



Our reference: 2004-0325-01

Ms Janice Paul
Acting Secretary
Senate Standing Committee for the Scrutiny of Bills
Suite SG - 49
Parliament House
CANBERRA ACT 2600

RECEIVED

5 AUG 2004

Senate Standing C'ttee
for the Scrutiny of Bills

Dear Ms Paul

Inquiry into the Government's Response to the Fourth Report: Entry and Search Provisions in Commonwealth Legislation

Thank you for providing the Office with an opportunity to make a submission to this Inquiry.

Please find attached the Office's submission to the Senate Standing Committee for the Scrutiny of Bills Inquiry into the Australian Government's response to the *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*.

Yours sincerely

Karen Curtis
Federal Privacy Commissioner

3 August 2004

OFPC Submission

Inquiry into the Australian Government's response to the *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*

Introduction

The Office of the Federal Privacy Commissioner (the Office) welcomes the opportunity to present a submission to the Inquiry by the Senate Standing Committee for the Scrutiny of Bills (the Committee) into the Australian Government's response to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* (the Fourth Report).

The jurisdiction of the Office includes regulating the handling of personal information by Australian Government agencies, as provided for in the *Privacy Act 1988* (the Act)¹. The preamble to the Act also refers to the protection of persons from "arbitrary or unlawful interference with their privacy, family, home or correspondence"². For this reason, the granting of additional powers to enter, search and seize material and the exercise of those powers (by Australian Government agencies) are issues of continuing interest to the Office.

Previous submission

In March 1999, the Office made a submission to the review by the Committee into the fairness, purpose, effectiveness and consistency of entry provisions in Commonwealth legislation authorising persons to enter and search premises. In that submission, the Office proposed two sets of principles (the OFPC principles); these principles had been developed by the Australian Law Reform Commission in its 1983 Report on *Privacy*. The principles are:

- principles governing the *granting* of powers of intrusion; and
- principles governing the *exercise* of powers of intrusion.

The submission recommended that all existing and future legislation should be assessed against the OFPC principles. The Office remains of the view that these principles provide a sound basis for the consideration of privacy issues in the assessment of entry, search and seizure legislative provisions. The Office's previous submission is Attachment 1.

The Fourth Report

In summary, the Committee's Fourth Report in April 2000 recommended that statutory search and entry provisions should conform to certain principles (the Report principles), including those for the grant and exercise of search and entry powers. The Office supports the Report principles (noting also some consistency between them and the OFPC principles proposed in 1999) and the Committee's recommendations, especially wherever the handling of personal information is involved. In particular, the Office endorses the need for appropriate justification and proportionality in the grant of search and entry powers³.

The Government's Response

In August 2003, the Australian Government published the *Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report: Entry and Search Provisions in Commonwealth Legislation* (the Response). In short, there was agreement with the majority of the Report's principles but, the Government noted, the complexity and range of regulatory and enforcement functions required a flexibility that is incompatible with some of the Report's principles and

¹ Section 6(1) of the Act defines personal information as "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion." A copy of the Act can be found on the Office's website at <http://www.privacy.gov.au/act/privacyact/index.html>.

² See p. 1 of the Act.

³ See paras 1.24 – 1.35 of the Fourth Report.

OFPC Submission

Inquiry into the Australian Government's response to the Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation

recommendations. There are sixteen recommendations in the Report. In this submission, further comment is made on two of those recommendations.

Recommendation 2 – the Office agrees with the Government's response. Broadly speaking, the exercise of intrusive powers which involves a reduction of individuals' privacy rights should not be the subject of administrative discretion alone. Except in cases of emergency or necessity, agencies should be required to obtain judicial authorisation for the exercise of specified powers related to entry and search⁴. Also, the Office agrees that the grant of entry and search powers to regulatory and revenue-collecting agencies should not exceed the powers available to the Australian Federal Police unless there are exceptional and critical circumstances.

Recommendation 3 – in the Office's view, ensuring public trust in the grant and exercise of intrusive powers requires the highest practicable degree of transparency. There are a number of transparency mechanisms which could usefully be adopted. These include:

- each agency maintaining a centralised record of its exercise of intrusive powers;
- agencies reporting on the grant and exercise of these powers to a Minister, under a model similar to that required of law enforcement agencies under the *Telecommunications (Interception) Act 1979*; or
- agencies reporting to the Parliament annually on effectiveness of these powers.

