



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2000

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
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

THIRD REPORT OF 2000

The Committee presents its Third Report of 2000 to the Senate.

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

Sydney Harbour Federation Trust Bill 1999

Telecommunications (Interception) Amendment Act 1999

Sydney Harbour Federation Trust Bill 1999

Introduction

The Committee dealt with this bill in *Alert Digest No 1 of 2000*, in which it made various comments. The Minister for the Environment and Heritage has responded to those comments in a letter dated 17 March 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2000

This bill was introduced into the Senate on 8 December 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to establish the Sydney Harbour Federal Trust for a period of ten years to:

- ensure the management of Trust land contributes to preserving the amenity of the Sydney Harbour region;
- conserve the environmental and heritage values of Trust land, and establish suitable land as park;
- maximise public access to Trust land; and
- cooperate with other Commonwealth, New South Wales and local government bodies.

Delegation to 'a person'

Clauses 48 and 72

Clause 72 of this bill gives the Sydney Harbour Federation Trust the power to delegate all or any of its functions and powers to, among others, a person employed by the Trust under clause 48. Clause 48 authorises the Trust to employ "any person who it considers necessary for the performance of its functions and the exercise of its powers".

Since its establishment, the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of ‘a person’. Generally the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated.

For example, in its *Seventh Report of 1985*, the Committee expressed its concern about a provision in the *Australian Sports Commission Bill 1985* which permitted the proposed Commission to delegate any of its powers under the Act (other than the power of delegation) to “a person” or to “a committee”. The then Minister for Sport, Recreation and Tourism responded to these concerns by proposing an amendment to clarify delegations to “a committee”, but the power to delegate to “a person” was left unamended.

In its *Eighth Report of 1985*, the Committee drew attention to a provision in the Australian Federal Police Amendment Bill 1985 which enabled the Commissioner to delegate all or any of his powers under the Principal Act (other than the power of delegation) to another member of the Australian Federal Police or a member of the Public Service support staff. The then Special Minister of State responded by observing that to specify appropriate ranks or levels of delegation “would not have the inherent flexibility presently available”. However, the Committee reaffirmed its concern with such clauses in the following terms:

The routine inclusion of such clauses by those responsible for the drafting of legislation would appear to result from an unwillingness on the part of Departments and authorities to determine in advance which powers should not be capable of delegation at all, which should only be capable of being delegated to senior officers and which may be appropriate for general delegation.

The Committee concedes that the level at which a delegated power is to be exercised is “a matter for judgement in each case” but suggests that this judgement would be more appropriately made by the legislature in conferring the power rather than by the executive after the power has been conferred.

As noted above, this bill authorises the delegation of all or any of the Trust’s functions and powers to any employee. The functions of the Trust include holding, rehabilitating, developing, enhancing and managing land; developing draft land management plans; undertaking community consultation on land management; and promoting appreciation of land. The powers exercisable by the Trust include the power to acquire, hold and dispose of land and other property; the power to undertake inter-governmental negotiations; the power to enter into contracts, agreements and partnerships; the power to form or participate in companies and joint ventures; and the power to borrow or otherwise raise money.

Some of the functions and powers that may be delegated by the Trust are of considerable significance. Given the breadth of the power of employment in clause 48, it is arguable that the power of delegation under clause 72 should not be as broad as it currently is. The Committee, therefore, **seeks the Minister's advice** as to why the power of delegation under clause 72 of this bill should not be limited in some way.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights and liberties unduly dependent on insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I note that the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'.

Clause 72 of the Bill provides that the Trust may delegate to its Executive Director, or an SES employee of my Department, or an employee of the Trust. Under Clause 48, the Trust may employ any person whom it considers necessary for the performance of its functions and the exercise of its powers.

As stated in the Explanatory Memorandum, such power of delegation is considered prudent for efficient operation of the Trust. I would expect that the Trust, like any body with the power of delegation, would use its power of delegation judiciously and according to its own policy guidelines. As delegation is restricted to employees, I believe it is more restrictive than some other pieces of legislation.

I appreciate that, in view of the Committee's similar concerns with the Australian Federal Police Amendment Bill 1985, you may consider that the level at which a delegated power is to be exercised should be specified in the legislation. I hold a view similar to the then Special Minister of State that to specify appropriate levels of delegation would be inflexible, especially in a government business enterprise like the Trust whose structure is undetermined (employees are not public servants) and which is not likely to employ large numbers of people.

More importantly in the context of your concerns, I do not believe that this power of delegation is as significant as you appear to believe because the Trust is essentially constrained, by Clause 7(d), to acting within the confines of the management plans. In this regard, I would draw your attention to Part 5 of the Bill and Clause 28 which specifies the content of management plans.

The management plans which the Trust is required to develop, in consultation with the community, for all land vested in it, are subject to my approval and are required to identify how the land will be used and managed. A delegated employee of the Trust would not be able to act contrary to the management plans any more than the Trust itself.

