SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2004

11 February 2004

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

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

FIRST REPORT OF 2004

The Committee presents its First Report of 2004 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:

ASIO Legislation Amendment Act 2003

Australian Protective Service Amendment Act 2003

Aviation Transport Security Bill 2003

Building and Construction Industry Improvement Bill 2003

Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Bill 2003

Migration Legislation Amendment (Identification and Authentication) Bill 2003

ASIO Legislation Amendment Act 2003

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 16 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 30 January 2004.

Although this bill has been passed by both Houses (and received Royal Assent on 17 December 2003) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 16 of 2003

[Introduced into the House of Representatives on 27 November 2003. Portfolio: Attorney-General]

The bill amends the *Australian Security Intelligence Organisation Act 1979* to strengthen ASIO's information-gathering powers by:

- extending the questioning time under a warrant when interpreters are used;
- preventing unauthorised overseas travel by persons specified in warrants;
- clarifying the powers of the prescribed authority to give directions consistent with questioning warrants; and
- prohibiting, except in specified circumstances, disclosures about investigations or sensitive operational information.

The bill also amends the *Intelligence Services Act 2001* to ensure that the Parliamentary Joint Committee on ASIO, ASIS and DSD reviews these amended provisions rather than the original provisions enacted by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*.

Strict liability
Proposed new subsection 34VAA(3)

Proposed new subsection 34VAA(3) of the *Australian Security Intelligence Organisation Act 1979*, to be inserted by item 10 in Part 4 of Schedule 1 to this bill, would impose on the subject of a warrant issued under section 34D of that Act, and a legal representative of such a subject, strict liability for the offence of disclosing operational information concerning that warrant.

An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held to be legally liable for their conduct irrespective of their moral responsibility. A person charged with a strict liability offence has recourse to a defence of mistake of fact. Where an offence is expressed to be one of absolute liability, then this defence is unavailable.

The Committee will draw the Senate's attention to provisions which create such offences and has expressed the view that, where a bill creates such an offence, the reasons for its imposition should be set out in the Explanatory Memorandum.

Unfortunately, the Explanatory Memorandum does not explain the reasons for imposing strict criminal liability in this instance, and fails to indicate clearly the difference between strict criminal liability and other forms of liability. Paragraph 33 of the Explanatory Memorandum reads:

For disclosures by subjects of a warrant or their lawyers who are covered by the subsection, the prosecution will still need to prove that a person intended to disclose information and that the person was reckless in relation to the other elements of the offence.

Paragraph 34 then states:

For disclosures by other persons who are not covered by this subsection, the prosecution would need to prove that a person intended to disclose information and that the person was reckless in relation to the other elements of the offence.

The Committee **seeks the Attorney-General's advice** as to why it was thought necessary to impose strict criminal liability in this instance, and what effect this has on those charged with an offence under proposed new section 34VAA.

Pending the Attorney-General's advice, 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 Attorney-General

The Committee noted the strict liability provision in proposed new subsection 34VAA(3) and sought my advice as to why it was thought necessary to impose strict liability, and what the effect will be, in this instance.

The purpose of proposed subsection 34VAA is to create secrecy offences to protect the effectiveness of intelligence gathering operations in relation to terrorism offences. The offences are designed to meet the objective of terrorism investigations not being compromised. The Government proposed these offences only after serious consideration and in response to genuine concerns about the integrity and effectiveness of the new regime.

There are two offences. The first will operate while a warrant is in force, and will prevent a person from disclosing information without authorisation where the information relates to the warrant, the questioning or detention of a person under the warrant, or operational information. It is clear that disclosure of this kind of information while a warrant is in force could have significant implications for the integrity of the questioning process under the warrant, and it could compromise related investigations.

The second offence will operate for two years after a warrant ceases to be in force, and will prevent a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. This offence is designed to protect ASIO's sources and holdings of intelligence and its methods of operations. It is necessary to protect against the disclosure of this kind of information after a warrant ceases to be in force, because of the potential to seriously affect ongoing or related investigations.

Strict liability does not apply to all elements of the offences, nor does it apply in all situations. It only applies to one element (the content or nature of the information) and only in relation to persons who are the subject of a warrant and their lawyers.

The Government's objective is to ensure that ASIO's new questioning and detention regime, as authorised by Parliament in June 2003, is effective. The concern is to protect information associated with the questioning and detention warrant process. Clearly, persons who are subject to a warrant, and their lawyers, are closer to that process than other people in the community. They may be directly exposed to a range of potentially sensitive information in the context of questioning, which means that a disclosure of information may have graver consequences in terms of damage to Australia's security interests. In addition, such persons will be left in no doubt

about their obligations not to disclose relevant information without permission or authority and the serious implications of doing so.

Accordingly, in relation to these persons (warrant subjects and their lawyers), strict liability will apply to one element of the offences so that the prosecution will not need to strictly prove awareness in relation to the nature of the information disclosed (that it indicates information about a warrant or that it is operational information). This means that, while a warrant is in force, the prosecution will not need to prove in the first instance that these persons were aware that the disclosure indicated information about the warrant or the questioning of a person or operational information. The prosecution would still need to prove that the warrant subject or their lawyer intended to disclose the information and that they were reckless in relation to the other elements of the offence (in particular, that it was not a permitted disclosure). In the two years after the warrant has expired, the prohibition will be on the disclosure of ASIO operational information only.

For all other people, the prosecution's task will be harder, in relation to any disclosures while the warrant is in force, and in the two years after the warrant has ended. Strict liability will not apply to any element of the offences. The prosecution will need to prove that a person intended to disclose information and that the person was reckless in relation to all other elements of the offences. (This is a consequence of subsection 5.6(2) of the *Criminal Code Act 1995*.) A person would be reckless in relation to the nature of the information if:

- the person is aware of a substantial risk that the information indicates that a warrant has been issued or a fact relating to its content or to questioning or detention of a person in connection with it, or that it is operational information, and
- having regard to the circumstances known to the person, it is unjustifiable to take the risk.

The effect of the provisions is that a successful prosecution could not be brought against a person who discloses information in innocent circumstances and is not culpable for any deliberate or reckless disclosure.

The provisions also ensure a legitimate prosecution would not be frustrated by the need to establish proof of the person's intention in disclosing the information beyond reasonable doubt - that is, the prosecution would not need to prove beyond reasonable doubt exactly what was in the person's mind at the time with respect to the nature of the information. Making the offences more difficult to prove would significantly detract from their deterrent effect.

I note that the Bill was passed by the Senate on 5 December 2003, but I trust that this letter addresses the Committee's concerns.

The Committee thanks the Attorney-General for this detailed response.

Australian Protective Service Amendment Act 2003

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2003,* in which it made various comments. The Minister for Justice and Customs responded to those comments in a letter dated 9 September 2003. The Committee reported on the response in its *Ninth Report of 2003*.

In *Alert Digest No. 15 of 2003*, the Committee drew attention to amendments made in the House of Representatives in relation to reasonable excuse and protection from self-incrimination in criminal proceedings. The Minister for Justice and Customs has responded in a letter dated 29 January 2004.