Entry and search provisions

In evaluating intrusive statutory powers, there needs to be an appropriate balance between adequate and effective investigative powers and the protection of personal information. In a rapidly changing environment a degree of flexibility in the grant and exercise of entry and search powers may be justified. At times, the public interest in ensuring that criminal activity is effectively investigated and prosecuted will permit elements of individual privacy to be set aside.

As one means of deciding between competing priorities in the present context, the Office commends to the Inquiry a basic framework against which these kinds of legislative measures can be assessed. Since 2002, the Office has developed and refined this framework for the purposes of assessing anti-terrorism and law enforcement initiatives. The framework is extracted from an OFPC Submission⁵ and is Attachment 2.

The Office notes that recent initiatives designed to enhance law enforcement powers in the interests of national security and inter-jurisdictional policing have emerged and are relevant to the deliberations of the Committee and its recommendations. These initiatives include the establishment of a Joint Working Group by the Standing Committee of Attorneys-General and the Australasian Police Ministers' Council in relation to National Investigative Powers. For instance, in November 2003 the Joint Working Group published its Report, which incorporated the *Surveillance Devices (Cross-Border Investigations) Model National Provisions*⁶. The impetus of these model provisions is to improve the inter-jurisdictional operation of certain law enforcement surveillance measures.

⁴ See OFPC Principle 5 in Attachment 1 below.

⁵ See the Office submission to the Senate Legal and Constitutional Committee Inquiry into *Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills* (April 2002) at <http://www.privacy.gov.au/publications/secleg.doc>. The most recent revision of the framework can be found in the OFPC submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment (Identification and Authentication) Bill 2003* (September 2003), which is available at <http://www.privacy.gov.au/publications/miqsub.doc>

⁶ The Report of the Joint Working Group is available at www.ag.gov.au under 'Publications'.

OFPC Submission

Inquiry into the Australian Government's response to the *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*

Generally, the Office has taken the following approach in commenting on such initiatives:

- to recommend that agencies' powers for specified purposes be prescribed in legislation or regulations that carefully articulate the limitations upon the use of those powers, particularly in respect of the purposes for which personal information can be used or further disclosed. The operation of an agency in the exercise of such powers is supported and enhanced if it is required to develop operational guidelines and protocols; and
- to emphasise the need for independent and effective oversight and accountability mechanisms to ensure the protection of personal information.

These considerations are relevant to the grant and exercise of entry and search powers.

Developments in intrusive powers – the incidental collection of third party information

A further development is the increase in the powers of agencies to seize materials. One example in the telecommunications field is the proposed interception of 'stored communications' without the need to obtain a telecommunications interception warrant. This is intended to facilitate the seizure of emails, SMS messages, voicemail and other technological forms of communication that have been described as 'stored communications'.

The Office recently made a submission to the *Senate Legal and Constitutional Legislation Committee Inquiry into the Telecommunications (Interception) Amendment (Stored Communications) Bill 2004*. The Office submitted that the Bill appeared to involve a reduction in personal privacy for communications⁷.

The seizure of electronic forms of communications involves the incidental collection and storage of personal information about third parties. In many cases, third party personal information may be irrelevant to the investigative purpose of the seizure or interception. The Information Privacy Principles (IPPs) in s.14 of the Privacy Act apply to information about individuals handled by most Commonwealth agencies, including the Australian Federal Police, but the IPPs do not include a requirement to destroy data that is not relevant to an agency's functions or activities.

This is in contrast, for example, to the National Privacy Principles (NPPs) that apply to the private sector. In general terms, NPP 4.2 requires that an organisation must take reasonable steps to destroy or permanently de-identify personal information that is no longer needed. In the absence of a protection principle around data retention in the IPPs, information about third parties may be retained indefinitely by an agency, even if that information is not needed by the agency.

The Office considers that legislation granting agencies power to seize materials should contain a requirement that incidentally collected third party personal information be destroyed by the agency as soon as practicable or when operational necessities permit.

Conclusion

The availability of powers to enter and search premises and to seize materials is an essential tool for government agencies performing law enforcement, national security and other regulatory functions. Appropriate regard should be given, however, to the extent to which the privacy of individuals is diminished in the grant and exercise of these powers.

The Office continues to support the giving of due weight and consideration to matters of justification, proportionality, necessity and accountability in the grant and exercise of search and entry powers.