In respect of the sale of land, I would draw your attention to Clause 24 which provides for my approval of any transfer of freehold interest.

I hope that this will allay the concerns of the Committee.

The Committee thanks the Minister for this response.

Telecommunications (Interception) Amendment Act 1999

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 14 of 1999*, in which it made various comments. The Attorney-General responded to those comments in a letter dated 18 October 1999.

In its *Seventeenth Report of 1999*, the Committee sought further advice from the Attorney-General regarding interception powers. The Attorney-General has responded in a letter dated 15 March 2000. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 11 November 1999) the response from the Attorney-General may, nevertheless, be of interest to Senators. An extract from the *Seventeenth Report of 1999* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 14 of 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Telecommunications (Interception) Act 1979* and the *Telecommunications (Interception) and Listening Device Amendment Act 1997* to permit the Anti-Corruption Commission of Western Australia (ACC) and the Queensland Crime Commission (QCC) to:

- receive intercepted information originally obtained by another agency where that information appears to relate to conduct that the ACC or QCC may investigate;
- use intercepted information for an investigation it is undertaking in relation to its functions;
- obtain warrants to intercept information, provided the Attorney-General first issues a declaration under section 34 of the Interception Act; and
- permit the Minister to continue to nominate specified members of the AAT to issue interception warrants for law enforcement.

General comment

This bill proposes to further increase the number of agencies entitled to receive and use information gained from the interception of telecommunications.

The core provision of the *Telecommunications (Interception) Act 1979* is section 7. This section prohibits the interception of communications passing over a telecommunications system. The balance of the Act as originally passed set out certain specified exceptions to this provision in “special circumstances”. These exceptions were intended to achieve the objects of the bill, which was introduced as part of a legislative package to reform the powers of ASIO, and to facilitate the investigation of narcotics offences (see Senate, *Hansard*, 8 March 1979, pp 646-649).

The Act has since been amended to widen the number of exceptions to section 7, and to increase the range of “special circumstances”. For example, in 1992 there were four exceptions in the balance of section 7. By 1998, these exceptions had grown to eight.

In *Alert Digest No 7 of 1997*, this Committee considered the Telecommunications (Interception) and Listening Devices Amendment Bill 1997. In discussing that bill, the Committee expressed its concern at the proposed extension to the Police Integrity Commission of access to the telecommunications interception powers. The Committee observed that that bill was “again an extension of an intrusive power and, as such, a fresh example of legislative creep”.

This bill now seeks to extend access to the telecommunications interception powers to the Anti-Corruption Commission of Western Australia and the Queensland Crime Commission. It is yet another “fresh example of legislative creep”.

While conscious of the need to adequately investigate “corruption by public officials, paedophilia and organised crime”, which is the explanation for the latest extensions, and while remaining conscious of the safeguards contained elsewhere in the Act, the Committee **seeks the Attorney-General’s advice** as to the reasons for the continuous weakening of the prohibition contained in section 7 of the Principal Act, and the continuous extension of access to the Act’s exceptional powers.

Pending the Attorney’s advice, the Committee draws Senators’ attention to these provisions, as they 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 Attorney-General dated 18 October 1999

The Committee is concerned that conferring eligible authority status on the Western Australian Anti-Corruption Commission (ACC) and the Queensland Crime Commission (QCC) might be an extension of an intrusive power by legislative creep. I do not believe this is the case.

The QCC was established under the *Crime Commission Act 1997* (QLD). It has a responsibility to investigate criminal paedophilia and major and organised crime. The proposed amendments to the *Telecommunications (Interception) Act 1979* (the Act) dealing with the QCC will not permit any wider use of telecommunications interception than is currently possible. The Bill merely takes into account the decision of the Queensland Parliament to transfer responsibilities for investigating organised and major crime from the Queensland Criminal Justice Commission (CJC) to the QCC. In performing its statutory functions, in relation to organised and major crime, the QCC will not have any powers under the Act which were not available to the CJC for the same purpose. The amendments also support the use of telecommunications interception for the investigation of criminal paedophilia. The QCC's investigations in this area are special circumstances which warrant an exception from the provisions in section 7 of the Act.

The ACC is established by the *Anti-Corruption Commission Act 1988* (WA). The ACC's role includes the receiving of or initiating allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers. The matters which the ACC investigate are of a serious nature and require the best tools of investigation. I consider that enabling the ACC to receive intercepted material and, if declared, to undertake interception in its own right, is an exception to section 7 of the Act which constitutes the special circumstances envisaged when the Act was originally passed.

