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Border Security Legislation Amendment Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 123 2001-02

Border Security Legislation Amendment Bill 2002

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Law and Bills Digest Group
29 April 2002

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Border Security Legislation Amendment Bill 2002

Date Introduced: 12 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The reader is referred to the Main Provisions section of this Digest.

Purpose

The major amendments proposed by this Bill:

- require employers of people who work in restricted areas of airports to provide information about those persons to the Australian Customs Service
- require goods that are in transit through Australia to be reported to the Australian Customs Service
- require certain airline and shipping operators to report passengers and crews to the Australian Customs Service and the Department of Immigration and Multicultural and Indigenous Affairs electronically
- require certain airlines to provide the Australian Customs Service with access to their computer systems, and
- allow the Australian Fisheries Management Authority to disclose vessel monitoring system data to the Australian Customs Service.

Background

The Bill is part of a package of counter-terrorism legislation introduced by the Howard Government on 12 March 2002. The other Bills in the package are the Security Legislation Amendment (Terrorism) Bill 2002 [No.2],¹ Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the Suppression of the Financing of Terrorism Bill 2002. Other components of the anti-terrorism package are the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* and the Australian Security Intelligence

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Organisation Legislation Amendment (Terrorism) Bill 2002 (the ASIO Bill).² The Government has also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate ‘an offence constituted by conduct involving an act or acts of terrorism’.³ The ASIO Bill has been referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for report by 3 May 2002. The other five Bills⁴ have been referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

Readers of this Digest are referred to the Digests that have been or will be produced for each of these Bills and to two Parliamentary Library Research Papers, [Terrorism in Australia: Legislation, Commentary and Constraints](#) and [Terrorism and the Law in Australia: Supporting Materials](#).

The two Research Papers contain a detailed treatment of issues associated with legislating to counter terrorism. One relevant theme struck in those papers is that in enacting specific anti-terrorism laws a cautious and considered approach must be taken. If there was a thesis in the *Terrorism and the Law in Australia* project it was that there are dangers in *underestimating* our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. The question of preparedness and the difficulty of balancing safety and liberty are considered in the *Legislation, Commentary and Constraints* Paper. Comparative approaches in the United Kingdom and United States are canvassed in the *Supporting Materials* Paper. In summary, the Paper observes that while precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

Also of note is the recent Leader’s Summit on Terrorism and Multi-Jurisdictional Crime. On 5 April 2002, the Prime Minister and State and Territory Leaders negotiated an Agreement on Terrorism and Multi-Jurisdictional Crime. In relation to terrorism, this included an agreement to:

... take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in legislation.⁵

At present, the details and implications of the Agreement are not clear.

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Main Provisions

Note: Where applicable, this Digest seeks to analyse each proposed amendment through the device of six questions, namely:

- (a) what, in plain English, is the effect of the existing laws which are sought to be amended?;
- (b) what, in plain English, is the legal effect of the proposed amendments?;
- (c) do the proposed amendments contain any major legal flaws?;
- (d) do the proposed amendments meet the Government's stated objective for the amendments⁶?;
- (e) what is the financial impact on passenger carriers/passengers of the proposed amendments; and
- (f) what, if any, are the privacy implications of the proposed amendments?

The reader should note that certain of the proposed amendments raise international privacy issues, particularly in relation to the effect of European Council Directive 95/46/EC. A background to these issues is contained in the *Concluding Comments* section of this Digest.

Schedule 1-Amendments Relating to Restricted Areas

Subsection 234AA(1) of the *Customs Act 1901* (the Customs Act) provides a Collector⁷, or person authorised by a Collector, at places used for:

- questioning passengers disembarking from or embarking on a ship or aircraft, or
- examining passenger luggage, or
- a holding place for such passengers,

with power to have signs displayed at or near such places identifying such places and stating that entry by an unauthorised person is prohibited. The above list of places is extended by **Item 1** of **Schedule 1** of the Bill to include a place specified in a **proposed subsection 234AA(3)** notice (see **item 3** below).