⁷ The submission is available on the Office website at <http://www.privacy.gov.au/publications/senTIAsub.doc>.

ATTACHMENT 1



Privacy Commissioner

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Review of the fairness, purpose, effectiveness and consistency of entry provisions in Commonwealth legislation authorising persons to enter and search premises

SUBMISSION

March 1999

1. Introduction

I am pleased to have the opportunity to make this submission to the Senate Standing Committee for the Scrutiny of Bills.

Under the Privacy Act 1988, I carry out a number of functions. These functions primarily relate to the areas of direct jurisdiction under the *Privacy Act 1988*: the handling of personal information by Commonwealth and ACT government agencies; and the rights of the individual to access and correction in relation to his/her own personal information. The Act applies to the wider community (including the private sector and state and local governments) only in relation to specific categories of information: tax file number information and consumer credit information.

My interest in the present inquiry stems from the fact that under section 27(1)(o) of the Privacy Act, I am given a more general function, 'to do anything incidental or conducive to the performance of any of the preceding functions'. This is generally taken to cover the promotion and protection of broader principles of privacy and in particular the privacy rights of individuals. However, the only direct area of jurisdiction involved would arise if and where the power to enter and/or search is accompanied by a power to seize documents, which contain the personal information of identifiable individuals.

A large number of Commonwealth Acts confer powers to enter and search property. The conferral and exercise of such powers always represents a significant incursion into the individual's right to privacy. In some circumstances, the public interest is best served by allowing some elements of privacy rights to be set aside. However, this should always be done in a manner that is consistent and fair and only where necessary and to the extent necessary to achieve that purpose.

This submission proposes a number of principles that should be followed by Parliament when conferring such powers and by Commonwealth officers when exercising them. It then examines the broad areas of Commonwealth legislation where such powers are conferred and exercised and measures them against these principles.

2. Fundamental Principles

In its 1983 report, *Privacy*⁸ the Australian Law Reform Commission (ALRC) examined a number of international principles relevant to Privacy. A number of these have particular relevance to the grant and exercise of powers of search and entry.

Principal among these is, of course, Article 17 of the International Covenant on Civil and Political Rights (ICCPR):

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.

Consideration of Article 17 led the Organisation of Economic Cooperation and Development (OECD) to convene an Expert Group to draw up guidelines on the basic rules to be observed for the protection of privacy in transborder data flows. This group was chaired by an Australian, the Hon. Justice Michael

⁸ ALRC, Report No. 22, *Privacy*, AGPS, Canberra, 1983; see esp. Vol.II, pp.32-36;

Kirby, AC CMG, now of the High Court of Australia. The OECD Guidelines were published in 1981 and adopted by Australia in 1984. The ICCPR and the OECD Guidelines are both acknowledged in the Preamble to the *Privacy Act 1988* and partially form the basis for the Commonwealth's jurisdiction to legislate in this area, under the External Affairs power contained in s. 51(xxix) of the Constitution.⁹

The ALRC distilled a number of basic principles relevant to the grant and exercise of the powers of search and entry that underlie the various international instruments, overseas laws and principles discussed in its Report. Despite the passage of time, it is my view that these principles still serve as a useful basis for the proper granting and exercise of such powers. The relevant principles are:

PRINCIPLES GOVERNING THE GRANTING OF POWERS OF INTRUSION

1. A power of intrusion (ie. a power to arrest a person, to search a person or a place or to enter private premises) should not be granted as a matter of course. There should be a clear weighing up of the need to interfere with privacy against the social value of the policy to be achieved by conferring the power.
2. A power of intrusion should be conferred expressly, not by implication.
3. A power of intrusion should be conferred by an Act, not by subordinate legislation.
4. The grounds on which a power of intrusion may be exercised should be stated expressly and in objective terms.
5. Authority to exercise a power should normally be dependent on special judicial authorisation (a warrant). Exceptions may be made to this, where necessary, for 'barrier' powers (for example, customs) and cases of emergency.

PRINCIPLES GOVERNING THE EXERCISE OF POWERS OF INTRUSION

The ALRC included here material concerning powers of arrest and powers of search of the person. These are not relevant to the present inquiry and are not reproduced.

