of the Public Service Commission, Merit Protection Commission or the Australian Industrial Relations Commission.

3.35 It was also argued that those quarantine officers employed by the APS are subject to direction and supervision by AQIS. As a matter of law, it is argued that contract staff would not be subject to day to day managerial direction and would only be subject to the terms of the contract.¹⁷

3.36 The issue of training and skill standards was also raised by the CPSU in relation to contract staff. It was argued that the entry level standards for quarantine officers employed by the APS are consistently high. The CPSU pointed to a recent recruitment intake, for example, where only applicants with tertiary qualifications in the areas of agriculture, horticulture, animal health, entomology, environmental science or other field were accepted. Following recruitment, employees must also pass a six month probationary period involving formal work performance assessments, following which quarantine officers then commence four weeks in-house training. The CPSU suggested that:

Effective quarantine requires ongoing training and AQIS provides certified training programs for quarantine officers, in 2000/2001 AQIS spent \$1,262,834 for a total of 4633 training days. Only AQIS has the quarantine expertise to select and train effective officers. Investing in this high standard

15 *Submission 2*, Community and Public Sector Union, p 1.

16 *Submission 2*, Community and Public Sector Union, p 2.

17 *Submission 2*, Community and Public Sector Union, p 2.

of in house training makes sense for your ongoing employees, but there is little incentive to invest in training for an irregular and insecure pool of independent contractors or someone else's labor hire employees.¹⁸

3.37 The CPSU also holds concerns about contract staff not being entitled to the same pay and conditions enjoyed by APS quarantine officers and argued that neither the APS Award nor the current Certified Agreement for quarantine officers would apply to contract staff, with the result that:

While this may drive down costs, it will drive down the living standards and employment security of Australia's committed and professional Quarantine Officers. Lower employment standards may attract a lower standard of skills and education as well as reducing resistance to inducement and enticements, which Quarantine Officers face from time to time in the course of their duties.¹⁹

3.38 In response to AFFA's assertion that AQIS relies on the flexibility of its workforce, the CPSU argued that the type of flexibility required is available through Public Service Act which allows for staff to be engaged on a full time, part time, ongoing or temporary basis. It was also argued that flexible employment under the Public Service Act is not difficult to use, and pointed to the fact that during the last financial year AFFA employed 15% of its staff on a temporary basis and 9.5% of its staff were part time.

3.39 The CPSU also argued that emergency powers already exist under the *Quarantine Act 1908*.

Section 9A (1A) already allows for contractors (or anyone else) to act as a temporary quarantine officer in an emergency where there is an epidemic or danger of an epidemic. Contractors could be engaged and authorised to use the statutory powers of a quarantine officer in these situations. The proposed "contract pool" is not needed for emergency situations.²⁰

3.40 The CPSU also indicated that quarantine officers are very concerned about the proposal to outsource quarantine officer powers and functions believing that the amendments will compromise the integrity of the quarantine service. The Committee was provided with a copy of a petition circulated by the CPSU to allow quarantine officers to express their concerns - over 650 quarantine officers signed the petition. The text of the petition read:

We the undersigned strongly oppose outsourcing quarantine officer powers and functions. We believe that any step in this direction will inevitably

18 *Submission 2*, Community and Public Sector Union, p 2.

19 *Submission 2*, Community and Public Sector Union, p 3.

20 *Submission 2*, Community and Public Sector Union, p 3.

compromise the integrity and accountability of AQIS, its officers, and the vital service it provides.²¹

3.41 A similar petition was also circulated to other border protection officers - including customs officers and immigration officers - who exercise similar statutory powers. The number of signatures totalled 1751.

21 Petition provided as a Tabled Document, hearing 18 October 2002.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

4.1 The Committee has considered the submissions and the evidence received by it on the provisions of the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002.

4.2 The Committee considers that, with the exception of the proposed amendments to the *Quarantine Act 1908* discussed in Chapter Three, the Bill appears to be non-controversial and the Committee makes no further comment.

