

## 6. FINDINGS

### 6.1 Introduction

The terms of reference for this Review require the Committee to test the application of the *Export Control Act* against National Competition Policy principles and, if inconsistencies are found, to recommend changes to existing legislative and administrative arrangements.

This chapter assesses the existing arrangements and approaches to addressing deficiencies, and examines ways of improving the effectiveness of arrangements.

### 6.2 Assessment of the Act against NCP Principles

The Committee made its assessments of the existing arrangements on the basis of the representations submitted, as well as its own examination of the legislation and individual programs. Information from previous reviews, including QEAC program evaluation reviews, was taken into account.

The Committee's broad assessment of the Act against NCP principles is that the benefits arising from the legislation outweigh any anti-competitive elements. These assessments are discussed in the foregoing chapters.

The Committee examined in detail the application of the Act and its subordinate legislation against the National Competition Policy and is of the opinion that current application of the authorities granted under the existing *Export Control Act* and subordinate legislation is inconsistent with elements of the NCP principles. This is especially apparent in relation to:

- the fundamental intent of the Act, in allowing the export of goods subject to certain conditions
- selective application of the Act to individual products and industries through prescription of goods under the Act
- the imposition of compliance costs
- the freedom granted in the legislation to interpret and impose overseas government requirements on individual export companies, leading to the potential for discrimination both within and between industries
- compulsory registration of premises used to produce goods for export
- specifications relating to the production, storage and handling of goods for export
- the multiple functions performed by AQIS as policy initiator, regulator, inspector and certifier, and
- limitations on the scope for contestability of services provided to implement the legislation.

Moreover, the Committee believes that the potential for distortion could be reduced by administrative changes to the existing arrangements.

### **6.2.1 Fulfilling its Purpose**

While specific objectives are not stated in the Act, its fundamental purpose is to provide authority for systems that assure overseas countries that Australian produce will satisfy their requirements, especially health and hygiene. These systems comprise written standards with outcomes that are auditable together with the means and methods of implementing these standards on a scientific basis.

The Committee concluded the Act has fulfilled and continues to fulfil this purpose. Australia has a robust means of securing access overseas markets for its food and agriculture products through the Act and the export programs managed by AQIS. Agreed conditions for access and systems to ensure that the products are supplied in accord with the required standards are in place and are effective. The AQIS Australia Inspected ("AI") health mark is recognised worldwide and is held in high regard by importing countries. The legislation provides tangible evidence that Australian law will enforce undertakings given by the Australian government in bilateral and multilateral trade agreements.

Acknowledgment by importing countries of the value of certification under the *Export Control Act* is evidence that there is an ongoing need for the legislation as a means of facilitating export.

The Committee had contact with representatives of all industries currently operating under the coverage of this legislation, and an overwhelming majority supported the retention of the Act.

The Committee believes that the Act must be retained and optimised.

### **6.2.2 Economic Benefit**

The Committee examined the impact of the legislation in economic terms (see Chapter 5). The Act is justified on two principal economic grounds.

The first is industry net benefit whereby the benefits from continued export market access are assessed as considerably exceeding the costs of compliance with prescribed conditions for export under the legislation.

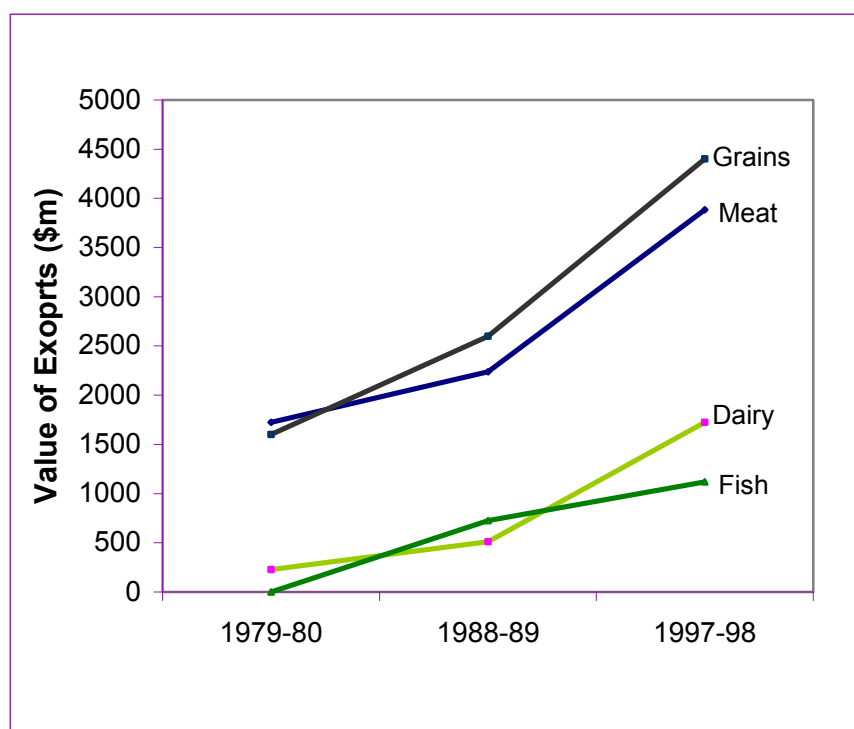
The second is the external benefit the legislation provides by reducing the likelihood of a food safety breakdown or a plant/animal health emergency in an export market. Such a situation reduces economic activity in the broader community and potentially has severe regional impact within Australia.

