



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

2002

13 November 2002

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MEMBERS OF THE COMMITTEE

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT OF 2002

The Committee presents its Fourteenth Report of 2002 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Excise Laws Amendment Bill (No. 1) 2002

Transport Safety Investigation Bill 2002

Excise Laws Amendment Bill (No. 1) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2002*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 23 October 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 11 of 2002

This bill was introduced into the House of Representatives on 26 September 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Excise Act 1901* to enable excise duty on excisable alcoholic beverages to be paid on the higher of the labelled alcohol content or the actual alcohol content; and to allow the Commissioner of Taxation to determine, by instrument in writing, rules for working out the percentage in volume of alcohol in the beverage.

The bill also makes consequential amendments to the *Distillation Act 1901* and the *Spirits Act 1906*.

Parliamentary scrutiny

Proposed new section 77FB

Proposed new section 77FB of the *Excise Act 1901*, to be inserted by item 6 of Schedule 1, would permit the Commissioner of Taxation to determine rules for working out the percentage of alcohol in a beverage. It appears that such rules are of a legislative character, but there is no provision in this bill for the rules to be subject to any Parliamentary scrutiny, such as disallowance or even tabling. The Committee, therefore, **seeks the Treasurer's advice** for the reason for this apparent omission.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Treasurer

The excise legislation has been administered by the Commissioner of Taxation since 1998 when responsibility for excise was transferred from the Australian Customs Service. The transfer was given legislative effect in May 2001. In legislation drafted since the responsibility for excise was transferred to the Australian Taxation Office (ATO), it has been the practice to be consistent where possible with other ATO administered legislation and the mechanisms used in that administration.

Excise legislation requires that in determining excise liability on alcoholic beverages, it is necessary to establish the alcohol content of the product. Alcohol production is not an exact manufacturing process in many cases and the degree of accuracy with which alcohol content can be consistently achieved in production varies from one class of product to another. In some cases, particularly beer, different batches within the one beverage class will vary. The degree of tolerance of variation needed in determining strength is therefore different from one class of alcoholic beverage to another.

A determination by the Commissioner of Taxation (who is the CEO under the *Excise Act 1901*) is considered an efficient and flexible way of dealing with the variations that occur in alcohol production and for responding to changes in the alcohol production industry. It is essentially a means of providing for efficient administration to determine an empirical but technical issue.

By enabling the Commissioner to determine the rules for establishing the alcohol content on which excise liability is paid, the provisions allow for flexibility to deal with the variations of alcohol content and methods of measurement arising from different processes and methods of manufacture in different classes of beverages. It is also a mechanism which gives the ability to respond promptly to industry changes and enables the Commissioner to provide certainty for manufacturers as quickly as possible about the determination of their liability where new products are developed or changes in production methods affect variations in the alcohol content.

The proposal that the Commissioner may, by instrument in writing, determine rules for working out the alcohol strength of classes of alcoholic beverages is consistent with provisions for determination by the Commissioner under other taxation administered legislation. For example, under section 26 of the *Product Grants and Benefits Administration Act 2000* the Commissioner may determine the pre-claim record keeping requirements and under various sections of the *A New Tax System (Goods and Services Tax) Act 1999* the Commissioner may determine a variety of things including the conversion of foreign currency amounts (section 9-85) and the extent to which a creditable acquisition is for a creditable purpose (subsection 11-30(5)).

The rules apply industry-wide to classes of alcoholic beverages, not to individual manufacturers, so the rules established must be appropriate and acceptable to industry in general. It is intended they will be determined in close cooperation and consultation with industry by the ATO and must be published in the Gazette. This is consistent also with general ATO practice in consultation on rulings.

I trust this information will be of assistance to you.

The Committee thanks the Treasurer for this response, which sets out in detail the background and reasons for the proposed rules.

The Committee accepts the Treasurer's advice about the need for flexibility and efficiency in addressing this technical issue and acknowledges that it may be appropriate to provide for this by delegated rather than primary legislation. The Committee's comments, however, relate to the lack of parliamentary scrutiny of the rules. In general, all delegated legislation should be subject to tabling and disallowance, or at least to tabling. The Committee notes that the rules must be published in the *Gazette*, which is a significant safeguard, but which does not involve parliamentary oversight. In this context, provision for, say, tabling the rules within 15 sitting days of making, would not affect flexibility but would assist parliamentary propriety.