Although this bill has been passed by both Houses (and received Royal Assent on 8 December 2003) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the Amendments section of the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Amendments section of Alert Digest No. 15 of 2003

Australian Protective Service Amendment Bill 2003
Reasonable excuse
Subclause 18A(4)

Subclause 18A(3) states that a person is not required to provide information where he or she has a reasonable excuse.

The House of Representatives amended the bill to remove subclause 18A(4) that permitted a person to establish as a reasonable excuse that he or she was participating in an industrial dispute, in a genuine demonstration or protest or an organised assembly. The Supplementary Explanatory Memorandum tabled in support of the amendments advises that the provision undermines the effectiveness of the legislation because a person who is a potential security threat could use such gatherings as cover and as such APS officers responsible for security should be able to ask a person for their name and evidence of their identity in order to proactively assess whether any potential security threat exists. The Committee accepts that there is a need to protect airports, diplomatic and consular premises, Defence establishments and other Commonwealth buildings but the removal of this provision would appear to weaken the safeguards available to people who legitimately take part in protests or industrial disputes. It is not apparent from subclause 18A(3) whether participation in such activities would be accepted as a reasonable excuse for not complying with the Act.

The Committee therefore **seeks the Minister's advice** on whether a person legitimately participating in an industrial dispute or a protest will now be required to provide personal information to an APS officer, and whether APS officers will be required to inform such people that they need not provide this information if they have a reasonable excuse.

Pending the Minister's advice, 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

The Committee seeks advice about the House of Representatives amendments to the Bill, which removed subclauses 18A(4) and 18A(5). The Bill received Royal Assent on 8 December 2003 and will commence on 5 January 2004.

Subclause 18A(4) would have provided for a reasonable excuse defence of participating in an industrial dispute, genuine demonstration, protest or organised assembly. The Committee notes the Explanatory Memorandum tabled in support of the amendments but says the removal of this provision appears to weaken the safeguards available to people who legitimately take part in such activities and that it is not apparent from subclause 18A(3) whether participation in such gatherings would be accepted as a reasonable excuse for not complying with the requirement to provide personal information. The Committee seeks advice on "whether a person legitimately participating in an industrial dispute or protest will now be required to provide personal information to an APS officer, and whether APS officers will be required to inform such people that they need not provide this information if they have a reasonable excuse".

The exercise of this power (and the other powers provided for in the Bill) by APS and AFP officers is limited to particular locations and circumstances. That is, they can only be exercised in locations where the APS can provide protective security and custodial functions, and where there are reasonable grounds to suspect that a person might have just committed, might be committing or might be about to commit an offence prescribed in section 13 of the *Australian Protective Service Act 1987*. The prescribed offences have been carefully selected and are limited to the security of persons and property. An officer cannot simply ask a person for their name because they are participating in a lawful protest. The officer must suspect on reasonable grounds that the person might have just committed, might be committing or might be about to commit a prescribed security offence.

The legislation also provides that the officer must inform the person of the officer's authority to make a request for personal information and also that it is an offence not to comply with such a request (subsection 18A(2)). There is no requirement to inform the person that he or she does not need to provide the information if the person has a reasonable excuse. This is consistent with other information gathering

powers in Commonwealth legislation. Once an officer makes a lawful request for this information, it is then up to the person to either provide, or to refuse to provide, the information.

Should the person refuse to provide the information, he or she may be charged with an offence, and it will be open to that person to raise the defence of "reasonable excuse". The High Court observed in *Taikato v The Queen* (1996) 186 CLR 454 at 464 that:

> "The term "reasonable excuse" has been used in many statutes and is subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception."

Accordingly, what constitutes a reasonable excuse will be considered on a case-by-case basis by the court.

The Committee thanks the Minister for this response.

Extract from Amendments section of Alert Digest No. 15 of 2003

Protection from self-incrimination in criminal proceedings
Subclause 18A(5)

The House of Representatives amended the bill to remove subclause 18A(5) that provides that information obtained by an APS officer cannot be used in criminal proceedings against the person who provided the information. The Supplementary Explanatory Memorandum advises that this provision goes further than merely ensuring that the common law privilege against self-incrimination is available. Although the omission of this provision does not affect the ability of a person to claim the common law privilege against self-incrimination, the Committee notes that such provisions are usual in legislation (eg. section 72V of the *Child Support (Registration and Collection) Act 1988*, section 47 of the *Transport Safety Investigation Act 2003* and section 129 of the *Veterans' Entitlements Act 1986*). The removal of this provision also raises the question of whether the information gathered by the APS officer and any information derived from it may be used in related proceedings. The Explanatory Memorandum to the bill does not provide any information on the use to which the information may be put or how long it will be kept. The Committee therefore **seeks the Minister's advice** on these matters.

Pending the Minister's advice, the Committee draws Senator's attention to the 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 Minister

The Committee is concerned that protection from self-incrimination provisions are included in a number of other Commonwealth Acts and that removal of subclause 18A(5) raises the question of whether the information gathered by officers and information derived from it may be used in related proceedings.

As the Committee notes, the removal of this subclause does not affect the ability of a person to claim the common law privilege against self-incrimination, which is available unless excluded by unmistakable language in a statute. It will be open to a person to claim the privilege rather than answer the questions asked by an officer under authority of section 18A. The Government believes the ability of a person to claim the privilege is a sufficient protection for that person in circumstances where the evidence might be used in criminal proceedings.

Information obtained under the questioning power will be used for the purposes of identifying persons who may pose a potential security risk. The information will be gathered in the course of an officer's duty and will be recorded, stored and retained in the same manner as other relevant information obtained by officers in the course of their duty. Consistent with Commonwealth legislation such as the *Archives Act 1983*, that information is kept indefinitely. The use of the information will be restricted by the secrecy provisions at section 60A of the *Australian Federal Police Act 1989* and section 70 of the *Crimes Act 1914*. Use of the information in any related proceedings would be limited by the normal rules of evidence. In all cases, information collected under this provision will be regulated by the *Privacy Act 1988*.

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this response.

Aviation Transport Security Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2003*, in which it made various comments. The Minister for Transport and Regional Services has responded to those comments in a letter dated 19 June 2003. 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. 5 of 2003

This bill was introduced into the House of Representatives on 27 March 2003 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

Introduced with the Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003, the bill proposes to:

- restructure the aviation security regulatory framework and provide for flexibility to respond to the changing threat environment;
- align Australian aviation security with the revised International Civil Aviation Organisation standards;
- introduce graduated penalties for a more equitable enforcement regime;
- respond to issues raised by the Auditor-General in a report by the ANAO;
- provide a separate piece of legislation that will allow for future amendments that may be extended to other transport sectors; and
- implement recent policy reviews and decisions made in response to the elevation of risk to aviation consequent to aviation terrorist attacks in the USA on September 11, 2001.

The bill also contains a regulation-making power and a saving provision.

Commencement on proclamation
Subclause 2(3)

By virtue of subclause 2(3) of this bill, clauses 3 to 133 are to commence on Proclamation, which may occur up to 12 months after Assent, after which they commence automatically. The Explanatory Memorandum puts forward as a reason for this deferred commencement that it will "allow time for numerous systems to be developed and put in place and it will allow for the completion of the drafting of the [necessary] regulations". The Committee notes that the 6 months referred to in Drafting Direction 2002, No. 2 is generally considered to be sufficient time for the drafting of any necessary regulations. The Committee therefore **seeks the Minister's advice** as to the reason for the extended time provided for in this bill.