There is a strong economic incentive for the Act to successfully facilitate exports to safeguard returns against threats and build new market opportunities from assurances the legislation is there to provide. The Act is successfully responding to a range of potential issues which may threaten market access. The Act has been and is very useful to Australian exporters in this regard.

### 6.2.3 Expanding Exports

The agricultural sector in Australia relies on the Act to facilitate a wide range of exports to many overseas markets. In recent years, exports of commodities covered by the *Export Control Act 1982* have expanded, as illustrated by the following chart:

**Figure 6.1**  
**Value of Australian Exports by Commodity**



Source: ABARE

Furthermore, AQIS has recently instituted surveys of its activities in reporting and monitoring market access for Australia's food exports. Results of these surveys support the conclusion that the Act is effective. In the last three years, 93 new individual markets have been opened, 55 have been expanded and there have been 137 instances where constructive solutions have been found where access to existing markets has been challenged.

### 6.2.4 Response to Potential Loss of Market Access

The Committee is satisfied that the existence and operation of the Act enables Australia to demonstrate that effective control measures can be initiated whenever market access has been threatened. Notable examples include the response to threats of market access following the detection of pesticide residues in Australian beef in the eighties and nineties, and the response to an outbreak of papaya fruit fly in Northern Queensland in 1997. More recently, a potential human health scare related to use of animal grain (vetch) intended as food for human consumption led to the prescription of some grains under the Act. Powers under the *Export Control Act* were used in these cases to

temporarily suspend certification of products until it was demonstrated that testing, product treatment or other controls were sufficient to address any potential health risk to consumers in importing countries.

### **6.2.5 Criteria for Prescribing Goods**

The Act operates by permitting the export of certain products as long as particular conditions and restrictions are met. However, the Act does not specify criteria as to which goods should be so prescribed. Since the Act is silent on when and why goods may be prescribed, the power is open ended. In theory, the Act could be used to prohibit the export of any product or commodity. In practice, it has been used primarily to ensure that Australian food and agricultural products satisfy specific health and hygiene requirements set either under Australian law or by overseas governments.

The Committee found that there is no guidance for government administrators or industry as to how to apply power to either prescribe or to de-prescribe goods. Industry requests, threat of market failure and and/or overseas government requirements have been the predominant reasons for adding goods to the list. There is no clear test or criteria for the prescription or non-prescription of product. The absence of such detail limits an assessment as to whether such status should or should not be applied.

Increased accountability relating to the power to prescribe (which is currently held by the Minister) is desirable to satisfy the issues of transparency and fairness. The Committee concluded that a protocol setting out how, when and why the power to prescribe may be exercised, and the regular review of the prescribed goods list, would improve the effectiveness of the Act and minimise redundant activities.

A weakness associated with the lack of guidelines covering the prescription of goods is the absence of any provision for the review of the legislation or the review of the prescription of products. As written, the legislation allows a product to be prescribed for an unspecified period of time. Because the requirements of the Act impose costs and affect competitiveness, the ongoing prescription of goods and the ongoing operation of the Act should be subjected to regular review.

### **6.2.6 From Prescription of Process to a Focus on Outcomes Based on Quality Assurance Systems**

The structure of the legislation has advantages in allowing timely response to trade issues through changes to regulations and orders under the Act. This means that necessary controls can be put into place quickly. The Committee suggests that the existing structure be maintained so that this advantage is preserved. However, some review of AQIS administrative methods is needed to ensure all activities fall within the powers granted by the legislation.