The Committee also accepts the Treasurer's advice that taxation legislation provides other instances of determinations by the Commissioner and that the present rules will be made after close cooperation and consultation with industry. These considerations, however, do not affect the desirability of parliamentary scrutiny.

The Committee continues to draw Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Transport Safety Investigation Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2002*, in which it made various comments. The Minister for Transport and Regional Services responded to those comments in a letter dated 16 September 2002.

In its *Twelfth Report of 2002*, the Committee commented on the Minister's response and sought a briefing on certain aspects of the bill. On 21 October 2002, the Committee received a briefing from officers of the Australian Transport Safety Bureau (ATSB) of the Department of Transport and Regional Services.

In its *Thirteenth Report of 2002*, the Committee reported in response to the briefing. It also sought further advice from the Minister regarding specific issues relating to safeguards for the search and entry provisions of the bill.

The Minister has responded in a letter dated 11 November 2002. An extract from the *Thirteenth Report of 2002* and relevant parts of the Minister's latest response are discussed at the end of the report on this bill.

Extract from Alert Digest No. 6 of 2002

This bill was introduced into the House of Representatives on 20 June 2002 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to establish an updated aviation, marine and rail transport safety regime for Australia based on the principles of international best practice. The regime includes provisions for the reporting of transport safety matters, conducting of safety investigations, making of safety action statements and publication of investigation results; and consolidates the Australian Transport Safety Bureau's investigation powers. The bill also contains regulation making provisions.

Delegation of power

Clause 33

Clause 33 of this bill would permit the Executive Director of Transport Safety Investigation (or his or her delegate, who may be any person, so long only as the Executive Director is satisfied that the delegate is a suitable person to exercise the power – see subclauses 13(1) and (6)) to enter “special premises” without a warrant and without the occupier’s consent. “Special premises” are defined as an accident site or vehicle. The power to enter an accident site appears reasonable but the power to enter vehicles appears wide. The Committee therefore **seeks the Minister’s advice** as to the circumstances in which the power to enter vehicles will be exercised and any safeguards in the legislation for its operation.

The Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Relevant extract from the response from the Minister dated 16 September 2002

Thank you for the letter of 27 June 2002, from the Standing Committee for the Scrutiny of Bills, concerning Clause 33 of the *Transport Safety Investigation Bill 2002* (the *TSI Bill*). I am pleased to provide assistance to the Committee on this matter.

Clause 33 of the *TSI Bill* gives the Executive Director power to enter ‘special premises’ without the occupier’s consent and without obtaining a warrant. The Executive Director is proposed to be able to do so with such assistance, and by such force, as is necessary and reasonable. Clause 3 of the Bill defines ‘special premises’ as accident site premises or a vehicle. The Clause 33 power is somewhat broader than existing powers under Part 2A of the *Air Navigation Act 1920* and the *Navigation (Marine Casualty) Regulations 1990*. For example, Regulation 11 of the *Navigation (Marine Casualty) Regulations* refers to the ability of the inspector or an investigator to board a ship without consent or a warrant to protect evidence that will be removed, destroyed or interfered with before consent or a warrant can be obtained.

The power to enter ‘special premises’ without consent or a warrant is in the *TSI Bill* to allow an investigator to gain access to accident sites in order to preserve and collect, as soon as possible, potentially vital evidence relevant to an investigation. It may be impossible or impracticable to obtain consent or a warrant where evidence is perishable and needs to be preserved immediately. As explained in the Explanatory Memorandum, this power extends to vehicles, which, by their highly mobile nature, may also need to be quickly accessed in case they are removed to a less accessible location where relevant evidence may be removed or destroyed simply by virtue of the vehicle relocating. Further, in a major transport accident involving large-scale

loss of life or damage, subsequent litigation can include criminal proceedings and/or civil claims for billions of dollars. There are therefore strong incentives to tamper with evidence and immediate powers of entry are needed to ensure evidence is preserved. I note that the definition of ‘special premises’ in the *TSI Bill* to include a vehicle, is consistent with the definition of ‘premises’ for investigative purposes under other Commonwealth legislation, such as the *Export Control Act 1982*.

