



Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Mr Richard Pye
Secretary
Senate Standing Committee for the Scrutiny of Bills
Suite SG – 49
Parliament House
CANBERRA ACT 2600

Dear Mr Pye

Thank you for your letter of 8 April 2004 to the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs, inviting the Department to lodge a submission on the Committee's Inquiry into the Government's response to its previous report on entry and search provisions tabled in 2000. The Secretary has asked me to reply on his behalf.

I am pleased to provide the attached submission on behalf of the Department of Immigration and Multicultural and Indigenous Affairs.

Thank you for drawing this matter to the Secretary's attention.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Yole Daniels'.

Yole Daniels
Assistant Secretary
Compliance and Analysis

30/6/04

**THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS SUBMISSION**

TO THE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS:

**INQUIRY INTO THE GOVERNMENT'S RESPONSE TO THE PREVIOUS
REPORT BY THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF
BILLS ON ENTRY AND SEARCH PROVISIONS TABLED IN 2000**

JUNE 2004

EXECUTIVE SUMMARY OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS SUBMISSION TO THE SCRUTINY COMMITTEE.....	3
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RESULTANT IMPACT WITHIN THE DEPARTMENT OF THE GOVERNMENT'S RESPONSES TO THE COMMITTEE'S FOURTH REPORT OF 2000: ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION	3
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THE FAIRNESS, PURPOSE, EFFECTIVENESS AND CONSISTENCY OF ENTRY AND SEARCH PROVISIONS IN THE MIGRATION ACT MADE SINCE THE COMMITTEE TABLED ITS FOURTH REPORT OF 2000 ON 6 APRIL 2000	5
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PROVISIONS WITHIN THE MIGRATION ACT 1958 THAT AUTHORISE THE SEIZURE OF MATERIAL	5
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SEIZURE PROVISIONS IN THE MIGRATION ACT	5
DEVELOPMENT OF PROTOCOLS GOVERNING THE SEIZURE OF MATERIAL	6

EXECUTIVE SUMMARY OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS SUBMISSION TO THE SCRUTINY COMMITTEE

The Department of Immigration and Multicultural and Indigenous Affairs (*the Department*) welcomes the opportunity to make a submission to the Senate Standing Committee for the Scrutiny of Bills (*the Committee*) on the Committee's inquiry into the Government response to its previous report on entry and search provisions tabled in 2000.

Powers of entry, search and seizure are essential tools for the enforcement of migration law in Australia. The Department has a specific role of ensuring compliance with the Migration Act 1958 (*the Act*), and its powers have been developed to reflect the demanding and specialised nature of this work. Policy and guidelines support the legislative base of the Department's work, and ensure that the powers of the Act are enforced fairly and properly, protecting the rights of the individual, whilst at the same time maintaining a contemporary relevance and the flexibility to suit the immigration compliance environment.

Search and entry provisions within the Act cover a number of immigration enforcement functions. The Act permits, in specific circumstances, the entry and search of vessels and aircraft (section 245F) and the search of a person (section 252). Pursuant to section 268CD an authorised officer can be granted a warrant for student monitoring purposes. Search warrants are also granted to seize valuables under section 223 of the Act. Currently the most commonly utilised entry and search provisions of the Migration Act are the powers conferred under section 251. Pursuant to section 251 an officer may be issued a warrant to enter and search a premises where they have a reasonable cause to believe that an unlawful non-citizen, non-citizen in breach of their visa conditions or certain documents will be located.

During the financial year of 2001-02 a total of 1,285 section 251 and 223 search warrants were issued and in 2002-3 a total 1,609. As at 31 March 2004 1,214 search warrants have been issued for this financial year. These search warrants play a vital role in locating unlawful non-citizens and those in breach of their visa conditions.