Generally the Act is administered flexibly. Commodity programs are designed and adapted to meet the different characteristics and profiles of the products to be exported. The Committee recognises that this approach is essential to minimise the impact of mandatory export control measures. A notable trend

in the way the Act is administered is the joint effort by government and industry to reduce reliance on detailed prescription of prerequisite conditions of process requirements in favour of comprehensive quality assurance systems that are monitored independently by AQIS or by approved third parties.

The Committee supports the adoption of quality assurance by industry as a means of reducing the impact of legislation on innovation and competition. Links between these company systems and regulation requirements overcome the need for the regulation to impose additional controls, provided the desired outcome is served.

The Committee recognises, however, that export industries will proceed along the pathway from prescription to quality assurance at different rates because of those limitations. More detailed discussion and linkage to the Committee's vision is contained in Chapter 7.

### 6.2.7 Culture of Control

Under the *Export Control Act*, a culture of control has evolved, both in industry and in government. This is not surprising, given the origins of the legislation—a crisis, born out of the meat substitution scandal.

From a government perspective, the culture of control is evidenced by the high degree of prescription in export programs. This is reinforced by a common belief, justified or not, that, given a choice, industry may give priority to commercial issues; in turn, this may increase the risk of a food safety breakdown. A culture supporting 'heavy handed' controls is further reinforced by demands from consumers and overseas governments, especially in developing countries, for increasing levels of government assurance about food safety.

For industry, the culture of control has often resulted in the creed to 'do enough just to meet government demands'. The Committee recognises that an interventionist, prescriptive and rigid set of regulatory controls will not deliver the outcomes required of the Act. Such an approach is in conflict with competition principles and ignores the potential for greater accountability within the industries that depend on exports to survive.

The fact that both Commonwealth and State Governments regulate food safety and animal and plant health in Australia further contributes to the legislative burden on industry.

The Committee found that there is still insufficient evidence of widespread industry acceptance that investment in improving health and hygiene standards is commercially sensible and rewarding. This attitude in industry may arise from experience with the heavy hand of prescription in export programs. There is also a perception that requirements for export are unavoidable, add costs and undermine competition and are not an essential cost of doing business overseas. The Committee suggests that the title of the *Export Control Act* also re-inforces the control mentality and could be changed to reinforce the move to QA based assurance.

The Committee sees considerable room for improvement in industry understanding of the value added to exports through operations under the legislation.

A high degree of voluntary compliance with legislative standards is essential for the Act to be effective within the National Competition Policy framework.

Overseas countries which import from Australia are also struggling to achieve an appropriate balance between controls to safeguard the interests of consumers and the degree of flexibility needed to encourage and develop trade.

Prescriptive rules and technical jargon in subordinate legislation are difficult for industry to absorb within day-to-day operations. In future, the Committee would like to see standards which can be assimilated easily into company QA systems and documentation which is easily understood, for example, in ISO format.

As government and companies continue to adopt food safety systems based on risk analysis and HACCP, the culture of control is changing and may be expected to change further. Significant progress in simplifying regulatory arrangements has already been made, but the Committee believes there is still a long way to go.

The overlay of one regulatory regime on another has been recognised by government as a limiting factor on business development. A comprehensive package has been developed for endorsement by the Council of Australian Governments (COAG), aiming for a substantial reduction in the regulatory burden on industry without compromising public health and safety. Measures proposed in the new regime include early warning systems and traceback mechanisms where a food safety risk is identified. The success of this package will be commercially driven. The Committee concludes that the COAG initiative should be taken up by AFFA and AQIS and reflected in the operations of the *Export Control Act*.

### **6.2.8 Two Systems for Managing Food Safety**

As reflected in the Food Regulation Review and in many submissions to the Committee, Australia has overlapping systems for managing food safety. There is a State based system for regulating food for domestic consumption and a Commonwealth set of arrangements for food products intended for export.