Powers under Clause 33 may appear to be broader than some Commonwealth legislative provisions allowing entry to vehicles without the occupier’s consent or a warrant. For example, other similar Commonwealth legislative provisions permit such entry only in limited circumstances such as where there are reasonable grounds for suspecting there is evidential material in the vehicle and the circumstances are serious or urgent. However, the broader nature of Clause 33 is justified by the ‘no blame’ future safety object of ATSB investigations. Consistent with the ‘no blame’ object, there are strict limits placed on the use of OBR evidence, and Restricted Information is further protected. ATSB reports cannot be used in civil or criminal proceedings. The search and entry provisions in the *TSI Bill* were closely scrutinised by the Attorney-General’s Department during the drafting process, and Clause 33 was not considered to trespass unduly on personal rights and liberties.

The *TSI Bill* contains sufficient general safeguards to prevent an abuse of the power provided under Clause 33. Firstly, Clause 28 has the effect of limiting the exercise of the power to the purposes of an investigation under the *TSI Bill*. Secondly, subclauses 13(1) and (6) have the effect of confining the Executive Director’s delegation to a suitable person for the exercise of the power. Such a delegation is likely to be made only where it is essential, for example, where there is an accident in a remote location and it is necessary to delegate powers to an appropriately qualified person in order to collect perishable evidence and to interview witnesses before their memory fades. Additionally, Clause 16 requires the Executive Director, or the Executive Director’s delegate, to have regard to the desirability of minimising any resulting disruption to transport by means of transport vehicles.

With regard to the seizure of evidential material, as a result of an exercise of power under Clause 33, Paragraph 36(3)(b) requires that the material be directly relevant to the investigation concerned and the Executive Director must believe on reasonable grounds that it is necessary to seize the material in order to prevent it being interfered with or to prevent its concealment, loss, deterioration or destruction.

The inclusion of Clause 33 in the *TSI Bill* is consistent with international obligations. The current text of Annex 13 to the *Convention on International Civil Aviation (Chicago Convention)*, to which Australia is a party, includes standards and recommended procedures that are applicable from 1 November 2001. For example, paragraph 5.6 of Annex 13 provides that:

“The investigator-in-charge shall have unhampered access to the wreckage and unrestricted control over it to ensure that a detailed examination can be made without delay by authorized personnel participating in the investigation.”

Clause 33 is thus in line with equivalent powers in other jurisdictions, such as New Zealand.

With the safeguards provided in the *TSI Bill*, I believe Clause 33 will not be used excessively or outside the context of what is necessary for the conduct of a transport safety investigation.

Thank you for seeking clarification on this matter from me.

The Committee thanks the Minister for this detailed response, which gives reasons for the delegation power and describes the safeguards for its operation. The Committee, however, remains concerned at the nature and extent of the power. As the Minister notes, the power is broader than similar powers in related legislation. There is also no constraint on the power except the subjective opinion of the Executive Director that a person is suitable.

The Committee therefore **seeks from the Minister** a briefing from departmental officers on these aspects of the bill. After the briefing the Committee may report further on the bill.

The Committee also draws to the attention of the Senate its *Fourth Report of 2000, Entry and Search Provisions in Commonwealth Legislation*. That report advises that the power to enter and search premises is exceptional and not to be granted as a matter of course. The report provides a set of principles with which search and entry provisions should conform. The provisions in the present bill, however, may not comply with all of these principles.

In the meantime, the Committee continues to draw Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Committee's comments in response to the briefing by Departmental officers

The ATSB emphasised that the relevant powers in the bill related only to "no blame" safety investigations which were recognised by international conventions. The ATSB suggested that such a purpose was a major constraint on the exercise of the powers. The ATSB quoted the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, which recommended that, in considering whether to provide for entry and search, Parliament should take into account proportionality between the object of the power and the degree of intrusion involved. The ATSB submitted that the balance of proportionality favoured the proposed provisions.

The ATSB advised that both Canada and New Zealand provided wider powers for “no blame” safety investigations than for other inquiries.