4.3 The Committee acknowledges the concerns raised by the Community and Public Sector Union, relating to:

- a) contract pool employees being given all the statutory powers of quarantine officers (except those under sections 66AC, 66AE and 66AF);
- b) the requirement for contract staff to meet public service standards of accountability;
- c) the requirement for contract staff to have appropriate protection in terms of whistleblowing provisions, staff selection, promotion, discipline, conduct and termination of employment;
- d) the requirement for contract staff to be provided with appropriate standards of training in relation to the performance of their duties;
- e) the requirement for contract staff to be subject to day to day managerial direction; and
- f) possible inequities in relation to pay and conditions

4.4 The Committee considers, however, that the amendments proposed in the Bill will overcome the current limitations in the Quarantine Act which restricts the pool of persons who may be called upon to assist in the protection of Australia's borders.

4.5 The amendments will provide the Australian Quarantine and Inspection Service with increased flexibility to implement enhanced quarantine border controls and to meet the additional demands raised by a higher level of quarantine intervention at seaports and airports.

Recommendation

4.6 The Committee recommends to the Senate that the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 1) 2002, be passed without amendment.

Senator B Heffernan

Chair

November 2002

APPENDIX ONE

SUBMISSIONS

Submission No.	Author
1	Australian Pork Ltd
2	Community and Public Sector Union
3	Food Standards Australia New Zealand
4	Department of Agriculture, Fisheries and Forestry - Australia
5	Food & Beverage Importers Association
6	Australian Food and Grocery Council

APPENDIX TWO

WITNESSES

Canberra, Friday 18 October 2002

Department of Agriculture, Fisheries and Forestry - Australia

Mr Robert Murphy, National Manager - Border, AFFA
Dr Andrew Carroll, National Manager, AFFA
Mr Timothy Carlton, General Manager, Finance and Information
Strategy, AQIS
Mrs Cathy Cox, General Manager, People and Strategies, AFFA
Mr Denis O'Brien, Solicitor to AFFA

Community and Public Sector Union

Mr Evan Hall, Secretary, Border Protection and International Affairs
Division
Mr Steven Ramsay, Legal Officer

Senate Rural and Regional Affairs and Transport Legislation Committee

**Provisions of the Agriculture, Fisheries and Forestry Legislation
Amendment Bill (No. 1) 2002**

Minority Report

Senator Geoff Buckland, ALP, SA (Deputy Chairperson)

Senator Kerry O'Brien, ALP, Tas

Senator Ursula Stephens, ALP, NSW

Senator John Cherry, AD, Qld

12 November 2002

Introduction

1.1 The Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 1) 2002 proposes amendments to the *Quarantine Act 1908*, the *Imported Food Control Act 1992*, the *Pig Industry Act 2001* and the *Wool Services Privatisation Act 2000*.

1.2 On 18 September 2002 the Senate referred the Bill to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry.

Submissions on the Bill

1.3 The Committee received submissions from Australian Pork Ltd, the Community and Public Sector Union (CPSU), Food Standards Australia New Zealand, the Department of Agriculture, Fisheries and Forestry – Australia (AFFA), the Food and Beverage Importers Association and the Australian Food and Grocery Council.

Hearing

1.4 The Committee heard evidence from AFFA and the CPSU at a public hearing in Canberra on Friday, 18 October 2002.

Non-controversial matters

1.5 Opposition and Democrat Senators concur with the conclusion of the Committee that with the exception of the proposed amendments to the *Quarantine Act 1908* relating to the performance of quarantine officer functions, the provisions of the Bill are non-controversial.

Extension of the *Quarantine Act 1908* to Christmas Island

1.6 Opposition and Democrat Senators note the submission by AAFA, and endorse the provisions of the Bill relating to the extension of the *Quarantine Act 1908* to Christmas Island (Schedule 1).

1.7 Opposition and Democrats Senators do, however, note concerns raised by residents of Christmas Island as to this Bill's impact on the cost of living. The Opposition and the Democrats will seek undertakings from the Minister to ensure the welfare of these residents is not adversely affected by the provisions in the Bill.

Quarantine expenses and fees

1.8 Opposition and Democrat Senators note the submission by AFFA, and endorse the provisions of the Bill relating to quarantine expenses and fees (Schedule 1).