Standards for food consumed within Australia are set by ANZFA and adopted by States and Territories in their legislation. However, ANZFA does not exercise this authority for red meat processing standards. They are currently set by ARMCANZ. The red meat industry has a joint government/industry body (SAFEMEAT) which is specifically charged with responsibility for developing and implementing controls to ensure safe and wholesome meat is produced for both the domestic and export markets. This peak body makes recommendations on standards to the joint State/Commonwealth Ministerial Committee (ARMCANZ) that endorses and publishes national standards for agricultural industries including beef, sheepmeat, poultry, game and live animal exports. SAFEMEAT also advises AQIS on export requirements to be

incorporated in the *Export Control Act 1982*. The standards setting is a complex and lengthy procedure under these arrangements.

The Committee believes these mechanisms should be harmonised and made more transparent in line with competition principles.

Food safety at retail level is also regulated by State and Territory Health authorities and local government.

Standards for export of food prescribed under the *Export Control Act* are a Commonwealth responsibility and are set by the Minister for Agriculture Fisheries and Forestry and are implemented and managed by AQIS.

The fact that separate controls exist under Commonwealth, State and local government legislation has led to a dual system of production in Australia. The Committee identified a demarcation of food production which is based on destination—domestic or overseas. With Australian food and agricultural industries heavily dependent on export markets, companies must continue to target these markets and ideally should be producing under a single regulatory system which meets global standards, and not under systems that differentiate between home and overseas consumption.

Harmonisation of standards for production, storage and handling of food within Australia is a priority which must be addressed.

### **6.2.9 The Decision to Export and the Point of Application of Export Controls**

As a general rule, Australian companies establish their operations to supply domestic outlets. Exports are usually targeted after a domestic base has been established. This often means production facilities and systems focus only on domestic requirements. In the case of food, a decision to export may result in a significant change to operations and systems additional to ANZFA standards, depending upon importing country requirements. Requirements for overseas markets need to be understood and addressed prior to processing for export. Frequently, commercial operators only seek export certification after production systems are in place. When certification is refused because the importing country requirements have not been addressed, AQIS is unjustly criticised and accused of stifling export opportunities.

A harmonised set of standards, easy to access and understand, would help overcome this shortcoming. Ready access to the details of overseas market requirements is needed to help potential exporters determine the investment required and decide which markets to target.

### **6.2.10 Complexity and Costs**

The current systems for meeting export requirements are complex, and as such are generally costly to administer. The additional costs of complying with the full range of domestic and any additional export requirements are passed on to exporters, and this can reduce their competitiveness relative to producers in other countries. Depending on the extent of those costs, they

may act as a barrier to entry for businesses with export potential. Early and accurate assessment of any additional requirements to be met for a particular market will avoid costly delays in obtaining export approval (certification).

In its submission, ANZFA contends 'that much of our food exports come from small to medium sized firms. For these firms in particular, it is hard to keep up with the complex legislation required for both domestic and export production, as it is expensive to employ someone with sufficient expertise or to hire consultants. Anything that reduces this complexity will be of benefit to them.'

With regard to compliance costs borne by individual exporters, the Committee recognised the following three specific benefits. First, it is a fact that the supply of products to export markets will always be more costly than sales in the domestic market. Second, the most appropriate way of addressing industry concerns about costs is to endeavour to simplify the total system. Third, the application of costs across individual exporters should be distributed as equitably as possible.

### **6.2.11 Consistency of Application**

Australia is a vast country, and preparation of food and agricultural products for export occurs in many and sometimes isolated locations. Administration of export programs under the Act necessitates the engagement by AQIS of many employees in various locations. This, coupled with the great diversity in both the profile of exporting industries and in the products exported, leads to significant variations in the application of the regulations.

On the basis of many representations from companies and industries, it appears that export requirements are not always consistently applied across States and regions. This gives rise to concerns that some companies are advantaged compared with others. This inconsistency is continually being addressed by AQIS but the problem persists.

The possibility of inconsistency also arises in those programs where AQIS certification relies on State based animal, plant and human health systems. For example, the 1998 European Union (EU) review of the Australian meat inspection system pointed to the differences in the State based systems for identification of cattle in relation to hormonal growth promotant status. Lack of a uniform national system threatened ongoing market access to the EU. A new system is being established in Australia under the *Export Control Act* to overcome this criticism and maintain access.

Finally, inconsistency can arise in those programs that allow for inspection and/or audit activities to be undertaken by third parties. For example, the dairy program provides for State Dairy Authorities to audit quality assurance systems. While there are guidelines for processes to be followed in audits, there may still be room for differing interpretations by individual auditors or by the organisation contracted to perform the actual audit.