Subsection 234AA(2) provides a Collector or person authorised by a Collector, with power to have signs displayed at places used for questioning passengers, etc., stating that the use of cameras or sound recorders is prohibited. The later list of prohibited items is extended by **item 2** of **Schedule 1** of the Bill to include mobile phones or other electronic forms of communications.

New subsections 234AA(3) and **234AA(4)** are inserted in the Customs Act by **item 3** of **Schedule 1** and provide the Chief Executive Officer (CEO) with power to publish a notice in the Commonwealth *Gazette* specifying as an area to which section 234AA applies, an

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area of an airport appointed under section 15 of the Customs Act.⁸ **New subsection 234AA(4)** limits the areas that may be specified in a notice to one or more of the following areas:

- areas used, or frequented by, passenger who have arrived in Australia until they have passed through the last point at which they or their baggage are normally subject to processing by Australian Customs Service (ACS) officers;
- areas used, or frequented by, passengers who are about to depart Australia after they have passed through the first point at which they are normally subject to processing by ACS officers; or
- areas that are in the vicinity of areas referred to above.

The effect of **item 5** of **Schedule 1** is to increase the penalty from \$1000 to \$5500 for persons other than passengers disembarking from, or embarking on, a ship or aircraft:

- entering a place subject to a section 234AA notice; or
- entering on or being in or on a ship, aircraft, or wharf at which, or part of a wharf next to where, a ship is berthed;

when passenger baggage is being examined for the purposes of the Customs Act.

Paragraph 234AB(1)(a) of the Customs Act provides ACS officers with power to direct a person, including a passenger disembarking from, or embarking on, a ship or aircraft not to use a camera or use an appliance to record or transmit sound, at a place in relation to which a sign is displayed under subsection 234AA(2) (see above). The effect of amendment proposed by **item 8** of **Schedule 1** is to extend the power in paragraph 234AB(1)(a) to the use of mobile phones or other electronic forms of communication.

Subsection 234AB(4) provides that in any proceedings for the prosecution of a person for using a camera or sound recorders in a section 234AA place, evidence that a sign stating that the use of such devices is prohibited was displayed at or near that place is *prima facie* evidence that the sign was so displayed in accordance with the Customs Act.

Item 9 of **Schedule 1** of the Bill extends the effect of the subsection to signs prohibiting the use of mobile phones and other electronic forms of communications.

New section 234ABA is inserted in the Customs Act by **item 10** of **Schedule 1** of the Bill that provides ACS officers with power to direct a person to leave a section 234AA place if they reasonably believe that the person is in that place in breach of section 234A⁹ (ie. is not authorised to be there).

New section 234ABA also allows ACS and Australian Protective Service officers to use reasonable force to remove a person from a section 234AA place if the person refuses to

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leave when directed. The level of force which may be used, or the level of indignity a person is subject to, must not be more than is necessary or reasonable.

Comment:

The stated objective of the amendments proposed by **Schedule 1** given in the Government's *Explanatory Memorandum* to the Bill is "[T]he amendments contained in this Schedule recognise the role of Customs in contributing to border security and enhance the capacity of Customs officers to more effectively monitor and enforce security requirements at our borders."¹⁰

Based on the stated rationale and the effect of the proposed amendments, it can be said that the outcome sought by the Government from the amendments is likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- Where an airport or wharf is in private ownership, what compensation, if any, would be payable for the use of section 234AA areas?
- Proposed section 234ABA provides that the level of force which may be used, or the level of indignity a person is subjected to, where they are removed from a section 234AA place must not be more than is necessary or reasonable. What are the limits of indignity a person may be subjected to?

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

Schedule 2-Amendments relating to information about people working in restricted areas

New subdivision HA (proposed sections 213A and 213B), dealing with information about people working in restricted areas or issued with security identification cards, is inserted in the Customs Act by **item 1** of **Schedule 2** of the Bill. As noted in the Government's *Explanatory Memorandum* to the Bill:

... currently, not all employees of retail businesses located in places covered by a notice made under subsection 234AA(3) ("restricted areas"), within an international airport, are required to have an ASIC [Aviation Security Identification Card].