Pending the Minister's advice, 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

The committee has noted that, by virtue of subclause 2(3) of the bill, clauses 3 to 133 may commence up to 12 months after Assent.

The Aviation Transport Security Bill 2003 introduces a number of changes to the security regulatory framework under which the aviation industry operates. For example, while the requirement to have a transport security program is not a new measure, the content and structure of the programs will need to be considerably reworked and updated under the new regulatory framework. Under the current regime there are some 64 airline and 39 airport programs, with scope in the Bill for other aviation industry participants to have aviation security programs, should that be appropriate. Development of these programs will require consultation between industry participants and my Department, which carries regulatory responsibility - with the Department being responsible for approval of each of these programs. Given the number and complexity of the programs involved, it is important that the timeframe for this process be adequate.

As well as the development of aviation security programs under the legislation, appropriate compliance and enforcement regimes need to be developed. This will entail consultation with industry, the development of properly documented procedures for systems based auditing, as recommended by the Auditor General in his report No. 26 of 2002-03 - *Aviation Security in Australia*, and the training of Aviation Security Inspectors to audit aviation security programs.

The Bill provides for a 12-month timeframe to allow for the necessary workload to be completed and to give industry confidence that appropriate compliance and enforcement measures have been developed. This timeframe will avoid the need for unnecessary transitional measures which, as the Committee would appreciate, would only serve to further complicate an already complex task.

The Committee thanks the Minister for this response.

Inappropriate delegation of legislative power
No provision for parliamentary scrutiny
Clause 67

Clause 67 empowers the Secretary of the Department to give "special security directions", requiring additional security measures to be taken. Clauses 73 and 74 then create offences, of strict liability, of failing to comply with such a direction. In light of the fact that the bill does not appear to subject the exercise of the Secretary's powers to any form of Parliamentary oversight, the Committee considers that these provisions may inappropriately delegate the power to create criminal offences to a member of the Australian Public Service. The Committee therefore **seeks the Minister's advice** as to whether the exercise of the power under clause 67 should not be subject to Parliamentary scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference; and 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 Minister

The Committee has noted that Clause 67 empowers the Secretary to give special security directions requiring additional security measures to be taken.

Maintenance of a secure aviation environment is a matter of public safety. The existence of a mechanism to develop a swift and often confidential response to a

threat assessment or incident is essential. Under the Aviation Transport Security Bill 2003, the special security direction (SSD) serves as this mechanism. This will replace a similar power, the Additional Security Measures (ASM) power, which was introduced in 1995 as section 22ZV of the Air Navigation Act 1920.

The Auditor-General's report No. 26 of 2002-03 - *Aviation Security in Australia* found that the ASM is a suitable mechanism for responding rapidly and flexibly to particular aviation security threats (p31). The Auditor-General also noted that ASMs enabled my Department and the aviation industry to respond rapidly and specifically to the heightened threat environment following the events of 11 September 2001 (p. 32). For example, DoTaRS had issued the first set of ASMs to airports and airlines by 9:00am on 12 September, 2001.

In recognition of the nature of the SSD power, the Bill builds in a number of safeguards that do not constrain the current ASM power. Clause 70 of the Bill creates a 'sunset' for an SSD. Subclause (5) requires the revocation of an SSD when the specific threat to which it is responding no longer exists, while subclause (6) provides that an SSD ceases to be in force when it has been in force for a continuous period of 3 months. Clause 71 provides that, on consultation, the SSD may be extended for a further 3 months, permitting an SSD to be in force for a maximum of 6 months. However clause 72 provides that the SSD, or a similar SSD, may not be made for 6 months after the original direction ceases to be in force. This has the effect of imposing a definite limit on the time in which an SSD can be operative. This approach has the support of industry.

I consider this mechanism to be a reasonable balance between providing the Government with a means to respond rapidly, appropriately, and confidentially where necessary to a specific threat to aviation security, while ensuring that any long term change to the regulatory regime governing aviation security in Australia will be subject to parliamentary and public scrutiny through the normal regulatory process.

Thank you for giving me the opportunity to address the Committee's concerns.

The Committee thanks the Minister for this response which notes that the Secretary's discretion to determine special additional security measures will allow for a quick response to imminent threats to aviation safety. Notwithstanding this, the Committee continues to have concerns where criminal offences can be created by officials without reference to the Parliament. Ultimately, this is an issue best left for resolution by the Senate.

For this reason, the Committee continues to draw Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Building and Construction Industry Improvement Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2003*, in which it made various comments. The Minister for Employment and Workplace Relations has responded to those comments in a letter received on 12 January 2004. 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. 15 of 2003

[Introduced into the House of Representatives on 6 November 2003. Portfolio: Employment and Workplace Relations]

Introduced with the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2003, the bill establishes a new regime for the management of workplace relations matters in the building and construction industry. The bill:

- establishes the Australian Building and Construction Commissioner (ABC Commissioner) and the Federal Safety Commissioner;
- improves the current bargaining framework;
- makes all industrial action within constitutional limits, other than protected industrial action, unlawful;
- strengthens freedom of association provisions;
- enhances and clarifies the right of entry system and enhances the accountability requirements of registered organisations; and
- improves the compliance regime.

The bill also contains a regulation-making power.

Reversal of the onus of proof
Clause 170

Clause 170 would reverse the usual onus of proof requiring a person or building association whose conduct is in question to prove that they did not carry out the conduct for a particular reason or with a particular intent. The Committee usually comments adversely on a bill which places the onus of proof on an accused person to disprove one or more of the elements of the offence with which he or she is charged. In this case, a person may have to disprove such elements based on an *allegation* that the conduct was or is being carried out for a particular reason or with a particular intent. The Committee is concerned that this lessens the basic cause that can give rise to proceedings under clause 227 where it will be *presumed* that the conduct was or is being carried out for that reason or intent. The bill does not appear to provide for a reasonable defence in such instances. The Explanatory Memorandum correctly points out that the proceedings in which this onus would be reversed are civil proceedings, and not criminal ones. The relevant proceedings, however, are those referred to in clause 227, for the imposition of a civil penalty, which may be regarded as more similar to criminal proceedings than to civil ones. The Committee therefore **seeks the Minister's advice** as to the reason for this reversal of the onus of proof. The Committee also **seeks the Minister's advice** as to the reason for establishing that a person may have to disprove an allegation in proceedings under clause 227.

Pending the Minister's advice, 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

The Alerts Digest commented on clause 170 of the Bill which deals with freedom of association (FoA). The FoA provisions in the Bill provide that certain conduct cannot be engaged in for a prohibited reason eg. because a person is a union member.

The Committee noted the reversal of onus in clause 170 and expressed concern that the explanatory memorandum to the Bill does not provide an appropriate rationale for this reversal.

Clause 170 provides that where a person is alleged to have engaged in conduct for a prohibited reason which would contravene a FoA provision, that person is *presumed*

to have engaged in that conduct for a prohibited reason. The overall effect is to place the onus on the defendant to prove on the balance of probabilities that the conduct was not engaged in for a prohibited reason.