Powers of entry and search of premises (including vehicles)

6. A person should not exercise power to search premises (including vehicles and other property) except:
 - a. with the consent of the owner or occupier of the premises or property;
 - b. to prevent the loss, concealment or destruction of evidence relating to an offence; or
 - c. in accordance with law.
7. Reasonable notice should be given of intention to exercise a power of entry, unless to do so would defeat the purpose of the exercise of the power.
8. A power of entry onto premises should only be exercised at a reasonable time.
9. A person should not use any more force than is necessary in effecting an entry onto premises under a power of entry.
15. Where a person has taken possession of any goods, papers or documents, he should permit, so far as is practicable, the person otherwise entitled to possession of them to use them.

The ALRC also made the following statement:

⁹ see Greg Tucker, *Information Privacy Law in Australia*, Melbourne, 1992, Chapters 1 and 4;

Of necessity, these principles are expressed in general terms. Nevertheless, they form a basis for the protection of privacy where powers of arrest, search, entry or seizure are conferred on or exercised by Commonwealth ... officials. They should be adopted as the basis for the consideration of privacy issues so far as Commonwealth ... legislation and administrative practices within the Commonwealth administration... are concerned.

I strongly reiterate this statement. The only principle that needs some clarification is Principle 15 c). Where an exercise 'in accordance with law' is mentioned, it is important to make clear that this refers to express authorisation by statute in order to effect a necessary legislative purpose, as indicated in Principles 1 to 5. I believe that the principles should be read together.

3. Existing legislative provisions

Over 300 legislative provisions (Acts and Regulations) conferring powers to enter and search property were revealed by a search of the Australasian Legal Information Institute (AUSTLII) web-site¹⁰, using the key words 'enter premises' and 'access to premises' to search the 'Commonwealth: All Legislation' databases. While this search elicited a large number of statutes and regulations, it should not be seen as exhaustive. It is highly likely that the statute book contains other provisions granting powers of search and entry.

These provisions encompass a wide range of areas, from the *Australian Meat and Live-Stock Industry Act 1997* to the *International War Crimes Tribunals Act 1995*. The provisions have been grouped into the following categories:¹¹

- i. Revenue Collection
- ii. Revenue Disbursement
- iii. Conservation and Environment
- iv. Social Benefit or Welfare
- v. Public Health and Safety
- vi. Occupational and Commercial
- vii. Law Enforcement
- viii. Defence and National Security
- ix. Miscellaneous

Each category will be dealt with in turn, with the general features of the provisions within each category being discussed in terms of the principles outlined above and their fairness, purpose, effectiveness and consistency. As well, there will be more detailed discussion of provisions that are of particular concern or interest. It should be noted that, as in the ALRC report, a number of provisions appear in more than one category.

*Revenue Collection*¹²

The powers in this area are in general exercisable by officers within the taxation and customs administrations. The safeguards attaching to the exercise of the powers vary significantly. The optimal position in my view, and that which most frequently obtains, is the requirement that entry be with the consent of the occupier or pursuant to a warrant issued by a magistrate or a Justice of the Peace, with provision for the magistrate or Justice to set conditions regarding the exercise of the warrant. This is

¹⁰ <http://www.austlii.edu.au>;

¹¹ These categories are based on those used in ALRC, *ibid.* See in particular, Vol. I, pp. 74-84. While the categories remain useful, the legislative provisions within them have of course changed and expanded.

¹² The Acts and Regulations contained in this category are set out at Appendix A;

the case in almost all of the Acts. However, in several cases,¹³ such safeguards are absent. These provisions, almost always conferring powers on officers of the Australian Tax Office, authorised by the Commissioner of Taxation, are similar in form and substance to the following section, Section 263 of the *Income Tax Assessment Act 1936*, which is reproduced as an example:

- 1) The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
- 2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
- 3) The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

Penalty for a contravention of this subsection: \$1,000.

Such provisions concern me, in that they do not contain a similar level of privacy protection as those requiring consent or a warrant. The protection of public revenue is vitally important to the national polity and civic life. So too, however, is the protection of the individual's right to privacy.

The Joint Committee on Public Accounts, in its Report on the Australian Taxation Office¹⁴ (ATO), recommended changes to these provisions. Recommendation 103 was:

Section 263 of the Income tax Assessment Act 1936 be amended to require that the Australian Taxation Office show just cause before being granted a warrant by an appropriate judicial official to access or enter the private property of a tax payer without permission.