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The presence of these people in the “restricted area” can potentially pose a threat to the integrity and security of the border, depending on whether they are of good character. Such workers have previously been detected acting in concert with passengers to smuggle and import prohibited goods into Australia.¹¹

The principal effects of **new section 213A**, which relates to people working in restricted areas, are to:

- require a person who employs or engages a restricted area employee, within 7 days after doing so, to provide to an ACS officer the “required identity information” in respect of the employee
- defines “required identity information” to mean the name and address of the employee, the employee’s date and place of birth, and any other information prescribed by regulation, and
- make it an offence, punishable by a fine of 30 penalty units (\$3300), for an employer to fail to provide required identity information in respect of an employee within the required time frame.

Persons who work at international airports in Australia with access to restricted areas require a security clearance and wear an identification card called an Aviation Security Identification Card (ASIC). **New section 213B** establishes new information requirements in relation to such persons, the major ones being:

- the issuer of an ASIC to another person must within 7 days of doing so provide to an authorised officer the required identity information in respect of the person; and
- defines “required identify information” to mean the name and address of the employee, the employee’s date and place of birth, and any other information prescribed by regulation.

Comment:

The amendments proposed by **Schedule 2** of the Bill seek, as stated in the Government’s *Explanatory Memorandum* to the Bill, to negate a threat to the integrity and security of the border by persons without security clearance having access to restricted areas.¹² The example given is of certain employees of retail businesses.

Based on the stated rationale and the effect of the proposed amendments, it can be said that the outcome sought by the Government from the amendments is likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government’s *Explanatory Memorandum* does not appear to answer, including:

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- What will be the cost to employers of giving effect to the proposed amendments?
- Will any costs be passed on to consumers?
- While the Government has stated that the use of employee information will fully comply with the provisions of the *Privacy Act 1988* and the requirements of section 16 of the *Customs Administration Act 1985*¹³, has the Privacy Commissioner been consulted in relation to the proposed amendments and will employees be informed of what use and who will have access to the information?

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

Schedule 3-Amendment relating to the power of ACS officer to patrol

Section 193 of the Customs Act provides ACS officers and any person assisting them to patrol on and pass freely along and over any part of the coast or any railway or the shores, banks, or beaches of any port bay harbour lake or river.

Item 1 of Schedule 3 of the Bill extends section 193 to include any part of any airport that ACS officers and any person assisting them may patrol on.

Comment:

The amendment proposed by **Schedule 3** of the Bill extends the effect of section 193 of the Customs Act, relating to the power of ACS officers to patrol, to include any part of any airport that ACS officers and any person assisting them may patrol on. The rationale provided by the Government in the *Explanatory Memorandum* to the Bill for the extension of the patrol power is that the current provision is an original provision and was inserted before aircraft had been invented and the concept of an airport forming part of the border was not a consideration.¹⁴

Based on the stated rationale and the effect of the proposed amendments, it can be said that the outcome sought by the Government from the amendments is likely to be met. However, the scope of the proposed amendment does raise a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

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- What are the limits of the powers attaching to section 193 of the Customs Act?
- If damage is done to property or injury to individuals during a patrol, is compensation payable?
- Will it be ACS officers who will patrol airports, or contracted personnel?
- If contracted personnel perform such duties, will they have the same powers as an ACS officer and would the cost of such activities be passed on to the private owner of an airport?

Commencement:

On Royal Assent

Schedule 4-Amendments relating to goods in transit through Australia

Section 64AB of the Customs Act requires the reporting of cargo on board aircraft and ships entering Australia before they are unshipped. As noted in the Government's *Explanatory Memorandum* to the Bill, goods in transit through Australia (ie. goods not being unshipped) are currently not reported to the ACS under section 64AB of the Customs Act.¹⁵ It is the Government's stated belief that because the ACS has no information about goods in transit the effectiveness of border controls are thereby undermined.¹⁶

New paragraphs 64AB(3AA)-64AB(3AE) are inserted in the Customs Act by **item 3 of Schedule 4** of the Bill that will impose new cargo reporting requirements in respect of goods in transit.