The granting of exemptions as previously mentioned in 2.5 can lead to another element of inconsistency that is of concern for industry. For example, the refusal to grant exemptions for trade samples may be related to previous abuse by some exporters. It is, however, a key element in the development of exports. Mechanisms to control its orderly use of such sanctions would be

preferable to the current system which appears to depend on the individual judgements of AQIS personnel.

The Committee appreciates it will never be possible to achieve complete consistency, as to seek to do so would probably result in greater prescription. Such a "cure" would be worse than the 'problem'. The solution lies in balancing the need for flexibility against overseas countries' expectations of a uniform approach to meeting their import requirements. This outcome will be easier to achieve in some markets than in others, and thus the issue should be addressed program by program. The Committee suggests that the issue be considered specifically when individual programs are next reviewed.

### **6.2.12 Quality Standards and Trade Descriptions**

Requirements relating to quality standards and product descriptions are regulated under a number of acts, including the Commonwealth Trade Practices Act and the Fair Trading Acts in the States and Territories. Authority also exists under the *Export Control Act* for specific conditions to be set for quality and product description on exported goods. At present, there is no common approach in the individual programs.

All goods covered by the *Export Control Act* are subject to these provisions. In addition, ANZFA, through the Food Standards Code, regulates product description, composition, advertising, use of additives and microbiological standards, among other things.

The *Export Control Act* currently includes a considerable amount of detail concerning:

- trade description (commercial), and
- quality specifications for export goods (weight, grade, size etc).

Orders under the *Export Control Act* may contain such detail, depending on the commodity.

This multiplicity of coverage is confusing and costly, and it detracts from the intent of the legislation—consumer awareness and consumer protection.

A common policy approach is necessary and the Committee suggests that this issue be flagged in AFFA's response to the COAG policy on food regulation and discussed with commodity groups subject to controls under the Act.

In structural terms, the Committee is of the view that any trade or product description should be time-bounded and subjected to regular review as to its necessity under regulation.

### **6.2.13 Electronic Databases and Documentation**

E-Commerce is a reality of modern businesses, but the potential for the provision of electronic documentation (the EXDOC system) is still in the process of being realised fully by both AQIS and export industries.

EXDOC supports the preparation of export documentation for prescribed products and has been in place since 1992. Initially it was developed for meat exports, but is now in the process of being made applicable to other export commodities.

EXDOC was designed to provide a seamless electronic interface between export processors, brokers, AQIS, statutory marketing authorities and the Australian Customs Service (ACS). This objective is being fulfilled as the system allows for input at the manufacturer's site and the resultant printing of the Health Certificate at the manufacturer's nominated site. Remote printing is becoming available to all non-meat commodities and the cost aspects are being worked on through the use of both data compression and Internet e-mail.

In its submission, the dairy industry disputes that the EXDOC system will meet their needs and has severe concerns that it can deliver the types of benefits that a fully integrated state-of-the-art electronic data system should be capable of. They also have expressed concerns relating to the costs and time associated with the development of the system. AQIS has responded that a concerted effort to resolve the Dairy Industry issues is under way.

The Committee regards the limited availability of electronic documentation for all transactions leading to certification as a weakness. In addition, electronic access to current information about the regulatory requirements for particular markets is not available to all exporters. This is an issue requiring attention, although AQIS has advised that it is now progressively putting requirements on the Internet. Lack of access to such information has the potential to limit uptake of export opportunities by small business.

As discussed in Chapter 3, E-Commerce is much more than an electronic documentation system. The Committee believes more resources should be applied by both government and industry towards the development and introduction of E-Commerce for all export programs.

The Committee believes that despite existing and planned levels of access to EXDOC, there is much to be gained through the development of E-Commerce, especially in efficiency, cost reduction and customer service and E-Commerce has the potential to provide Australia's export industries with a significant competitive advantage.

This is particularly true for producers and potential exporters outside the metropolitan area, and for small businesses that do not have an existing IT facility for information management.

### **6.3 Approaches to Improving Effectiveness**

In the previous section (6.2) the Committee has identified areas for improvement to existing arrangements. This section expands on the Committee's approach to improvement in the following areas:

- legislative alternatives,
- objectives for the legislation,

- structure of the legislation, and
- certification.