In 2001-02 a total of 7,475 unlawful non-citizens or non-citizens breaching visa conditions were located in the field. In 2002-03 the number was 9280 and as at 31 March 2004, 6700 have been located. Those located as a result of search warrants contribute substantially to the total number of field locations of unlawful non-citizens during the year.

The Committee has been given terms of reference for its inquiry. The Department's submission addresses each of the provisions within the terms of reference.

RESULTANT IMPACT WITHIN THE DEPARTMENT OF THE GOVERNMENT'S RESPONSES TO THE COMMITTEE'S FOURTH REPORT OF 2000: ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION

The Department's current entry, search and seizure powers are a vital tool for ensuring the effective administration and enforcement of migration law. Enforcement of the Migration Act 1958 is a complex and specialist task, for which the Act provides the Department with specifically tailored powers. Those powers are designed with the required flexibility to cater for the changing demands of the immigration enforcement environment. The Act along with the policy outlined in the Migration Series Instructions (*MSI*) provide the rules and guidance

for the Department to issue and execute search warrants in a manner which ensures that private rights are protected and the powers are exercised properly.

MSIs are used by the Department to guide staff on the legal requirements and policy guidelines for exercising certain powers, including that of entry, search and seizure under the Act. These instructions are periodically reviewed to ensure they are appropriate, then examined and clarified in the light of operational experience. The Department's MSI 389 on entry, search and seizure was updated in late 2003 taking into consideration comments made by the Government in its response to the Committee's Report. Whilst the Act provides a general search warrant power, the MSI imposes strict policy limitations on the issue of a search warrant to ensure that the powers of the Act are exercised appropriately and the rights of the individual are protected.

Since the Committee issued its report the Department has reviewed its compliance training and operational guidelines, which culminated in the development of the National Compliance Operational Guidelines (*the Guidelines*) and the development of the National Compliance Training Strategy. The guidelines provide officers with a practical day-to-day guide to compliance activities and supplement the updated policy in the MSI. The Department's Compliance Training Strategy is structured around a nationally accredited training program towards Certificate IV in Government (Statutory Investigation & Enforcement). Both the guidelines and training reinforce the legislative and policy boundaries within which compliance activities are conducted.

Departmental policy requires that appropriate records are kept of the exercise of search and entry powers. Each State and Territory Compliance office is required to keep a register of warrants issued and returned. Following the execution of the warrant, the warrant holder is required to provide a comprehensive report on the execution of the warrant to the issuing delegate. The warrant is then stored securely with the application and report.

At recommendation thirteen the Committee suggested that, where practical, all executions of search warrants be video-taped or tape-recorded. The Department is currently in the process of making the latter facility available to all State and Territory Compliance offices. Equipment has been purchased and policy guidelines on the use of digital voice recording devices are currently being developed. The primary purpose of the recording will be to evidence the execution of the warrant, where circumstances permit.

In keeping with recommendation ten in the Committee's report, the Department has an information sheet on s251 Migration Act search warrants for distribution to occupiers during the execution of a Migration Act search warrant. The document contains information on the powers and responsibilities of the compliance officer and the rights and responsibilities of the occupier. As indicated in the Government response to the Committee's report, the Department has had this information sheet translated into fifteen of the most commonly required foreign languages. Where other languages are required an interpreter is made available to the occupier either in person or by phone.

The Committee's Recommendation twelve, which recommended all agencies introduce best practice training procedures, other internal controls and enforcement and compliance manuals, was accepted in principle by the Government. Within the Department internal quality review processes are in place to ensure that the exercise of powers of entry, search and seizure are exercised lawfully and as appropriately as possible. This is a fluid process with ongoing feedback into the training, operational guidelines and policy, reflecting the Department's commitment to ensuring private rights are protected and powers are exercised properly.