The rationale for clause 170 is that the reason or intention for a person's conduct will often be a matter solely within the knowledge of that person. Without the reversal of onus, it would often be extremely difficult for an applicant to establish that the conduct complained of was undertaken for a particular reason or intent. Removing this provision would severely limit many of the protections provided by the FoA provisions.

This provision reflects section 298V of the *Workplace Relations Act 1996* (WR Act), and equivalent provisions in the former *Industrial Relations Act 1988.* The NSW legislation also contains a similar provision.

Such provisions also exist in other legislation, in circumstances where knowledge of the relevant intention is peculiarly within the knowledge of the defendant; for example:

- section 130A of the *Copyright Act 1986* imposes a reverse onus on importers to show that an imported sound recording is "non-infringing material";

- section 118 of the *Environmental Protection Act 1986* (WA) was amended earlier this year to make company directors subject to a reverse onus - in circumstances where a corporation is convicted of an offence, a director is deemed to have committed the same offence unless they prove otherwise.

However, to limit the scope for it to operate unfairly, the reverse onus in clause 170 does not apply to interlocutory proceedings. This is to address difficulties which have arisen because in interlocutory proceedings, the applicant must only show on the *balance of convenience* that there is reasonable issue to be tried and the courts are generally unwilling to test competing evidence at this stage. The combination of these two factors can make the reverse onus difficult to discharge in interlocutory proceedings.

Clause 170 therefore strikes the appropriate balance between ensuring FoA protection and fairness for parties alleged to have breached the FoA provisions.

I hope this information addresses the Committee's concerns in relation to the operation of clause 170.

The Committee thanks the Minister for this response. The Committee considers it would have been helpful if this information had been included in the Explanatory Memorandum.

Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 2003,* in which it made various comments. The Minister for Agriculture, Fisheries and Conservation has responded to those comments in a letter dated 4 February 2004. 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. 16 of 2003

[Introduced into the Senate on 28 November 2003. Portfolio: Agriculture, Fisheries and Forestry]

The bill amends the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* to give effect to Australia's obligations under the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and to strengthen the ability of the Australian Fisheries Management Authority to deliver and enforce fisheries management in Commonwealth fisheries.

The bill also contains a saving provision.

Commencement by Proclamation
Subclause 2(1), item 2

By virtue of item 2 in the table to subclause 2(1) of this bill, the amendments proposed in Schedule 1 would commence on a single day to be fixed by Proclamation, with no limit set by the legislation within which the amendments must commence in any event.

The Committee is wary of provisions which enable legislation to commence on a date 'to be proclaimed' rather than on a determinable date. Where a bill (or part of a bill) is expressed to commence on proclamation, the date proclaimed should be no later than 6 months after the Parliament passes the relevant matter. Where the date of commencement is longer than 6 months, the Explanatory Memorandum should explain the reason for this.

In this case, the Explanatory Memorandum notes that the amendments will give effect to Australia's obligations as a party to an international agreement relating to the conservation and management of fisheries. Although it would be a good reason to delay commencement of Schedule 1 if that international agreement had not yet come into force, the Explanatory Memorandum also points out that the relevant agreement in this case "entered into force internationally … on 24 April 2003." There consequently does not appear to be any reason for delaying commencement of Schedule 1 beyond the accepted 6 months after Assent. The Committee **seeks the Minister's advice** as to whether there are any further reasons for delaying commencement of Schedule 1.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

As advised by a letter from Ms Janice Paull, Acting Secretary to the Standing Committee for the Scrutiny of Bills (the Committee) to my senior adviser, the Committee made a number of comments regarding the Fisheries Legislation Amendment (High Seas Fishing Activities and Other Measures) Bill 2003 (the Bill) in the Scrutiny of Bills Alert Digest No. 16 of 2003. This letter contains my responses to these comments, which I would appreciate being included in any report to the Senate.

Commencement by Proclamation, Subclause 2(1), item 2

Schedule 1 of the Bill provides for a number of amendments to the *Fisheries Administration Act 1991* (FAA) and the *Fisheries Management Act 1991* (FMA) to enable Australia to give effect in its domestic law to the obligations it would have as a Party to the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the Compliance Agreement).

Australia cannot take binding treaty action and formally deposit its Instrument of Acceptance to the Compliance Agreement with the Director-General of the Food and Agriculture Organisation of the United Nations until the Executive Council gives its approval for Australia to do so. Conversely, the legislation should not pre-empt a decision of the Executive Council by entering into force before a formal decision to take binding treaty action has been taken.

The amendments and repeals as set out in Schedule 1 of the Bill will not take effect, therefore, until a day set by Proclamation to ensure the legislation does not come into force before the Executive Council has considered Australia's acceptance of the Treaty. In the event that the Executive Council may not have completed its deliberations within 6 months of the Parliament passing the Bill, it was not considered appropriate for the legislation to commence on a determinable date or no later than 6 months after the passage of the Bill.

The Committee thanks the Minister for this response.

No review of decisions
Proposed new section 16B

Proposed new section 16B of the *Fisheries Management Act 1991*, to be inserted by item 13 of Schedule 1, would give the Australian Fisheries Management Authority a discretion to decide on the grant of a fishing concession for fishing activities on the high seas of an Australian-flagged boat. Although section 165 of the Act subjects various decisions of the Authority to merits review by the Administrative Appeals Tribunal, this bill does not amend section 165 to include decisions under proposed new section 16B among the list of reviewable decisions. The Committee consistently draws attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee therefore **seeks the Minister's advice** of the reasons for this omission.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The proposed section 16B of the FMA broadens the Australian Fisheries Management Authority's (AFMA) power to have discretion over the nomination of boats to a fishing permit or statutory fishing right. Section 16B is not an operative decision to grant a fishing permit or a statutory fishing right. It simply imposes a condition on the granting of fishing permits and statutory fishing rights under sections 31 and 32 of the FMA.

There is no circumstance under the proposed section 16B that an 'Australian-flagged boat' could be a foreign boat. An Australian-flagged boat under the FMA means a boat that: (a) is an Australian ship as defined in the *Shipping Registration Act 1981* (SRA); or (b) would be an Australian ship as defined in the SRA if it were a ship as defined in that Act. 'Australian ship' is defined by section 29 of the SRA as: (i) registered ships; and (ii) unregistered ships which are not registered anywhere else. Unregistered ships are defined in section 29 of the SRA as 'Australian-owned ships' referred to in section 13 of the SRA (that is, including 'fishing vessels'), and ships wholly owned by residents/nationals of Australia or ships operated solely by residents/nationals of Australia. The definition of 'Australian ship' for the purposes of 'Australian-flagged vessel' therefore does not include vessels registered in a foreign jurisdiction. In addition, section 17(1) of the SRA states that Australia cannot register a foreign registered ship.

Ultimately, this means that a foreign boat is excluded from section 16B. As the fishing concessions under the proposed section 16B of the FMA cannot be granted to foreign boats, AFMA has not been given the discretion to grant a foreign fishing permit under section 16B. Those applying for fishing permits or statutory fishing rights already have merits review available to them under section 165 of the FMA. So section 16B as currently drafted does not require a new merits review provision.

The Committee thanks the Minister for this response.