The Committee expressed a view that the ATO should not be given greater powers than any other enforcement body (eg. see 'Law Enforcement', below). The Committee indicated that 'just cause' could be shown by evidence of reasonable attempts by the ATO to gain information voluntarily from the taxpayer.¹⁵ The then Privacy Commissioner supported this view, in his response to the Report. He also put this position in his Annual Report of 1994:

The recommendation limiting the circumstances in which ATO officers can enter premises without the consent of the occupier is also strongly supported.¹⁶

¹³ *Child Support Act 1988*, s.61; *Excise Act 1901-1973*, s.87; *Fringe Benefits Tax Assessment Act 1986*, s.127; *Income Tax Assessment Act 1936*, s.263; *Meat Chicken Levy Collection Act 1969*, s.9; *Petroleum Resource Rent Tax Assessment Act 1987*, s.107; *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, s.38; *Sales Tax Assessment Act 1992*, s.109; *Termination Payments Tax (Assessment and Collection) Act 1997*, s.26;

¹⁴ Parliament of the Commonwealth of Australia, Joint Committee of Public Accounts, Report 326 *An Assessment of Tax*, 1994;

¹⁵ *ibid.*;

¹⁶ Privacy Commissioner, *Sixth Annual Report on the Operation of the Privacy Act: for the period 1 July 1993 to 30 June 1994*, AGPS, Canberra, 1994, p. 19;

While the then Government did not support the recommendation, such a measure would be a welcome strengthening of privacy protection and would enhance the consistency and fairness of Commonwealth law.

While not all Regulations dealing with access to property and revenue collection were examined, those that were¹⁷ all dealt with formal or incidental matters, rather than conferring powers. This is consistent with principle 3, above.

Revenue Disbursement¹⁸

Typically, these powers permit entry to registered premises or non-residential premises where there are stored articles in respect of which bounty has been or in the opinion of an authorised person, is likely to be claimed. The only explicit restriction on the exercise of such powers is that entry must occur at reasonable times.¹⁹ Some provisions specify that an authorised person may only enter with consent or, in certain circumstances related to the purpose of the Act, with a warrant issued by a Justice of the Peace. These provisions offer better privacy protection.²⁰

Conservation and Environment

Most of the provisions in this grouping appear to be consistent, fair and to offer adequate protection of privacy rights. The statutory powers make provision for entry not only to land and buildings but also to ships and boats²¹ and aircraft.²² Most of these powers of entry require consent or a warrant issued by a Justice of the Peace or a Magistrate.²³ Moreover, it is unlikely that issues of personal privacy would arise in this area unless documents containing personal information were to be seized.

Social Benefit or Welfare

Most of these provisions are unexceptional – they require consent or a warrant before entry. However, the *Aged Care Act 1997* contains a variation on this. Section 91.1 of that Act gives an 'authorised officer' power to enter premises with the occupier's consent to monitor compliance with the Act.²⁴ Under this provision the officer may enter an 'aged care service' (as defined) at any time and any other premises between 9 am and 5 pm on a business day. While consent is required²⁵, s. 91.1 (4) provides, *inter alia*, that:

Note: Approved providers have a responsibility under paragraph 63- 1(1)(b) to co-operate with a person exercising powers under this Part and to comply with this Part in relation to the person's exercise of those powers.

An approved provider who: a) refuses to consent to the entry of an 'authorised officer;' or b) withdraws consent for an authorised officer to enter premises;

may not be complying with that responsibility. Failure to comply with a responsibility can result in a sanction being imposed under Part 4.4.

¹⁷ see Appendix A;

¹⁸ see Appendix B;

¹⁹ eg. *Bounty(Citric Acid) Act 1991*, s.19;

²⁰ eg. *Dairy Industry Assistance Act 1977*, s.15;

²¹ *Wildlife Protection (Regulation of Exports and Imports) Act 1991*, s.62;

²² *ibid.*;

²³ eg. *Environment Protection (Sea Dumping) Act 1981*, s.30;

²⁴ *Aged Care Act 1997*, s.91(1);

²⁵ *ibid.*, s.91(3);

This appears to have the effect of rendering a seemingly voluntary action compulsory. Given the objects of the Act, which include '(b) to promote a high quality of care and accommodation for the recipients of 'aged care services that meets the needs of individuals and (c) to protect the health and well-being of the recipients of aged care services',²⁶ there may be arguments justifying compulsory inspection of premises. For reasons of fairness, however, a more transparent process would be preferable.