The principal effect of **new paragraph 64AB(3AA)** is to require where a ship is due to arrive at its first port in Australia the master or owner of the ship to provide the ACS with a report on cargo on board that is intended to be kept on board for shipment on to a place outside Australia. The report must be provided not later than 48 hours before the ship arrives at an Australian port if its journey from the last port outside Australia is likely to take 48 hours or more. Where the journey from the last port outside Australia is likely to take less than 48 hours, the report must be provided not later than 24 hours before arrival. Similar provisions are imposed by **proposed paragraph 64AB(3AB)** in relation to aircraft. A breach of the proposed reporting requirements will constitute an offence punishable by a maximum fine of 60 penalty units (ie. \$6600).

Items 14 and 15 of Schedule 4 of the Bill define the term "**terrorist act**". The term is defined in **item 14** to mean an action or a threat of action where:

(a) the actions falls within subsection (4) (see below); and

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(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

but does not include:

(c) lawful advocacy, protest or dissent; or

(d) industrial action.

The proposed definition also states that it is immaterial whether the action or threat, or any part of the action or threat or anyone or anything affected by the action or threat, is within or outside Australia.

New subsection 183U(4), which is inserted in the Customs Act by **item 15**, specifies that an action falls within the definition of terrorist act if it:

- involves serious harm to a person
- involves serious damage to property
- endangers a person's life, other than the life of the person taking the action
- creates a serious risk to the health or safety of the public or a section of the public
- seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system
 - (ii) a telecommunications system
 - (iii) a financial system
 - (iv) a system used for the delivery of essential government services
 - (v) a system used for, or by, an essential public utility, or
 - (vi) a system used for, or by, a transport system.

Reference to any person, property, or the public above is taken to be a reference to any person or property wherever situated including the public of a country other than Australia.

Item 20 of **Schedule 4** of the Bill inserts a **new Subdivision DA (proposed section 203DA)** - into Division 1 of Part XII of the Customs Act dealing with the seizure of goods connected with the carrying out of a terrorist act, or which are likely to prejudice Australia's defence or security or international peace or security.

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Proposed subsection 203DA(1) specifies when a seizure warrant can be issued for goods in transit through Australia, namely: a judicial officer may issue a warrant to seize goods on or in particular premises where he or she is satisfied by information on oath that the Minister has reasonable grounds for suspecting that:

- the goods are, or within the next 72 hours will be, on or in the premises
- the goods are in transit through Australia, and
- the goods are connected with the carrying out of a terrorist act, or which are likely to prejudice Australia's defence or security or international peace or security.

A section 203DA warrant will have a maximum life of 7 days (**proposed subsection 203DA(3)**), however this limitation does not prevent the issue of successive warrants in relation to the same premises (**proposed subsection 203DA(5)**).

Proposed section 203DB specifies the things that are authorised by a **proposed section 203DA** seizure warrant, and include:

- to enter the warrant premises;
- search for the relevant goods;
- seize the goods; and
- seize other goods that the executing officer or person assisting them believes on reasonable grounds to be special forfeited goods (ie. prohibited imports and all prohibited exports put on any ship boat or aircraft for export or brought to any wharf or place for the purpose of export.¹⁷)

Item 25 of Schedule 4 of the Bill inserts a **new Subdivision GA (proposed sections 209B-209L)** into Division 1 of Part XII of the Customs Act. These proposed sections mirror sections within the Customs Act relating to how goods seized under a warrant must be dealt with. The proposed sections deal with such matters as to how seized goods are to be secured, the return of seized goods, compensation for certain goods disposed of or destroyed and the disposal of unsafe goods.