Amendment of the Imported Food Control Act 1992

1.9 Opposition and Democrat Senators note the submission by AFFA and its evidence to the public hearing on 18 October 2002 in relation to the proposed amendment of the *Imported Food Control Act 1992*.

1.10 Opposition and Democrat Senators also note the support of Food Standards Australia New Zealand, the Food and Beverage Importers Association and the Australian Food and Grocery Council for the proposed amendments, and endorse these provisions in the Bill (Schedule 2).

Carry forward of research and development expenditure

1.11 Opposition and Democrat Senators note the submissions by AFFA and Australian Pork Limited in relation to the proposed amendment of the *Pig Industry Act 2001* and *Wool Services Privatisation Act 2000*, and endorse these provisions in the Bill (Schedule 3).

Issues related to quarantine officer functions

1.12 Amendments contained in Part 3 of Schedule 1 of the Bill expand the category of persons whom may be appointed to perform quarantine functions within the meaning of the *Quarantine Act 1908*, including contractors and state quarantine officers.

Legality of existing contractors

1.13 The Committee heard that AQIS currently engages 150 to 200 contractors to perform routine tasks such as loading and unloading X-rays, cleaning shoes and assisting to remove dirt from shipping containers.¹

1.14 AFFA contends the provisions that broaden the range of persons able to be appointed as a quarantine officer to include contract labour are intended to “remove any doubt that these contractors can continue to perform routine tasks lawfully.”²

1.15 In evidence, AFFA said:

The proposed amendments to the Quarantine Act aim to ensure protection under law for the contractors currently employed by AQIS in the performance of their supporting role.³

1.16 AFFA also said:

The intent of the amendments is to underpin and to give proper basis to the arrangements we have at the moment.⁴

¹ *Evidence*, RRA&T, 18 October 2002, pp.2-3

² *Submission 4*, AFFA, p.4

³ *Evidence*, RRA&T, 18 October 2002, p.1

1.17 AFFA was, however, unable to provide any actual evidence as to doubt about legality of existing contract arrangements.

1.18 In its submission, AFFA says that in a specific instance – the detection of Black Strip Mussel in Darwin in 1999 – legal advice confirms that AQIS did not have the authority under the *Quarantine Act 1908* to engage contractors in the task it had them perform.⁵ This single instance was again relied on in AFFA’s evidence to the Committee.⁶

1.19 However, the legal advice provided to the Committee merely confirms that AQIS cannot appoint independent contractors or agency staff to the role of quarantine officer.⁷ It specifically provides alternative options to AQIS, including the employment of people as quarantine officers on a fixed term or fixed task basis and the engagement of people to assist quarantine officers in the performance of their duties.⁸ For completeness, the advice notes that in the case of an emergency, section 12A of the *Quarantine Act 1908* confers broad power upon the Minister to act in a way not otherwise permitted.⁹

1.20 It is the view of Opposition and Democrat Senators that AFFA’s own legal advice does not support the change to quarantine arrangements proposed in the Bill. Indeed, the advice serves to undermine the rationale for the extension of quarantine powers to independent contractors.

1.21 AFFA itself contends that the “regime at the border is working very effectively at the moment.”¹⁰

Scope of increased powers

1.22 AFFA contends that it does not contemplate any change to the actual role of contractors under the amended quarantine regime.¹¹

1.23 In answer to a question about what duties AQIS will engage contractors to perform under the amended Act, AFFA said:

We are envisaging that the only area where we are not currently using contract staff but may need to is with an interception at the border. We may have to put people in to perform tasks on an emergency basis.¹²

⁴ *Evidence*, RRA&T, 18 October 2002, p.2

⁵ *Submission 4*, AFFA, p.4

⁶ *Evidence*, RRA&T, 18 October 2002, p.3

⁷ *Submission 4*, AFFA, attachment p.4

⁸ *Submission 4*, AFFA, attachment p.4

⁹ *Submission 4*, AFFA, attachment p.4

¹⁰ *Evidence*, RRA&T, 18 October 2002, p.2

¹¹ *Evidence*, RRA&T, 18 October 2002, p.3

¹² *Evidence*, RRA&T, 18 October 2002, p.8

1.24 This is despite the fact the existing section 12A of the *Quarantine Act 1908* provides extensive power to the Minister in the event of an emergency. This power clearly extends to employment matters.