Public Health and Safety

These powers are conferred for a variety of reasons, from monitoring air safety²⁷ to preventing medical fraud and overservicing.²⁸ Most of the provisions comply with the principles enunciated in Section Two, above, in that they require the consent of the occupier or a warrant prior to entry. Where this standard is not met, it is generally for well justified public interest reasons, to prevent imminent threats to life, health or safety.²⁹ Where particularly sensitive material is involved, for example medical records, suitable provisions apply.³⁰ My major concerns in this area would be with the fact that a number of Regulations actually grant powers of entry³¹. As outlined above, it is my strong belief that such powers should be conferred by statute, not regulation.

Occupational and Commercial

The provisions in this group are also concerned with a diverse range of matters. Powers of entry are exercisable for an equally diverse range of purposes, from the assessment and collection of levies,³² to monitoring compliance with workplace agreements.³³ Most of the provisions contain appropriate safeguards, with a requirement for consent or a warrant. A number draw a distinction between premises registered under legislative instruments and other premises, with a right of entry without consent to the former, provided the premises are not also a residence.³⁴ While this is a less effective protection of privacy, it is arguable that becoming registered is a form of implied consent, provided the possibility of inspection/monitoring etc. is made clear at the time of registration. However, in industries where registration is a pre-requisite to participation, this argument is more difficult to sustain. In addition, in at least one instance,³⁵ powers of entry are contained in Regulations, rather than the principal Act.

It should be noted that this is an area in which issues of personal privacy are unlikely to arise,³ unless items containing personal information are seized.

Law Enforcement

Most of the provisions listed in Appendix G are reasonable and necessary, requiring consent or a warrant for search and entry, except in emergency situations. However, a small number of provisions do not conform with this. Under sections 25 and 27 of the *Australian Security Intelligence Organization Act 1979*, warrants are issued, not by a Court, but by the Minister, on receipt of a request from the Director-General. While there are a number of limits and safe guards included in these provisions, the level of accountability and protection is lower than if the warrant were to be issued by a Court. Likewise, under section 27E of the *Financial Transaction Reports Act 1988*, it is the Director who 'may, by written notice to a cash dealer, a solicitor, a solicitor corporation or a partnership of solicitors, require the

²⁶ *ibid.*, s.1(b), (c);

²⁷ *Civil Aviation Act 1988*;

²⁸ *Health Insurance Commission Act 1973*;

²⁹ *eg. Road Transport Reform (Dangerous Goods) Act 1995*, ss. 18, 20, 32; *Space Activities Act*, s.99;

³⁰ *eg. Health Insurance Commission Act 1973*, s.s 8V, 8Y which set out specific limits, even under warrant, to access to clinical records. My office was extensively involved in the drafting of these provisions prior to their enactment.

³¹ *eg. 1990, No. 257 Navigation (Marine Casualty) Regulations – Regs 12, 26*;

³² *Apple and Pear Export Charge Collection Act 1976*, s.9;

³³ *Workplace Relations and Other Legislation Amendment Act 1996*, Schedule 14

³⁴ *eg. Offshore Minerals Act 1994*, ss. 377, 379;

³⁵ *Wool Marketing Regulations – Reg 23*;

dealer, solicitor, corporation or partnership to give the authorised officer named in the notice access on the day and during the hours stated in the notice to the business premises described in the notice of the dealer, solicitor, corporation or partnership.’³⁶ While certain limits and safeguards also apply here, it is a matter of some concern that no judicial oversight applies.

Defence and National Security

All of these provisions contain appropriate safeguards and appear consistent and fair.

Miscellaneous

The final category contains those statutory powers of entry which do not fall neatly within any other of the named groupings. Most provisions are reasonable and consistent. A small number of provisions, however, present reasons for concern.

Section 251 of the *Migration Act 1958* provides very broad powers of search and entry of vessels, with few, if any safeguards. While this may be justifiable, given the objects of the Act, it would appear preferable to include some judicial oversight of the process, except in cases of emergency, as is true under other statutory provisions.

There are some inconsistencies between provisions with similar objects, as well. For instance, section 14 of the *Ombudsman Act 1976* gives fairly broad powers of entry and search to the Ombudsman. Section 155 of the *Trade Practices Act 1974* gives similarly broad powers to the Australian Competition and Consumer Commission. However, section 68 of the *Privacy Act 1988* requires consent or a warrant before officers of my office can enter or search premises. There are no clear reasons for this inconsistency.