Search without warrant
Proposed new subsection 84(1AB)

Proposed new subsection 84(1AB) of the *Fisheries Management Act 1991*, to be inserted by item 10 of Schedule 2, would permit an officer of the Australian Fisheries Management Authority to stop and search a vehicle or aircraft, without a warrant and despite the refusal of consent to such a search by the person in charge of the vehicle or aircraft. Unfortunately, the Explanatory Memorandum does not indicate whether the Minister considered the terms of the Committee's Report on *Entry and Search Provisions in Commonwealth Legislation* before proposing this amendment. The Committee **seeks the Minister's advice** as to whether such was the case.

Pending the Minister's advice, 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

> The Committee also queried whether I considered the Committee's report on *Entry and Search Provisions in Commonwealth Legislation* in developing the Bill.
>
> The Government welcomed the Committee's report and recently tabled its response. Entry and search powers are a vital tool for ensuring the effective administration of government schemes, and compliance with the law. The Government also believes that it is equally important to frame such provisions to ensure that private rights are protected and that powers are exercised properly.
>
> The Government's policy on entry and search powers forms part of the Commonwealth's 'criminal law policy'. Guidelines setting out the policy as at mid-1999 formed part of the Attorney-General's Department's submission to the Committee during its inquiry that culminated in the Committee's report on entry and search powers. I am advised that these guidelines are currently being revised in light of the Committee's report. Indeed, the Committee's views have figured prominently in the development and evaluation of law enforcement powers over many years. It is via constant reference to these guidelines that the principles contained in the Committee's report impact upon the framing of new entry and search powers, including the new powers contained in the Bill.
>
> I hope this information is of assistance to the Committee's important work. Please do not hesitate to contact me if you have further queries in relation to the Bill.

The Committee thanks the Minister for this response.

Migration Legislation Amendment (Identification and Authentication) Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2003*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 10 February 2004. 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. 9 of 2003

[Introduced into the House of Representatives on 26 June 2003. Portfolio: Immigration and Multicultural and Indigenous Affairs]

The bill amends the *Migration Act 1958* to include a legislative framework for the collection of personal identifiers, such as fingerprints, photographs, measurements, recordings, signatures, iris scans, and other personal identifiers as prescribed in the regulations from non-citizens at key points in the immigration process.

The bill also includes provisions intended to protect non-citizens who are required to provide their personal identifiers, and prescribes general rules that must be followed when carrying out an identification test on a non-citizen, or accessing and disclosing information.

The bill was previously considered by the Committee in *Alert Digest No. 8 of 2003* in which it made no comment. After the publication of that *Digest*, the following issue has come to the Committee's attention.

Wide discretion
Items 13, 17, 20, 22, 24 and 28

The bill provides for the collection of 'personal identifiers' from non-citizens for the purposes of identifying persons entering Australia. A number of the proposed new sections set out, in general terms, situations in which a person may be required to supply such personal identifiers 'if prescribed circumstances exist'. The Committee is concerned about the breadth of the power to prescribe such circumstances.

According to the Explanatory Memorandum 'it is envisaged that the regulations prescribing the situations in which such persons must provide personal identifiers, and the types of identifiers required, will largely mirror the current situations in which proof of identity to determine lawful status is required in the migration context.' The Committee notes that, while it is envisaged that regulations will largely reflect current arrangements, the measures in the bill would permit extensive changes by way of regulation. While the bill places specific limits upon the types of identifiers which might be prescribed, there do not appear to be any constraints on the power to prescribe the circumstances in which identifiers must be supplied, nor any indication of the nature of the circumstances which might be prescribed.

The Committee recognises that regulations establishing 'prescribed circumstances' would be disallowable instruments and subject to the scrutiny of the Senate Regulations and Ordinances Committee. It is possible, however, that such a broad power might be used to implement policy measures which properly should be considered by the Parliament before implementation.

The Committee therefore **seeks the Minister's advice** as to the scope of the power to prescribe circumstances for these purposes, the nature of the circumstances which might be prescribed, and whether the bill should include measures to limit the circumstances which might be prescribed.

Pending the Minister's advice, the Committee draws Senators' attention to the 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 and may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee sought advice in relation to a number of matters concerning this Bill. Advice on these matters is attached to this letter. I trust that the attached comments will be of assistance to the Committee.

The Senate Standing Committee for the Scrutiny of Bills noted in its Alert Digest No. 9 of 2003 (pages 7-8):

"While the Bill places specific limits upon the types of identifiers which might be prescribed, there do not appear to be any constraints on the power to prescribe the circumstances in which identifiers must be supplied, nor any indication of the nature

of the circumstances which might be prescribed... The Committee therefore seeks the Minister's advice as to the scope of the power to prescribe circumstances for these purposes, the nature of the circumstances which might be prescribed, and whether the Bill should include measures to limit the circumstances which might be prescribed."

These concerns reflect those of the Senate Legal and Constitutional Legislation Committee, which tabled its report on the Bill on 18 September 2003.

Recommendation 1 of that report is of most relevance to the enquiry by the Senate Standing Committee for the Scrutiny of Bills. It recommends that "the Bill be amended to include the circumstances in which non-citizens must provide personal identifiers and the types of identifiers required".

In response to this recommendation, the Government proposes to amend the Bill to specify the types of personal identifiers that may be collected at the different stages in the migration process (for example, on visa application and visa grant, and on immigration clearance), and the circumstances in which they are to be provided (for example, the Bill provides for different identifiers to be collected at visa application stage depending on whether the application is for a protection visa or some other type of visa). This reflects the Government's current thinking on the possible use of identifiers. The power to make regulations prescribing additional identifiers which may be collected will be retained to provide a capacity to respond to changing technologies and research into the practical use of such technologies.

The Bill is currently due for debate in the Senate on Tuesday 10 February 2004.

The Committee thanks the Minister for this response, and for her intention to amend the bill accordingly.

Trish Crossin
Chair

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

RECEIVED
9 FEB 2004
Senate Standing C'ttee
for the Scrutiny of Bills

03/12738; MC03/237404

30 JAN 2004

Senator T Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to Janice Paull's letter of 4 December 2003 drawing my attention to the Committee's comments in the Scrutiny of Bills Alert Digest No. 16 of 2003 (3 December 2003) concerning the ASIO Legislation Amendment Bill 2003.

The Committee noted the strict liability provision in proposed new subsection 34VAA(3) and sought my advice as to why it was thought necessary to impose strict liability, and what the effect will be, in this instance.

The purpose of proposed subsection 34VAA is to create secrecy offences to protect the effectiveness of intelligence gathering operations in relation to terrorism offences. The offences are designed to meet the objective of terrorism investigations not being compromised. The Government proposed these offences only after serious consideration and in response to genuine concerns about the integrity and effectiveness of the new regime.

There are two offences. The first will operate while a warrant is in force, and will prevent a person from disclosing information without authorisation where the information relates to the warrant, the questioning or detention of a person under the warrant, or operational information. It is clear that disclosure of this kind of information while a warrant is in force could have significant implications for the integrity of the questioning process under the warrant, and it could compromise related investigations.

The second offence will operate for two years after a warrant ceases to be in force, and will prevent a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. This offence is designed to protect ASIO's sources and holdings of intelligence and its methods of operations. It is necessary to protect against the disclosure of this kind of information after a warrant ceases to be in force, because of the potential to seriously affect ongoing or related investigations.