THE FAIRNESS, PURPOSE, EFFECTIVENESS AND CONSISTENCY OF ENTRY AND SEARCH PROVISIONS IN THE MIGRATION ACT MADE SINCE THE COMMITTEE TABLED ITS FOURTH REPORT OF 2000 ON 6 APRIL 2000

In March 2001 search and entry powers were introduced into the Act to give new investigatory authority to authorised officers in respect of an education provider's premises. To ensure compliance with the Act and Regulations and, ultimately, the integrity of the Student Visa Program, the new provisions were aimed at enhancing the Department's ability to monitor compliance with student visa conditions.

For authorised officers to enter any education provider's premises under the provisions, it must be 'reasonable to believe' there may be a thing or activity relevant to a visa monitoring purpose. There must be relevant facts and evidence to support an authorised officer's reasonable belief to justify the entry. Under the new provisions, a monitoring warrant may only be issued by a magistrate or member of the Administrative Appeals Tribunal (AAT). In the circumstances where a magistrate or member of the AAT issues a monitoring warrant for a visa monitoring purpose, they must be satisfied that it is 'reasonably necessary' to do so. An authorised officer must give the magistrate or tribunal member information on oath or an affidavit that sets out the grounds for seeking the warrant.

As with other search warrant provisions under the Migration Act, the Department has introduced policy by way of a MSI, to guide officers on the appropriate legal and policy procedures for the application, granting, execution and reporting on these new warrant powers. MSIs are designed to support officers in the contemporary enforcement environment. The MSIs are regularly updated to reflect any changes and ensure that the rights of the individual to privacy remain protected and that the powers conferred by the provision are exercised appropriately.

PROVISIONS WITHIN THE MIGRATION ACT 1958 THAT AUTHORISE THE SEIZURE OF MATERIAL

Seizure Provisions in the Migration Act

In general the Migration Act provides immigration officers with very limited circumstances under which they are able to seize property. Those strict limitations closely reflect the immigration enforcement functions of the Department. Provisions exist within the Act which allow for seizure, or possession and retention of property, under warrant, during a search of a detainee or by way of notice. This is for the purpose of establishing a Migration Act offence or breach of the Act, forfeiture of things used in an offence under the Act or to recover costs to the Commonwealth. Possession and retention of property is also permitted during the search of a detainee to seize certain items in order to protect the detainee's personal health, safety and security.

With the introduction of the new student monitoring powers, further provisions for the seizure of property were introduced into the Act. These powers are only available to authorised officers. They permit the securing of things that might evidence an offence under the Migration Act or Regulations, the Crimes Act or the Criminal Code, pending the obtaining of a search warrant to seize such things. Powers also exist where, in limited circumstances, an authorised officer may seize such things as outlined above, without warrant, where failure to seize them may result in the property being concealed, lost or destroyed and the circumstances are so serious and urgent as to require such action.

Officers are guided in the use of these powers by the relevant MSIs and the National Compliance Operational Guidelines. Both documents provide strict guidelines on policy and

procedures to be followed when exercising these statutory powers. The MSI on exercising student monitoring powers provides strict guidance on the seizing of material unrelated to Migration matters, and instructs officers in such circumstances to seek police guidance on exactly what action to take. There are legislative guidelines on the retention of items seized under the student monitoring powers.

Where property or documents are seized pursuant to the Migration Act, this must be clearly documented on a property receipt form. A copy of that receipt is provided to the detainee or occupier of the property and they are asked to sign a copy of that receipt if present.

Development of protocols governing the seizure of material

The Department already has in place strict protocols and guidelines governing the seizure of material. These have been developed for the unique nature of immigration work, and are designed to ensure the rights of the individual are protected and powers used in a fair and reasonable manner.

The primary purpose for the Migration Act seizure provisions are to actively enable enforcement of the Migration Act, rather than for evidentiary purposes in a criminal offence context. Seizure provisions are most often used to seize travel documents and tickets, or to seize valuables to recover costs incurred to the Commonwealth. To enable these functions to work successfully in the immigration compliance environment they have been designed with the flexibility to cater for the unique demands of enforcing the Migration Act.