1.25 It is clear the amending provisions provide a vastly expanded range of powers to independent contractors appointed to perform quarantine functions. These powers extend far beyond the type of work currently performed by contractors. Such an extension has not been adequately justified by AFFA.

1.26 AFFA argues it will stipulate the function contractors will be employed to perform. The amended Act, however, will contain no such stipulation, or limitation of power.

1.27 Under the Act, contractors would have all existing quarantine powers with some limited exceptions. Contractors would, for example, have the power to enter and search premises (section 66AB), seize material without a warrant (section 66AD) and search goods (section 70B).

Employment flexibility in existing Act

1.28 During the Committee hearing on 18 October 2002, AFFA demonstrated a lack of knowledge about the existing employment flexibility under the *Quarantine Act 1908*. Despite AQIS's own legal advice dated 18 April 2001 advising that the Act contemplates the performance of some duties by an "authorised person"¹³, evidence to the Committee would suggest that this option has not been investigated.

1.29 When Senator O'Brien asked AFFA about the appointment of authorised persons under the Act, responses included "I am not entirely aware of the appointment in fact of authorised persons. But it may have occurred from time to time," and "I do not recall anyone being appointed as an authorised person."¹⁴ AFFA did not answer a question about whether the appointment of authorised persons within the meaning of the Act had been investigated and would assist in providing the desired employment flexibility.

1.30 In respect to other provisions in the *Quarantine Act 1908* providing for "any necessary help" to assist quarantine officers¹⁵, AFFA conceded that it may be that such provisions are permissive of engaging people other than quarantine officers to perform some functions.¹⁶

1.31 According to AFFA's own legal advice, options including the employment of people as quarantine officers on a fixed term or fixed task basis, and the engagement of people to assist quarantine officers in the performance of their duties, are available

¹³ *Submission 4*, AFFA, attachment p.2 and p.4

¹⁴ *Evidence*, RRA&T, 18 October 2002, p.4

¹⁵ Section 66AB, *Quarantine Act 1908*

¹⁶ *Evidence*, RRA&T, 18 October 2002, p.5

under the current Act.¹⁷ It seems that these options have not been properly investigated – either to give a more sound footing to the work of existing contractors, or to plan for future quarantine events requiring a rapid response.

1.32 An additional factor undermining AFFA's contention that the current Act limits employment flexibility is the significant growth in AQIS employment over the past year.

1.33 According to the CPSU:

It is quite clear that the Public Service Act and the current regime have shown an immense capacity to cope with change over the past year. We have seen the government successful in implementing its increased quarantine intervention program. We have had a tripling of the number of staff engaged at Sydney airport, with over 1,200 additional staff engaged. All of that has been under the current public sector arrangements.¹⁸

1.34 The submission from the CPSU highlights recent statements by the Minister for Agriculture, Fisheries and Forestry and the Minister for Forestry and Conservation highlighting increased staff numbers under its increased quarantine intervention project.¹⁹

Accountability

1.35 Opposition and Democrat Senators are concerned about the accountability measures proposed in the amending provisions.

1.36 It is most unlikely that the purported imposition of the APS code of conduct to the new contract pool would have good effect. In the event of any alleged breach, the only avenue available to AFFA would be through the terms of the individual employment contract.