Strict liability does not apply to all elements of the offences, nor does it apply in all situations. It only applies to one element (the content or nature of the information) and only in relation to persons who are the subject of a warrant and their lawyers.

The Government's objective is to ensure that ASIO's new questioning and detention regime, as authorised by Parliament in June 2003, is effective. The concern is to protect information associated with the questioning and detention warrant process. Clearly, persons who are subject to a warrant, and their lawyers, are closer to that process than other people in the community. They may be directly exposed to a range of potentially sensitive information in the context of questioning, which means that a disclosure of information may have graver consequences in terms of damage to Australia's security interests. In addition, such persons will be left in no doubt about their obligations not to disclose relevant information without permission or authority and the serious implications of doing so.

Accordingly, in relation to these persons (warrant subjects and their lawyers), strict liability will apply to one element of the offences so that the prosecution will not need to strictly prove awareness in relation to the nature of the information disclosed (that it indicates information about a warrant or that it is operational information). This means that, while a warrant is in force, the prosecution will not need to prove in the first instance that these persons were aware that the disclosure indicated information about the warrant or the questioning of a person or operational information. The prosecution would still need to prove that the warrant subject or their lawyer intended to disclose the information and that they were reckless in relation to the other elements of the offence (in particular, that it was not a permitted disclosure). In the two years after the warrant has expired, the prohibition will be on the disclosure of ASIO operational information only.

For all other people, the prosecution's task will be harder, in relation to any disclosures while the warrant is in force, and in the two years after the warrant has ended. Strict liability will not apply to any element of the offences. The prosecution will need to prove that a person intended to disclose information and that the person was reckless in relation to all other elements of the offences. (This is a consequence of subsection 5.6(2) of the *Criminal Code Act 1995*.) A person would be reckless in relation to the nature of the information if:

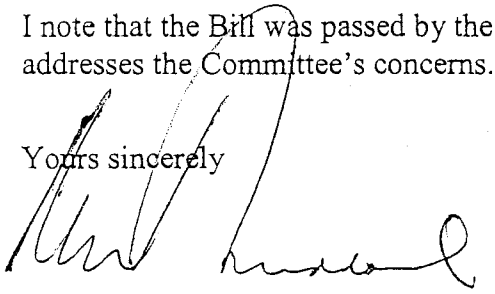
- the person is aware of a substantial risk that the information indicates that a warrant has been issued or a fact relating to its content or to questioning or detention of a person in connection with it, or that it is operational information, and
- having regard to the circumstances known to the person, it is unjustifiable to take the risk.

The effect of the provisions is that a successful prosecution could not be brought against a person who discloses information in innocent circumstances and is not culpable for any deliberate or reckless disclosure.

The provisions also ensure a legitimate prosecution would not be frustrated by the need to establish proof of the person's intention in disclosing the information beyond reasonable doubt – that is, the prosecution would not need to prove beyond reasonable doubt exactly what was in the person's mind at the time with respect to the nature of the information. Making the offences more difficult to prove would significantly detract from their deterrent effect.

I note that the Bill was passed by the Senate on 5 December 2003, but I trust that this letter addresses the Committee's concerns.

Yours sincerely



Philip Ruddock

SENATOR THE HON. CHRISTOPHER ELLISON
Minister for Justice and Customs
Senator for Western Australia

03/11981
03/237213

29 JAN 2004

Senator Trish Crossin
Chair
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin Trish,

I refer to the letter dated 27 November 2003 from the Acting Secretary of your Committee to my Senior Adviser about amendments made by the House of Representatives to the Australian Protective Service Amendment Bill 2003 (the Bill).

In its Scrutiny of Bills Alert Digest No 15 of 2003, the Committee seeks advice about the House of Representatives amendments to the Bill, which removed subclauses 18A(4) and 18A(5). The Bill received Royal Assent on 8 December 2003 and will commence on 5 January 2004.

Subclause 18A(4) - reasonable excuse

Subclause 18A(4) would have provided for a reasonable excuse defence of participating in an industrial dispute, genuine demonstration, protest or organised assembly. The Committee notes the Explanatory Memorandum tabled in support of the amendments but says the removal of this provision appears to weaken the safeguards available to people who legitimately take part in such activities and that it is not apparent from subclause 18A(3) whether participation in such gatherings would be accepted as a reasonable excuse for not complying with the requirement to provide personal information. The Committee seeks advice on "whether a person legitimately participating in an industrial dispute or protest will now be required to provide personal information to an APS officer, and whether APS officers will be required to inform such people that they need not provide this information if they have a reasonable excuse".

The exercise of this power (and the other powers provided for in the Bill) by APS and AFP officers is limited to particular locations and circumstances. That is, they can only be exercised in locations where the APS can provide protective security and custodial functions, and where there are reasonable grounds to suspect that a person might have just committed,

might be committing or might be about to commit an offence prescribed in section 13 of the *Australian Protective Service Act 1987*. The prescribed offences have been carefully selected and are limited to the security of persons and property. An officer cannot simply ask a person for their name because they are participating in a lawful protest. The officer must suspect on reasonable grounds that the person might have just committed, might be committing or might be about to commit a prescribed security offence.

The legislation also provides that the officer must inform the person of the officer's authority to make a request for personal information and also that it is an offence not to comply with such a request (subsection 18A(2)). There is no requirement to inform the person that he or she does not need to provide the information if the person has a reasonable excuse. This is consistent with other information gathering powers in Commonwealth legislation. Once an officer makes a lawful request for this information, it is then up to the person to either provide, or to refuse to provide, the information.

Should the person refuse to provide the information, he or she may be charged with an offence, and it will be open to that person to raise the defence of "reasonable excuse". The High Court observed in *Taikato v The Queen* (1996) 186 CLR 454 at 464 that:

> "The term "reasonable excuse" has been used in many statutes and is subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception."

Accordingly, what constitutes a reasonable excuse will be considered on a case-by-case basis by the court.

Subclause 18A(5) - protection from self-incrimination in criminal proceedings and use of the information obtained

The Committee is concerned that protection from self-incrimination provisions are included in a number of other Commonwealth Acts and that removal of subclause 18A(5) raises the question of whether the information gathered by officers and information derived from it may be used in related proceedings.

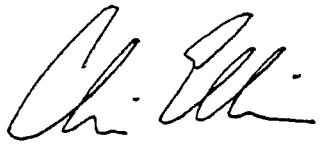
As the Committee notes, the removal of this subclause does not affect the ability of a person to claim the common law privilege against self-incrimination, which is available unless excluded by unmistakable language in a statute. It will be open to a person to claim the privilege rather than answer the questions asked by an officer under authority of section 18A. The Government believes the ability of a person to claim the privilege is a sufficient protection for that person in circumstances where the evidence might be used in criminal proceedings.