Comment:

As stated in the Government's *Explanatory Memorandum* to the Bill, goods in transit through Australia (ie. goods not being unshipped) are currently not reported to the ACS under section 64AB of the Customs Act.¹⁸ It is the Government's stated belief that because the ACS has no information about goods in transit the effectiveness of border controls are thereby undermined.¹⁹

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Based on this rationale and the effect of the proposed amendments, it can be said that the outcome sought by the Government from the amendments proposed by **Schedule 4** of the Bill is likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- Is the level of penalty for breaching the proposed reporting requirements appropriate?
- What will be the cost to business of the reporting scheme for goods in transit?
- Will any costs associated with the reporting scheme be passed on to consumers, or will the ACS compensate business for the additional costs?
- The proposed definition of “terrorist act” raises a number of legal issues that are not addressed in the Government’s *Explanatory Memorandum* to the Bill. For a discussion of the proposed definition of “terrorist act” the reader is referred to the Digest for the Security Legislation Amendment (Terrorism) Bill 2002 and Department of the Parliamentary Library Research Paper No.13 2001-02 - *Terrorism and The Law in Australia: Supporting Materials*²⁰.
- It is arguable that given that the consequences of terrorist acts are already criminal offences (eg. it is already an offence to build a bomb with the intention of killing someone) would it not be more practical to define the terms and make the proposed provisions operate where there is a reasonable belief that a criminal offence may be committed?
- Is there sufficient flexibility built into the reporting requirements to cater for the vagaries of electronic information systems?
- Does the ACS have the resources and expertise to ensure honest compliance?
- Has the Privacy Commissioner been consulted regarding the amendments?
- Might not the Government’s objective be more effectively met if the powers proposed by item 20 of the Bill were exercisable without a warrant?

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Schedule 5-Amendments relating to the reporting of mail

Division 3 of Part IV of the Customs Act contains provisions dealing with the reporting of cargo. Subdivision A of Division 3 specifies general reporting requirements for ships and aircraft due to arrive at an Australian port or airport.

Item 1 of Schedule 5 of the Bill inserts a **new definition** of “cargo” in the Customs Act that provides that cargo, in relation to a ship or aircraft, includes any mail carried on the ship or aircraft. As correctly noted in the Government’s *Explanatory Memorandum* to the Bill,²¹ the insertion of this definition will have the effect of making the reporting of mail subject to the reporting requirements of Division 3 of Part IV of the Customs Act. **Schedule 5** of the Bill also inserts a **new definition** of “mail” in the Customs Act (**item 2**). The term mail, in relation to a ship or aircraft, is defined to mean:

- any goods sent through the Post Office that are carried on the ship or aircraft; and
- any other correspondence carried on the ship or aircraft that is not sent as cargo and is not crew or passenger baggage.

Comment:

As stated in the Second Reading Speech to the Bill, the amendments proposed by **Schedule 5** relating to the electronic reporting of mail in relation to a ship or aircraft will address a perceived anomaly with the current provisions whereby international sea mail is electronically reported on arrival whilst this is not the case for any international mail carried by air.²²

Further, the Government contends in its *Explanatory Memorandum* to the Bill that the proposed amendments will clarify, for example, that mail has to be reported to the ACS as part of a cargo report and that the ACS has the power to ask questions and require documents to be produced in respect of mail.²³ It is the Government’s stated belief that because the ACS has no information about goods in transit the effectiveness of border controls are thereby undermined.²⁴

Based on this rationale and the effect of the proposed amendments, it can be said that the outcome sought by the Government from the amendments proposed by **Schedule 5** of the Bill is likely to be met. However, the scope of the proposed amendments raises a number of

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questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- What will be the cost, if any, to business of complying with the additional reporting requirement?
- If there is a cost to business of complying with the additional reporting requirements who will meet that cost?
- What, if any, are the privacy implications regarding the proposed amendments?

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent

Schedule 6-Amendments to the *Customs Act 1901* relating to the reporting of passengers and crew

The amendments proposed by Schedule 6 of the Bill provide for the ACS and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) to receive electronically information about air and sea passengers and crew travelling to Australia.