### 6.3.1 Legislation Versus Non-Legislative Alternatives

Having determined that the benefits of an *Export Control Act* exceed the costs, the Committee considered whether the same benefits could be secured without recourse to legislation. The options considered included:

- *No specific regulation*: reliance to be placed on market mechanisms in conjunction with existing liability and insurance laws.
- *Self regulation*: industry to accept full responsibility to build in quality assurance through the production process and government involvement limited to an information role.
- *Co-regulation*: government and industry to develop mutually acceptable codes, regulations and operations to best secure the needs of industry and requirements of customers.

Under the National Competition Principles, one test that may be applied to legislation is whether the objectives of the existing Act could be achieved by a non-legislative based approach. Such a test is difficult to satisfy in this instance because the current Act does not have specific objectives.

The second reading speech for the legislation in 1982 stated ‘...the purpose of this bill is to establish a new and comprehensive legislative base for the export inspection and control responsibilities...’ within the portfolio of then Minister for Primary Industry. This wording limits the objectives of the Act to providing authority for the establishment of regulations and orders to control exports. Non-legislative alternatives could not meet such an objective, but the Committee considers that rejection of non-legislative alternatives purely on such grounds would not be in the spirit of the National Competition Principles.

A more appropriate test would be to determine whether non-legislative measures are adequate to satisfy the purpose for which the export inspection and control responsibilities had been judged as necessary.

In this context, the purpose of the controls is to ensure that the inspection and other requirements set under Australian domestic standards or by overseas governments can be met. A related purpose is to ensure the export product is true to description, that is to prevent product substitution or product misrepresentation.

Australian standards are enforced by both Commonwealth and State legislation. There are no plans and no industry request to terminate such legislation. Moreover, community expectations support more rather than less legislative and regulatory oversight. This attitude has emerged primarily in response to a number of instances of harmful or potentially harmful food being delivered to markets both in Australia and overseas. Notable examples are E Coli in smallgoods in Australia in 1996-97 and evidence of the existence of BSE (mad cow disease) in the beef herd in the United Kingdom throughout the nineties.

The current debate in Australia and overseas about the treatment to be accorded to GMOs in food and agricultural products is a further example of increasing community concern about food safety, food labelling and related issues.

The requirements of Australia's major trading partners are set out in Chapter 3. While the requirements differ from country to country, the most consistent element is a requirement for government to government assurances in the form of certification.

As in Australia, overseas governments impose production, processing and handling standards on their local industries and monitor their operations to ensure compliance. A logical extension of such requirements is for imported products to be subject to similar disciplines.

Thus overseas governments generally make the same demands of their offshore suppliers as they do of local producers. In addition, overseas governments look for some form of proof that what is promised can be delivered. Governments address this by backing these promises with legislation. Possible reliance by Australia on a non-legislative approach would therefore appear to be unacceptable for two reasons, failure by Australia to set standards backed by legislation, and an inability, without legislative support, for a government agency to certify that all requirements would be met.

These co-regulatory systems require that certification continues to be issued by AQIS.

The Committee was informed that Australia had advised a number of trading partners that it will extend its coregulatory approach. The responses have been mixed. Some have accepted in full. Others, such as the USA with regard to meat, have accepted the proposed changes in principle; more negotiations will be necessary. Finally, the EU has indicated that the current regulatory system will need to continue for the foreseeable future.

The Committee was convinced that the requirements for final certification by a competent government authority will continue to be mandatory for most markets in the immediate future.

Impartial and independent implementation of controls is the basis for the integrity of certification conferred under the legislation. Efforts to move the regulatory assurance mechanisms towards co-regulatory arrangements will continue. However, most of the submissions to the Review expressed the need for caution in relation to changes to export regulatory controls.

The Committee concluded that given the role of certifying authorities under the Act, non-legislative alternatives could not deliver the same benefits to exporters and the nation as can be obtained by legislation. The Committee considers most overseas governments will continue to insist that Australia retain the legislative power to impose standards for the foreseeable future. It is also clear that trading partners expect certification to be backed by investigative powers and strong penalties to ensure compliance.

The Committee concluded that legislation is necessary.

### 6.3.2 Objectives for Legislation

Objectives define the expectations and purpose of legislation. They also provide a basis for the development of benchmarks for day-to-day administration of the Act and for assessing success or failure when legislation is reviewed in the future.

The existing legislation does not have stated objectives other than those expressed in the Minister's second reading speech statement 'to establish a new and comprehensive legislative base for . . . export inspection and control responsibilities.'