Information obtained under the questioning power will be used for the purposes of identifying persons who may pose a potential security risk. The information will be gathered in the course of an officer's duty and will be recorded, stored and retained in the same manner as other relevant information obtained by officers in the course of their duty. Consistent with Commonwealth legislation such as the *Archives Act 1983*, that information is kept indefinitely. The use of the information will be restricted by the secrecy provisions at section 60A of the *Australian Federal Police Act 1989* and section 70 of the *Crimes Act 1914*. Use of the information in any related proceedings would be limited by the normal rules of

evidence. In all cases, information collected under this provision will be regulated by the *Privacy Act 1988.*

I trust this information is of assistance to the Committee.

Yours sincerely



CHRIS ELLISON
Senator for Western Australia

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

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

19 JUN 2003

Dear Senator McLucas

I refer to the Alert Digest No 5 of 2003 of the Senate Standing Committee for the Scrutiny of Bills, and the subsequent letter from the Committee Secretary to my office concerning comments in the Digest on the Aviation Transport Security Bill 2003. I appreciate the opportunity to respond to the Committee's comments.

Commencement on Proclamation

The committee has noted that, by virtue of subclause 2(3) of the bill, clauses 3 to 133 may commence up to 12 months after Assent.

The Aviation Transport Security Bill 2003 introduces a number of changes to the security regulatory framework under which the aviation industry operates. For example, while the requirement to have a transport security program is not a new measure, the content and structure of the programs will need to be considerably reworked and updated under the new regulatory framework. Under the current regime there are some 64 airline and 39 airport programs, with scope in the Bill for other aviation industry participants to have aviation security programs, should that be appropriate. Development of these programs will require consultation between industry participants and my Department, which carries regulatory responsibility – with the Department being responsible for approval of each of these programs. Given the number and complexity of the programs involved, it is important that the timeframe for this process be adequate.

As well as the development of aviation security programs under the legislation, appropriate compliance and enforcement regimes need to be developed. This will entail consultation with industry, the development of properly documented procedures for systems based auditing, as recommended by the Auditor General in his report No. 26 of 2002-03 - *Aviation Security in Australia*, and the training of Aviation Security Inspectors to audit aviation security programs.

The Bill provides for a 12-month timeframe to allow for the necessary workload to be completed and to give industry confidence that appropriate compliance and enforcement measures have been developed. This timeframe will avoid the need for unnecessary transitional measures which, as the Committee would appreciate, would only serve to further complicate an already complex task.

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Special Security Directions

The Committee has noted that Clause 67 empowers the Secretary to give special security directions requiring additional security measures to be taken.

Maintenance of a secure aviation environment is a matter of public safety. The existence of a mechanism to develop a swift and often confidential response to a threat assessment or incident is essential. Under the Aviation Transport Security Bill 2003, the special security direction (SSD) serves as this mechanism. This will replace a similar power, the Additional Security Measures (ASM) power, which was introduced in 1995 as section 22ZV of the Air Navigation Act 1920.

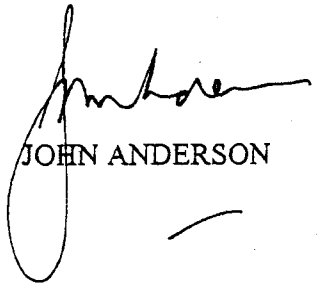
The Auditor-General's report No. 26 of 2002-03 – *Aviation Security in Australia* found that the ASM is a suitable mechanism for responding rapidly and flexibly to particular aviation security threats (p31). The Auditor-General also noted that ASMs enabled my Department and the aviation industry to respond rapidly and specifically to the heightened threat environment following the events of 11 September 2001 (p. 32). For example, DoTaRS had issued the first set of ASMs to airports and airlines by 9:00am on 12 September, 2001.

In recognition of the nature of the SSD power, the Bill builds in a number of safeguards that do not constrain the current ASM power. Clause 70 of the Bill creates a 'sunset' for an SSD. Subclause (5) requires the revocation of an SSD when the specific threat to which it is responding no longer exists, while subclause (6) provides that an SSD ceases to be in force when it has been in force for a continuous period of 3 months. Clause 71 provides that, on consultation, the SSD may be extended for a further 3 months, permitting an SSD to be in force for a maximum of 6 months. However clause 72 provides that the SSD, or a similar SSD, may not be made for 6 months after the original direction ceases to be in force. This has the effect of imposing a definite limit on the time in which an SSD can be operative. This approach has the support of industry.

I consider this mechanism to be a reasonable balance between providing the Government with a means to respond rapidly, appropriately, and confidentially where necessary to a specific threat to aviation security, while ensuring that any long term change to the regulatory regime governing aviation security in Australia will be subject to parliamentary and public scrutiny through the normal regulatory process.

Thank you for giving me the opportunity to address the Committee's concerns.

Yours sincerely



JOHN ANDERSON

The Hon Kevin Andrews MP

Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service

Senator Trish Crossin
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I am writing in response to your Committee's comments on the Building and Construction Industry Improvement Bill 2003 (the Bill), contained in the Scrutiny of Bills Alert Digest No. 15 of 2003 (26 November 2003).

The Alerts Digest commented on clause 170 of the Bill which deals with freedom of association (FoA). The FoA provisions in the Bill provide that certain conduct cannot be engaged in for a prohibited reason eg. because a person is a union member.

The Committee noted the reversal of onus in clause 170 and expressed concern that the explanatory memorandum to the Bill does not provide an appropriate rationale for this reversal.

Clause 170 provides that where a person is alleged to have engaged in conduct for a prohibited reason which would contravene a FoA provision, that person is *presumed* to have engaged in that conduct for a prohibited reason. The overall effect is to place the onus on the defendant to prove on the balance of probabilities that the conduct was not engaged in for a prohibited reason.

The rationale for clause 170 is that the reason or intention for a person's conduct will often be a matter solely within the knowledge of that person. Without the reversal of onus, it would often be extremely difficult for an applicant to establish that the conduct complained of was undertaken for a particular reason or intent. Removing this provision would severely limit many of the protections provided by the FoA provisions.

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This provision reflects section 298V of the *Workplace Relations Act 1996* (WR Act), and equivalent provisions in the former *Industrial Relations Act 1988*. The NSW legislation also contains a similar provision.

Such provisions also exist in other legislation, in circumstances where knowledge of the relevant intention is peculiarly within the knowledge of the defendant; for example:

- section 130A of the *Copyright Act 1986* imposes a reverse onus on importers to show that an imported sound recording is "non-infringing material";
- section 118 of the *Environmental Protection Act 1986* (WA) was amended earlier this year to make company directors subject to a reverse onus – in circumstances where a corporation is convicted of an offence, a director is deemed to have committed the same offence unless they prove otherwise.

However, to limit the scope for it to operate unfairly, the reverse onus in clause 170 does not apply to interlocutory proceedings. This is to address difficulties which have arisen because in interlocutory proceedings, the applicant must only show on the *balance of convenience* that there is reasonable issue to be tried and the courts are generally unwilling to test competing evidence at this stage. The combination of these two factors can make the reverse onus difficult to discharge in interlocutory proceedings.

Clause 170 therefore strikes the appropriate balance between ensuring FoA protection and fairness for parties alleged to have breached the FoA provisions.

I hope this information addresses the Committee's concerns in relation to the operation of clause 170.