The submission of information about passengers and crew will have to be made by the operator of a ship or aircraft. The term **operator** is defined by **item 4** of **Schedule 6** of the Bill to mean:

- the shipping line or airline responsible for the operation of the ship or aircraft for the voyage or flight; or
- the master of the ship or the pilot of the aircraft

Sections 64AC and 64AD of the Customs Act deal with passenger and crew reports and communications with the ACS. Subsection 64AC(2A) requires the pilot or owner of an aircraft that is due to arrive at an airport in Australia to communicate to the ACS by document, not later than 3 hours after the arrival of the aircraft at the airport, or by computer, not later than the time of arrival of the aircraft at the airport, a report of the full names and date of birth of each crew member and the number of passengers who were or will be on board the aircraft at the time of its arrival at the airport. The penalty for non-compliance with subsection 64AC(2A) is a maximum fine of \$500. Similar provisions apply under subsection 64AC(2) in relation to ships arriving at a port in Australia.

Sections 64AC and 64AD of the Customs Act are repealed by **item 4** of **Schedule 6** and **new sections 64ACA-64ACE** inserted. **New section 64ACA** imposes a requirement on the operator of a ship or aircraft that is due to arrive in Australia to report to the ACS on the passengers who will be on board at the time of its arrival. Failure to so report will

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constitute an offence punishable by a maximum fine of 120 penalty units (\$13 200) where the breach is intentional, or a maximum fine of 60 penalty units (\$6 600) for an unintentional breach (**proposed section 64ACD**).

Proposed subsection 64ACA(2) requires certain operators of ships and aircraft to report on passengers by the approved electronic system. An electronic report will have to be given where:

- the ship is on a voyage for transporting persons that is provided for a fee payable by those using it, the operator is prescribed by the regulations and the CEO of the ACS has approved an electronic system for the operator; and
- the aircraft is on a flight that is provided as part of an airline service that is:
 - provided for a fee payable by those using it;
 - provide in accordance with fixed schedules to or from fixed terminals over specific routes;
 - available to the general public on a regular basis; and
 - the CEO of the ACS has approved an electronic system for the operator.

Where an approved electronic system is not working, or where a ship or aircraft does not fall within **proposed subsection 64ACA(2)**, the passenger report may be given by document (**proposed subsection 64ACA(4)**).

Proposed subsections 64ACA(5) and 64ACA(6) set time limits for when passenger reports must be made. For aircraft, the report must be given not later than:

- if the flight from the last airport outside Australia is likely to take not less than 3 hours–3 hours;
- if the flight from the last airport outside Australia is likely to take less than 3 hours–1 hour;

before the time stated as the estimated time of arrival.

Where a passenger report is given by document it must be in writing, be in an approved form, contain such information as is required by the form, be signed in a specified manner, and be communicated to the ACS by sending or giving to an ACS officer (**proposed subsection 64ACA(7)**)

Proposed subsection 64ACA(8) provides that where a report is given electronically it must communicate such information as is set out in an approved form. An approved form is defined by section 4A of the Customs Act to be a reference to a form that is approved, by instrument in writing, by the CEO of the ACS. Subsection 4A(2) of the Customs Act

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provides that the instrument by which a form or statement is approved is a disallowable instrument. Under the proposed amendments the CEO of the ACS is also given power to approve different forms for documentary reports and different statements for electronic reports by different kinds of operators of ships or aircraft (**proposed subsection 64ACA(9)**).

Proposed subsection 64ACA(11) imposes a requirement on the ACS to provide DIMIA, as soon as is practical, with information collected under **proposed section 64ACA**. However, if the operator of a ship or aircraft has already reported relevant information regarding passengers to DIMIA under section 245L of the *Migration Act 1958* then the operator is taken not to be required by **proposed section 64ACA** to report the same information.