Experience has shown that covert surveillance is one of the most powerful investigative tools for uncovering and prosecuting crime. In the 1997/98 Telecommunications (Interception) Act's Annual Report, the following results were reported:

- 625 arrests on the basis of information that was or included lawfully obtained information;
- 451 prosecutions on the basis of lawfully obtained information;
- 329 convictions on the basis of lawfully obtained information;
- 4 prosecutions on the basis of lawfully obtained information by eligible authorities of a State; and
- 2 convictions on the basis of lawfully obtained information by eligible authorities of a State.

The Committee thanks the Attorney-General for this response which addresses most of its concerns. However, it is not clear whether the Queensland Criminal Justice Commission is to retain any interception powers under this bill in addition to those interception powers to be conferred on the Queensland Crime Commission. The Committee **would appreciate the Attorney's further advice** on this issue.

Relevant extract from the response from the Attorney-General dated 15 March 2000

The Committee is concerned about whether the Bill removes the Queensland Criminal Justice Commission's (CJC) eligible authority status. This is not the case. The CJC retains eligible authority status under the *Telecommunications (Interception) Act 1979*.

The decision of the Queensland Parliament to transfer responsibilities for investigating organised and major crime from the CJC to the Queensland Crime Commission, does not affect the CJC's primary function to investigate incidence of official misconduct within units of Queensland's public administration and to investigate misconduct or official misconduct and criminal activities on the part of members of the Queensland Police Service.

The Committee thanks the Attorney-General for this response.

Barney Cooney
Chairman



RECEIVED

22 MAR 2000

Senate Standing C'ttee
for the Scrutiny of Bills

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

17 MAR 2000

Dear Senator 

I refer to a letter dated 17 February 2000 from your Committee's Secretary and the concerns raised in the Committee's Alert Digest No. 1 of 2000 regarding powers of delegation in the Sydney Harbour Federation Trust Bill 1999 (the Bill).

I note that the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'.

Clause 72 of the Bill provides that the Trust may delegate to its Executive Director, or an SES employee of my Department, or an employee of the Trust. Under Clause 48, the Trust may employ any person whom it considers necessary for the performance of its functions and the exercise of its powers.

As stated in the Explanatory Memorandum, such power of delegation is considered prudent for efficient operation of the Trust. I would expect that the Trust, like any body with the power of delegation, would use its power of delegation judiciously and according to its own policy guidelines. As delegation is restricted to employees, I believe it is more restrictive than some other pieces of legislation.

I appreciate that, in view of the Committee's similar concerns with the Australian Federal Police Amendment Bill 1985, you may consider that the level at which a delegated power is to be exercised should be specified in the legislation. I hold a view similar to the then Special Minister of State that to specify appropriate levels of delegation would be inflexible, especially in a government business enterprise like the Trust whose structure is undetermined (employees are not public servants) and which is not likely to employ large numbers of people.

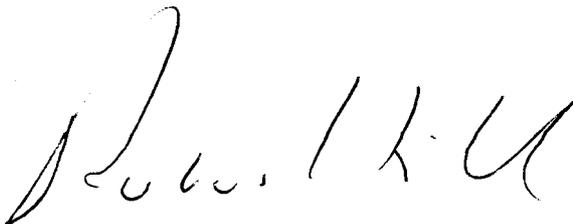
More importantly in the context of your concerns, I do not believe that this power of delegation is as significant as you appear to believe because the Trust is essentially constrained, by Clause 7(d), to acting within the confines of the management plans. In this regard, I would draw your attention to Part 5 of the Bill and Clause 28 which specifies the content of management plans.

The management plans which the Trust is required to develop, in consultation with the community, for all land vested in it, are subject to my approval and are required to identify how the land will be used and managed. A delegated employee of the Trust would not be able to act contrary to the management plans any more than the Trust itself.

In respect of the sale of land, I would draw your attention to Clause 24 which provides for my approval of any transfer of freehold interest.

I hope that this will allay the concerns of the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robert Hill', written in a cursive style.

Robert Hill

The Hon Daryl Williams AM QC MP



RECEIVED

16 MAR 2000

Attorney-General
Senate Standing Committee
for the Scrutiny of Bills

ISL 99/7826

15 MAR 2000

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the question raised in the Senate Standing Committee for the Scrutiny of Bills Seventeenth Report concerning the *Telecommunications (Interception) Amendment Bill 1999* (the Bill).

The Committee is concerned about whether the Bill removes the Queensland Criminal Justice Commission's (CJC) eligible authority status. This is not the case. The CJC retains eligible authority status under the *Telecommunications (Interception) Act 1979*.

The decision of the Queensland Parliament to transfer responsibilities for investigating organised and major crime from the CJC to the Queensland Crime Commission, does not affect the CJC's primary function to investigate incidence of official misconduct within units of Queensland's public administration and to investigate misconduct or official misconduct and criminal activities on the part of members of the Queensland Police Service.

Yours sincerely

A handwritten signature in cursive script that reads 'Daryl Williams'.

DARYL WILLIAMS