Yours sincerely

KEVIN ANDREWS

Senator the Hon. Ian Macdonald
Parliament House Canberra ACT 2600 Ph: 02 6277 7270 Fax: 02 6273 7096
Minister for Fisheries, Forestry and Conservation

04 FEB

Senator T Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

As advised by a letter from Ms Janice Paull, Acting Secretary to the Standing Committee for the Scrutiny of Bills (the Committee) to my senior adviser, the Committee made a number of comments regarding the Fisheries Legislation Amendment (High Seas Fishing Activities and Other Measures) Bill 2003 (the Bill) in the Scrutiny of Bills Alert Digest No. 16 of 2003. This letter contains my responses to these comments, which I would appreciate being included in any report to the Senate.

Commencement by Proclamation, Subclause 2(1), item 2

Schedule 1 of the Bill provides for a number of amendments to the *Fisheries Administration Act 1991* (FAA) and the *Fisheries Management Act 1991* (FMA) to enable Australia to give effect in its domestic law to the obligations it would have as a Party to the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the Compliance Agreement).

Australia cannot take binding treaty action and formally deposit its Instrument of Acceptance to the Compliance Agreement with the Director-General of the Food and Agriculture Organisation of the United Nations until the Executive Council gives its approval for Australia to do so. Conversely, the legislation should not pre-empt a decision of the Executive Council by entering into force before a formal decision to take binding treaty action has been taken.

The amendments and repeals as set out in Schedule 1 of the Bill will not take effect, therefore, until a day set by Proclamation to ensure the legislation does not come into force before the Executive Council has considered Australia's acceptance of the Treaty. In the event that the Executive Council may not have completed its deliberations within 6 months of the Parliament passing the Bill, it was not considered appropriate for the legislation to commence on a determinable date or no later than 6 months after the passage of the Bill.

No review of decisions: proposed new section 16B

The proposed section 16B of the FMA broadens the Australian Fisheries Management Authority's (AFMA) power to have discretion over the nomination of boats to a fishing permit or statutory fishing right. Section 16B is not an operative decision to grant a fishing permit or a statutory fishing right. It simply imposes a condition on the granting of fishing permits and statutory fishing rights under sections 31 and 32 of the FMA.

There is no circumstance under the proposed section 16B that an 'Australian-flagged boat' could be a foreign boat. An Australian-flagged boat under the FMA means a boat that: (a) is an Australian ship as defined in the *Shipping Registration Act 1981* (SRA); or (b) would be an Australian ship as defined in the SRA if it were a ship as defined in that Act. 'Australian ship' is defined by section 29 of the SRA as: (i) registered ships; and (ii) unregistered ships which are not registered anywhere else. Unregistered ships are defined in section 29 of the SRA as 'Australian-owned ships' referred to in section 13 of the SRA (that is, including 'fishing vessels'), and ships wholly owned by residents/nationals of Australia or ships operated solely by residents/nationals of Australia. The definition of 'Australian ship' for the purposes of 'Australian-flagged vessel' therefore does not include vessels registered in a foreign jurisdiction. In addition, section 17(1) of the SRA states that Australia cannot register a foreign registered ship.

Ultimately, this means that a foreign boat is excluded from section 16B. As the fishing concessions under the proposed section 16B of the FMA cannot be granted to foreign boats, AFMA has not been given the discretion to grant a foreign fishing permit under section 16B. Those applying for fishing permits or statutory fishing rights already have merits review available to them under section 165 of the FMA. So section 16B as currently drafted does not require a new merits review provision.

Search without warrant, Proposed new subsection 84(1AB)

The Committee also queried whether I considered the Committee's report on *Entry and Search Provisions in Commonwealth Legislation* in developing the Bill.

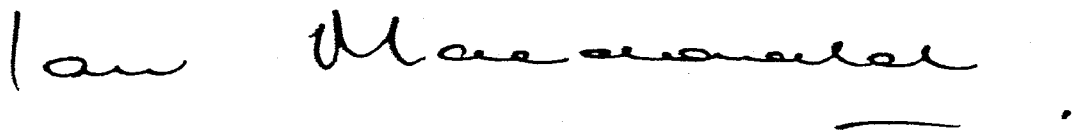
The Government welcomed the Committee's report and recently tabled its response. Entry and search powers are a vital tool for ensuring the effective administration of government schemes, and compliance with the law. The Government also believes that it is equally important to frame such provisions to ensure that private rights are protected and that powers are exercised properly.

The Government's policy on entry and search powers forms part of the Commonwealth's 'criminal law policy'. Guidelines setting out the policy as at mid-1999 formed part of the Attorney-General's Department's submission to the Committee during its inquiry that culminated in the Committee's report on entry and search powers. I am advised that these guidelines are currently being revised in light

of the Committee's report. Indeed, the Committee's views have figured prominently in the development and evaluation of law enforcement powers over many years. It is via constant reference to these guidelines that the principles contained in the Committee's report impact upon the framing of new entry and search powers, including the new powers contained in the Bill.

I hope this information is of assistance to the Committee's important work. Please do not hesitate to contact me if you have further queries in relation to the Bill.

Yours sincerely



Ian Macdonald

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Senator T Crossin
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Crossin~~ Trish

Thank you for the letter of 21 August 2003 from Mr Richard Pye, Secretary to the Committee, to the Senior Adviser of the then Minister for Immigration and Multicultural and Indigenous Affairs. This letter referred to comments in the Scrutiny of Bills Alert Digest No. 9 of 2003 (20 August 2003) concerning the *Migration Legislation Amendment (Identification and Authentication) Bill 2003*.

The Committee sought advice in relation to a number of matters concerning this Bill. Advice on these matters is attached to this letter. I trust that the attached comments will be of assistance to the Committee.

Thank you for bringing this matter to attention.

Yours sincerely

Amanda Vanstone

AMANDA VANSTONE

10/2/04

Migration Legislation Amendment (Identification and Authentication) Bill 2003

Comments by the Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills noted in its Alert Digest No. 9 of 2003 (pages 7-8):

"While the Bill places specific limits upon the types of identifiers which might be prescribed, there do not appear to be any constraints on the power to prescribe the circumstances in which identifiers must be supplied, nor any indication of the nature of the circumstances which might be prescribed... The Committee therefore seeks the Minister's advice as to the scope of the power to prescribe circumstances for these purposes, the nature of the circumstances which might be prescribed, and whether the Bill should include measures to limit the circumstances which might be prescribed."

These concerns reflect those of the Senate Legal and Constitutional Legislation Committee, which tabled its report on the Bill on 18 September 2003.

Recommendation 1 of that report is of most relevance to the enquiry by the Senate Standing Committee for the Scrutiny of Bills. It recommends that "the Bill be amended to include the circumstances in which non-citizens must provide personal identifiers and the types of identifiers required".

In response to this recommendation, the Government proposes to amend the Bill to specify the types of personal identifiers that may be collected at the different stages in the migration process (for example, on visa application and visa grant, and on immigration clearance), and the circumstances in which they are to be provided (for example, the Bill provides for different identifiers to be collected at visa application stage depending on whether the application is for a protection visa or some other type of visa). This reflects the Government's current thinking on the possible use of identifiers. The power to make regulations prescribing additional identifiers which may be collected will be retained to provide a capacity to respond to changing technologies and research into the practical use of such technologies.

The Bill is currently due for debate in the Senate on Tuesday 10 February 2004.