This lack of concise objectives, against which progress may be measured, is an obvious weakness of the existing legislation. There are no criteria under the Act for assessing whether the legislation achieves the purposes for which it was enacted. In addition, there is no benchmark in the legislation for assessing outcomes of the administrative processes imposed under the Act. Since the legislation potentially restricts competition, these deficiencies represent a serious weakness in NCP terms.

The Committee considered a full spectrum of possible objectives for legislation authorising export controls. Almost all the written submissions received by the Committee made specific reference to the need for objectives and many suggested revised wording.

The suggestions canvassed included:

- cover market failure,
- build Australia's reputation as a trading partner,
- facilitate exports from Australia,
- guarantee that overseas government requirements will be met,
- authorise the establishment of appropriate inspection and certification arrangements,
- secure access to overseas markets,
- ensure Australian health and hygiene standards are met,
- improve the efficiency, effectiveness and accountability of Australian procedures,
- provide authority for enforcement of quality standards and product specifications,
- provide authority for enforcement of specific production procedures, environmental requirements or animal welfare standards,
- provide authority for Australia to meet its international obligations as defined in the WTO, Codex, OIE and IPPC agreements, and
- provide authority to initiate controls for any purpose related to meeting importing country or other relevant requirements.

Before finalising its views on objectives, the Committee debated a number of key principles. These included the extent of the authorities to be granted, broad or narrow product coverage and the scope to include industry requests.

Firstly, the basic purpose of the legislation is to facilitate Australia's exports. World trade is unpredictable and complex, and frequent changes are made to the regulations, often without notice. Such characteristics require scope for a rapid response by Australia, and, in these circumstances, it would be counterproductive to have a rigid and narrow range of authority.

Secondly, the Committee considers that the potential product coverage of the legislation should not be limited. In the past, the Act has been applied principally to food and agricultural products, and this can be expected to continue in the future. But there have been exceptions, some of which were initiated in response to specific developments and/or government policies within Australia. The notable examples have been export controls on wood chips, coal and certain other minerals. The Act has also been used to authorise the imposition of quantitative limits on exports of products such as sugar, grains, beef and dairy products as part of undertakings given by Australia in multilateral or bilateral agreements. The Committee considers it desirable to allow for similar use of the legislation in the future.

Thirdly, the legislation should not limit the government's authority to that of imposing requirements related to health and hygiene. The Committee recognises that the bulk of the application of the Act will be in relation to such matters and administration of the Act will be undertaken by AFFA and AQIS. However, there is a need for government to be able to respond flexibly and rapidly to circumstances and developments that cannot be defined in advance.

Having determined these first three principles, the Committee suggests that one means of avoiding open-ended authority for export controls for any reason and on any product would be to specify time limits on the application of particular controls. For example, controls required for sanitary or phytosanitary standards, or other health or process requirements would remain applicable until no longer required, whereas controls required for other reasons such as quotas would be limited to one year, after which the regulation would need to be reviewed to authorise ongoing application.

Finally, while the key purpose of the legislation should be to ensure compliance with the requirements of importing countries, there may also be scope for controls for reasons beyond such requirements. It may be necessary to impose controls to ensure Australia's reputation as a supplier of consistent quality products is not threatened. Some threats could arise from the activities of immature or inexperienced exporters or alternatively government and industry may decide to pursue a special opportunity that requires export producers to comply with a particular quality or standard.

The Committee considers that the above principles would be satisfied by adoption of the following statement of objectives (see Recommendation 2).

*The objective of future export control legislation should be to facilitate, sustain and enhance Australia's exports by providing authority for the imposition of systems to:*

- *ensure compliance with overseas country requirements,*
- *ensure compliance with any other standards established through government/industry consultations.*

### 6.3.3 Structure of Legislation

The current legislation comprises

- the **Act** which authorises the Minister of Agriculture Fisheries and Forestry to issue Orders to prohibit the trade in a specific (prescribed) product or products unless certain conditions are met.
- the **Regulations** and **Orders**, which contain the conditions with which potential exporters must comply before export will be permitted.

This structure is designed to grant maximum authority by means of the Act, and maximum flexibility by means of the Orders and Regulations. An alternative would be for the Act to specify individual prescribed products and the terms under which export would be permitted. Such an approach would mean that changes in the terms and conditions could only be made by amendment of the Act by Parliament, and would be time consuming and inflexible. The reality of international trade requires a more rapid response.