In any event, the ATSB noted, the bill requires a warrant for most entry powers. The ATSB further advised that the bill provides safeguards for the few cases which would not require a warrant. For instance, any self-incriminating evidence cannot be used in adversarial proceedings. In addition, marine powers of entry and search will now be in primary rather than delegated legislation.

Finally, the ATSB suggested that the powers were proportionate given the practicalities of their exercise.

The Committee, however, remained concerned at the provisions, asking about the process of delegation by the Executive Director, in order to ensure that the delegate was an appropriate person to exercise the power. The Committee developed this line of question to include the lack of nexus in the legislation itself to connect the delegation power to criteria such as qualifications and experience. The Committee noted that under the bill a delegate need have no specific training in accident safety investigation or in search and entry procedures, which need a particular style and approach; basic criteria in relation to these matters should be established.

Another area of concern for the Committee was direct breach of individual rights. The view was expressed that private rights were involved, notwithstanding the “no blame” nature of the investigation. Powers exercised under such investigations still intrude on personal rights.

These breaches of individual rights were exacerbated by the nature of the power conferred, which appeared quite broad. For instance, the entry and search provision applies to any vehicle, whether or not it is at the scene of an accident. In addition, these and other provisions, which may be seen as arbitrary or summary, are not adequately defined. In this context there is no reasonable grounds qualification to the key clause 33. This is in contrast to related legislation.

The Committee also suggested that a warrant can be obtained relatively quickly, on oral testimony. Related legislation also provides for this.

Apart from the briefing, the Committee notes that provisions in the bill relating to identity cards may be deficient in that they do not require persons exercising premises powers to give a proper caution to those affected by them.

Conclusions of the Committee

The Committee concludes that the present provisions of the bill may be considered to trespass unduly on personal rights and liberties in that it fails to implement a number of principles set out in its *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*. These principles could be implemented by either the Act or the regulations, although if the regulations are used then the Act must refer expressly to them. The principles are as follows:

- (a) criteria should be established to ensure delegates have proper qualifications and training;
- (b) there should be a process whereby delegates must not only identify themselves, but also caution people affected as to their rights; and
- (c) any entry and search powers not involving an accident where loss of life has occurred, or which involve a vehicle away from an accident site, should be subject to a reasonable grounds requirement.

The Committee **seeks the further advice of the Minister** on these three matters.

In the meantime, the committee continues to draw Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the further response from the Minister dated 11 November 2002

Further to the committee's previous requests to me concerning the *Transport Safety Investigation Bill 2002* (TSI Bill) that have been addressed, the committee's thirteenth report of 23 October 2002 has sought further advice from me on three matters which I will provide in this letter.

Having further considered clause 33 and subclauses 13(1) and (6), the committee in its latest report concludes that the present provisions of the TSI Bill "may be considered to trespass unduly on personal rights and liberties in that it fails to implement" (by either Act or regulations expressly linked to the Act) several principles in the manner listed as follows:

- (a) criteria should be established to ensure delegates have proper qualifications and training;
- (b) there must be a process whereby delegates must not only identify themselves, but also caution people affected as to their rights; and

- (c) entry and search powers not involving an accident where a loss of life has occurred, or which involve a vehicle away from an accident site, must be subject to a reasonable grounds requirement.

In the hearing on 21 October, departmental officers advised that the proposed clause 33 powers were substantially constrained by clause 28 (powers only exercisable in relation to an investigation) and the objects clause 7 of the Bill which states that it is not an object to apportion blame or liability. In addition to the officers' evidence, I note that in relation to vehicles, clause 39 requires the Executive Director to have reasonable grounds for believing that evidential material is in or on a transport vehicle and that stopping and detaining the vehicle is necessary to prevent the material from being removed from Australia or from being interfered with or to prevent its concealment, loss, deterioration or destruction. I highlighted the importance of the object of the TSI Bill powers in my letter of 16 September 2002. This is important in terms of the committee's principles involving proportionality but I note from your comment in the Committee's *Hansard* of 21 October that the 'no blame' object may not have been sufficiently weighed at that time.

However, as a matter of internal policy, the ATSB already seeks to operate under current legislation in accordance with the committee's recommendations and would continue to do so under the TSI Bill. Accordingly, while they may not be strictly necessary, I do not oppose amendment to the TSI Bill and draft TSI regulations in line with the committee's suggestions.