1.37 It was contended by the CPSU that disputes in relation to the observance of the code of conduct could only be resolved through application of the common law.²⁰ It was further contended that this would be expensive and time consuming, creating a disincentive from upholding the code for all but the most serious breaches.²¹

1.38 It is clear that existing mechanisms to maintain accountability in respect to the performance of quarantine functions are not contemplated to have any operation in respect to contract pool staff. AFFA has confirmed, for example, that the Public Service Commissioner and the Merit Protection Commissioner will have no role in

¹⁷ *Submission 4*, AFFA, attachment p.4

¹⁸ *Evidence*, RRA&T, 18 October 2002, p.13

¹⁹ *Submission 2*, CPSU, p.4

²⁰ *Evidence*, RRA&T, 18 October 2002, p.12

²¹ *Submission 2*, CPSU, p.3

respect to contract quarantine staff.²² Nor has ‘whistleblower’ protection been contemplated.²³

1.39 The CPSU contends the proposed arrangements pose a threat to the integrity of Australia’s quarantine function:

The ‘contract pool’ could not have the whistleblower protections of the Public Service Act to report poor quarantine enforcement, corruption or breeches (sic) of the Code of Conduct. Selection, promotion, discipline, conduct and termination of the ‘contract pool’ would not be subject to independent review or Directions of the Public Service Commission, Merit Protection Commission or Australian Industrial Relations Commission.²⁴

1.40 Opposition and Democrat Senators are not satisfied that the dilution of public service accountability standards for officers performing statutory quarantine functions is in the public interest.

Negotiation with workforce

1.41 It is noteworthy that despite the detailed discussions AFFA has had with its quarantine officers in relation to the proposed changes²⁵, 650 quarantine officers have signed a petition that states:

1.42 We the undersigned strongly oppose outsourcing quarantine officer powers and functions. We believe that any step in this direction will inevitably compromise the integrity and the accountability of AQIS, its officers, and the vital service it provides.²⁶

1.43 Opposition and Democrat Senators are concerned that a significant percentage of Australia’s 1,800 quarantine staff has signed a petition opposing changed arrangements for quarantine protection on the grounds such changes threaten the integrity of the national quarantine regime.

State quarantine officers

1.44 Proposed amendments to clarify the power to appoint state quarantine officers to perform quarantine functions within the meaning of the *Quarantine Act 1908* are acceptable to the Opposition and Democrat Senators. It is regrettable that the rationale for these provisions was not specifically addressed in the Explanatory Memorandum or AFFA’s submission to the Committee.

1.45 The CPSU told the Committee:

²² *Evidence*, RRA&T, 18 October 2002, p.7

²³ *Evidence*, RRA&T, 18 October 2002, p.7

²⁴ *Submission 2*, CPSU, p.3

²⁵ *Evidence*, RRA&T, 18 October 2002, p.5

²⁶ *Submission 2*, CPSU, p.4

... part 3 also contains provisions that at least clarify the ability for state public employees under state public sector arrangements to be engaged as quarantine officers. Obviously, we have a preference for the Commonwealth, but the values about accountability that we hold dear – that we are raising with the committee today – do hold for state government employment today.²⁷

1.46 Opposition and Democrat Senators are satisfied that the provisions relating to state quarantine officers maintain satisfactory standards of accountability, and do not undermine Australia's quarantine function.

Conclusion

1.47 The government has manifestly failed to explain the rationale for extending quarantine powers to contract pool staff. The powers extended in the amending provisions provide for most quarantine functions to be outsourced to private contract staff. No reasonable doubt has been shown to exist in respect to the legality of the performance of existing contract functions.

1.48 It is the view of Opposition and Democrat Senators that the proposed amendments in respect to the performance of quarantine functions (with the exception of the recognition of state quarantine officers) are unwarranted.

1.49 The submissions made to the Committee, and the evidence given at the Committee hearing on 18 October 2002, have lead Opposition and Democrat Senators to form the view that the proposed extension of quarantine powers to private contract staff poses a direct threat to the integrity of Australia's quarantine regime.

1.50 The non-quarantine function provisions are of an uncontroversial nature.

Recommendation

1.51 Opposition and Democrat Senators recommend that the Bill be passed subject to amendments reflecting the concerns in this report relating to the extension of quarantine powers to contract staff.

1.52 Accordingly, Opposition and Democrat Senators recommend that all provisions relating to contract staff, including appointment and exercise of quarantine powers, be excised from the Bill.

Senator Geoff Buckland

Senator Kerry O'Brien

Senator Ursula Stephens

Senator John Cherry

²⁷ Evidence, RRA&T, 18 October 2002, p.14