4. Conclusions

While most statutory provisions granting powers of search and entry appear to be fair and consistent, there are areas of concern. In some cases, the legislative objects of the Act in question do not clearly outweigh the violation of privacy rights involved. Provisions which grant very broad powers of entry to the Australian Tax Office, in particular, are of concern.

It is my submission that such existing provisions, along with all proposed new legislative provisions, should be examined using the criteria and principles set out in Section 2, above. In this way, the fairness, consistency, and effectiveness of such provisions and the privacy rights of all Australians would be greatly enhanced.

TIMOTHY PILGRIM
Acting Privacy Commissioner

³⁶ *Financial Transaction Reports Act 1988*, s. 27E(1) [inserted by *Financial Transaction Reports Amendment Act 1997*, sect 59];

ATTACHMENT 2

Essentially, the framework intends to bring about balance and perspective to considerations of legislative proposals with significant effects on privacy. It does so by leading us through seven key steps, including: defining the nature of the problem and the scope of possible responses to it; thinking about how new powers might be enacted; considering what the transparency, accountability and reporting requirements should be; and ensuring review of the mechanisms after a suitable period.

The Framework

Key step	Things to consider, including:
Identify the problem	<ul style="list-style-type: none"> ✓ Size & scope of the problem ✓ Likely longevity ✓ Implications in the Australian context
Identify the range of possible solutions	<ul style="list-style-type: none"> ✓ The range of responses open to us ✓ Resource implications of these options ✓ Efficacy issues – which option/s will work best and not unduly affect people's lives?
Think carefully and clearly about the proposed solution	<ul style="list-style-type: none"> ✓ What is the impact on privacy, and on whose privacy? ✓ Will the solution work and will it meet its target? ✓ What are the community's values here? ✓ Proportionality – is the measure proportional to the known risk?
What does the community think?	<ul style="list-style-type: none"> ✓ What consultation or debate has occurred? ✓ What does it tell us?
Implementing the new powers	<ul style="list-style-type: none"> ✓ Confer intrusive powers expressly in law (via an Act, not subordinate legislation) ✓ Legislation to state, expressly and objectively, the grounds on which the powers may be used ✓ Authority to exercise powers to rest at an appropriate level – to be expressly stated in legislation
Need to ensure transparency, accountability and reporting	<ul style="list-style-type: none"> ✓ Make sure the community is kept informed about use of the powers ✓ Ensure a transparent and independent complaints-handling system, monitoring system and the powers of independent audit ✓ Include an independent and public assessment and reporting process for the operation of the measures ✓ Ensure reporting and oversight powers are commensurate with the intrusiveness of the measures ✓ Preferably spell out these arrangements in legislation, especially where the new powers are particularly intrusive
Review processes	<ul style="list-style-type: none"> ✓ Parliamentary review of the measures after a fixed period – identify operational successes, as well as unintended or undesirable consequences ✓ Modify or remove powers as needed ✓ Include a 'sunset clause' – it is wise to pause and think again.

The latter two steps (outlined in the table above), reflect a vital process in ensuring that what we aim for in constructing anti-terrorism measures is just what we deliver. Not only this, but individuals have a reasonable right of complaint and should have available the option of redress by an independent body. The community expects to be told about how the use of these measures is progressing with regard to their effects upon the use of personal information.¹ These steps, supplemented by the assurance that necessary monitoring and auditing maintains an effective and proportional overview of the measures, go far in maintaining community confidence that potentially intrusive actions are minimised, justified, exercised accountably and that they are reviewed.

Finally, building in a review of the measures helps guard against 'function creep' at a later date or the otherwise unnecessary retention of powers that risk losing their necessity as circumstances change. Two practical ways of achieving this outcome are to build into the legislation a trigger for parliamentary review, perhaps involving an assessment and report to that review by an independent body, or alternatively (and arguably more effectively) to insert a 'sunset clause' into the legislation. The latter step means that the law will lapse, so the parliament must look again at the circumstances and consider anew whether that which influenced the measures in the past, remains a consideration in the present. If so, further legislation would need to be passed.

¹ OFPC Research 'Privacy and the Community' (Approx. 90% of those surveyed wanted to know what information about them was being collected and for what purposes it was being used.) The research is available at: www.privacy.gov.au/publications/rcommunity.html