Subject to the normal Government approval and drafting protocols and procedures, I propose to seek amendments to the TSI Bill and draft TSI Regulations along the lines of the following:

1. Provide an express link to the TSI Regulations in cl 13(6) in relation to specifying requirements for a person to be considered suitable as a delegate of the Executive Director including in relation to appropriate briefing/training in search and seizure powers where these are proposed to be delegated (similar to the arrangements to be proposed for cl 14).
2. Amend cl 30 by replacing the text with a requirement for the Executive Director to take all reasonable steps to notify the occupier of the purpose of the entry and produce an identity card when exercising premises powers.
3. Amend cl 33 to require the Executive Director to inform the occupier of their rights and obligations as specified in the TSI Regulations before exercising cl 33 powers.
4. Limit the use of powers under cl 33 to Immediately Reportable Matters, which include accidents and serious incidents.
5. Include a 'reasonable grounds' requirement in cl 33 for entry to special premises for the investigation of Immediately Reportable Matters.

Thank you for raising this matter with me and I trust that my positive responses will now enable the committee to give the TSI Bill its unqualified support. As the Bill is also being considered by the Senate Rural and Regional Affairs and Transport Legislation Committee, I have copied this letter to its Chair, Senator the Hon Bill Heffernan for the information of that committee.

The Committee thanks the Minister for this further response. Amendment of the bill and the draft regulations as suggested by the Minister will implement appropriate safeguards in relation to the search and entry provisions of the bill. The Committee is grateful for this cooperation from the Minister, which demonstrates a commitment to personal rights and liberties.

Jan McLucas
Chair



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23 OCT 2002

Senate Standing Committee
for the Scrutiny of Bills

TREASURER

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CANBERRA ACT 2600

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23 OCT 2002

Senator J. McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

I refer to the letter of 17 October 2002 from the Standing Committee for the Scrutiny of Bills concerning the proposed new section 77FB in the *Excise Laws Amendment Bill (No. 1) 2002*.

The excise legislation has been administered by the Commissioner of Taxation since 1998 when responsibility for excise was transferred from the Australian Customs Service. The transfer was given legislative effect in May 2001. In legislation drafted since the responsibility for excise was transferred to the Australian Taxation Office (ATO), it has been the practice to be consistent where possible with other ATO administered legislation and the mechanisms used in that administration.

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A determination by the Commissioner of Taxation (who is the CEO under the *Excise Act 1901*) is considered an efficient and flexible way of dealing with the variations that occur in alcohol production and for responding to changes in the alcohol production industry. It is essentially a means of providing for efficient administration to determine an empirical but technical issue.

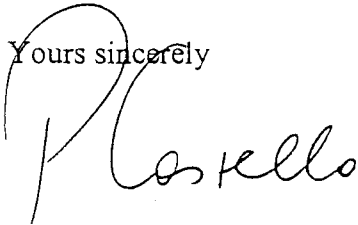
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I trust this information will be of assistance to you.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'P Costello', with a large, stylized initial 'P'.

PETER COSTELLO



The Hon John Anderson MP
Deputy Prime Minister
Minister for Transport and Regional Services
Leader National Party of Australia

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12 NOV 2002

Senate Standing C'ttee
for the Scrutiny of Bills

Senator Jan McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

11 NOV 2002

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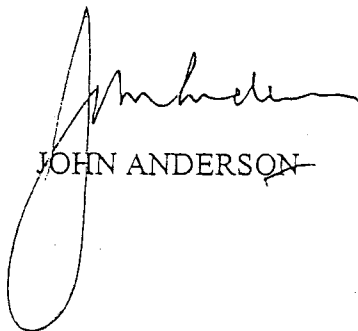


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5. Include a 'reasonable grounds' requirement in cl 33 for entry to special premises for the investigation of Immediately Reportable Matters.

Thank you for raising this matter with me and I trust that my positive responses will now enable the committee to give the TSI Bill its unqualified support. As the Bill is also being considered by the Senate Rural and Regional Affairs and Transport Legislation Committee, I have copied this letter to its Chair, Senator the Hon Bill Heffernan for the information of that committee.

Yours sincerely



JOHN ANDERSON