Accordingly, the Committee believes there is no practical alternative to retaining the structure of the legislation - Act and associated Regulations and Orders - as it is at present. It would not be feasible or effective to attempt to cover all the required powers in any other form.

The Committee envisages the Act will be a possible point of control for activities beyond its present focus at a secondary or tertiary processing level.

An example of this is the new scheme of arrangement to satisfy EU market requirements for identification of cattle and certification of the HGP-free status of meat exported to the EU.

This arrangement includes controls at farm level as well as process controls at abattoirs. Regulation to cover all aspects of production, transport, processing and storage of export goods is now demanded by many markets.

Arrangements involving a combination of State and Commonwealth legislative controls are losing credibility with some markets. This dichotomy will need to be revised in the future. A single set of control arrangements is desirable.

The existing Act and subordinate legislation deliver an internationally recognised system of inspection and certification that assists Australian exporters gain access to markets with stringent food health and safety standards. The level of inspection and certification is tailored to meet the requirements of individual export markets. An outcome of this approach is that compliance costs incurred by individual industries are also tailored to the specific requirements of the industry and markets.

The *Export Control Act* gives wide-reaching authority for prescription of specific goods for export control and the determination of the actual conditions under which exports may occur. The Act does not specify conditions or criteria for determining when controls should be applied or the degree of prescription. Judgements on these issues may be left to the discretion of the Secretary.

The Committee concludes that the present broad structure of the Act allows flexibility and meets requirements for the export trade at the moment. However, some suggestions have been made which if adopted, will improve reliance on and effectiveness of the Act for future applications.

#### **6.3.4 Certification under Existing Arrangements**

The Committee considered the suggestion that responsibility for certification be devolved to State governments and/or other independent agencies such as quality assurance inspection companies.

For a number of reasons the Committee favours retention of the existing arrangements under which final export certification is provided by a single Commonwealth authority (AQIS).

First, AQIS certification is recognised and well respected internationally. Introducing other certification agencies would undermine the strong reputation of the current health mark (Australia Inspected or AI) and also create confusion in overseas markets. Dual systems of standards already add unnecessary complexity and costs within Australia; therefore additional complications should be avoided.

Second, the existing AQIS arrangements provide considerable flexibility and cater for different inspection and alternative systems. For example, certification can be based on physical presence of AQIS staff during production or an accredited quality assurance program monitored by independent third party agencies. Such flexibility should cater adequately for the vast majority of exporter requirements.

AQIS also provides certification for certain non-prescribed goods. As noted in Chapter 2, it appears that there is no legislative authority to support this. However, such certification facilitates exports and is therefore beneficial. The Committee believes that the Act should be amended as necessary to provide legislative cover for continuation of this service.

The Committee is of the opinion that future undertakings regarding certification, such as protocols for access to overseas markets, should increasingly be based on accredited quality assurance programs with the final certification being issued by a single national authority in the knowledge of the effectiveness of these systems. There has been much recent progress in this regard and it is a well-established fact that such programs are more effective than on line inspection in producing goods of a uniform, high standard.

While there is scope for greater flexibility under the Act using co-regulation as a base, there are significant roadblocks and limitations to be overcome in commodities where certification has been based on a strong government inspection presence. Despite this observation, the Committee is convinced that all export commodity programs should evaluate their current arrangements against alternatives offered under co-regulation.

***Integrity of certification***

The reputation of Australia as an exporter of high quality, safe products under the *Export Control Act* is underpinned by the integrity of the certification system. Steps must be taken in any co-regulatory process to ensure this level of integrity is not threatened. If there are events which compromise integrity, then the response from the regulator must be swift and effective. Importing countries expect a higher level of sanctions to apply to transgressions where a co-regulatory arrangement is in place. Sanctions and penalties must reflect the degree of risk to be managed under the co-regulatory framework.

***Administration of the Export Control Act utilising co-regulatory options***

The Committee noted that the extent of existing co-regulatory arrangements varies between export programs administered under the Act. The way forward on this issue is described in the next chapter. The Committee proposed a more transparent way of organising and delivering the regulatory functions under the legislation so that market confidence is maintained and the influence of the independent certifying authority is highlighted. Recognising additional importing countries while emphasising the strengths of domestic arrangements in Australia is the concept behind the three tier administrative arrangement that is described in Chapter 7.