New section 64ACB sets out requirements for the making of crew reports. **Proposed subsection 64ACB(1)** requires the operator of a ship or aircraft that is due to arrive in Australia to report to the ACS on the crew at the time of its arrival at the port or airport. Failure to so report will constitute an offence punishable by a maximum fine of 120 penalty units (\$13 200) where the breach is intentional, or a maximum fine of 60 penalty units (\$6 600) for an unintentional breach (**proposed section 64ACD**). Crew reports may be given by document or electronically (**proposed subsection 64ACB(2)**).

Proposed subsection 64ACB(3) provides that crew reports must be made during the period specified within which a report under section 64 of the Customs Act (impending arrival report) is required to be made²⁵. **Proposed subsection 64ACB(4)** specifies that crew reports are not be made before the date of departure of the aircraft from the last airport outside Australia. Where a passenger report is given by document it must be in writing, be in an approved form, contain such information as is required by the form, be signed in a specified manner, and be communicated to the ACS by sending or giving it an ACS officer (**proposed subsection 64ACB(5)**).

Proposed subsection 64ACB(6) provides that where a report is given electronically it must communicate such information as is set out in an approved form. An approved form is defined by section 4A of the Customs Act to be a reference to a form that is approved, by instrument in writing, by the CEO of the ACS. Subsection 4A(2) of the Customs Act provides that the instrument by which a form or statement is approved is a disallowable instrument. Under the proposed amendments the CEO of the ACS is also given power to approve different forms for documentary reports and different statements for electronic reports by different kinds of operators of ships or aircraft (**proposed subsection 64ACB(7)**).

Proposed subsection 64ACB(8) imposes a requirement on the ACS to provide DIMIA, as soon as is practical, with information collected under **proposed section 64ACB**. However, if the operator of a ship or aircraft has already reported relevant information regarding passengers to DIMIA under section 245L of the *Migration Act 1958* then the operator is taken not to be required by **proposed section 64ACB** to report the same information.

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Comment:

The amendments proposed by **Schedule 6** of the Bill provide for the ACS and DIMIA to receive electronically information about air and sea passengers and crew travelling to Australia. The rationale, as stated in the Government's Explanatory Memorandum to the Bill, for the proposed amendments is to "... enhance the ability of Customs and DIMIA to assess passengers and crew, prior to their arrival in Australia, for the risk they may present in relation to a range of Commonwealth laws."²⁶ Additionally, the Government in the Second Reading Speech to the Bill gives as a rationale for the proposed amendments: "[T]he Government has decided that for border security reasons, it is important for Customs and the Department of Immigration and Multicultural and Indigenous Affairs to be able to assess any risks that passengers and crew might pose before they arrive in Australia."²⁷

Based on this rationale and the effect of the proposed amendments, it can be said that the outcomes sought by the Government from the amendments proposed by **Schedule 6** of the Bill are likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- Do the ACS and DIMIA have the resources and expertise to ensure honest compliance with the reporting requirements?
- Do the ACS and DIMIA have the resources to assess the information relating to passengers and crews?
- Given that effective border security requires and involves a combination of Commonwealth and State agencies, should other agencies, such as the Australian Federal Police, the Australian Defence Force and State and Territory Police, have access to ACS and DIMIA information?
- What will be the cost, if any, to business of complying with the additional reporting requirement?
- If there is a cost to business of complying with the additional reporting requirements who will meet that cost?

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

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Schedule 6-Amendments to the *Migration Act 1958* relating to the reporting of passengers and crew

A **new Division 12B (proposed sections 245I-245N)** is inserted in the *Migration Act 1958* (the Migration Act) by **item 9 of Schedule 6** of the Bill that essentially mirrors the passenger and crew reporting scheme introduced in the Customs Act by **item 5 of Schedule 6** of the Bill. However, it should be noted that while the proposed amendments essentially mirror the passenger and crew reporting scheme under the Customs Act, they can, to an extent, operate separately. For example, while there is a provision to prevent (see **proposed section 64ACC**) information collected by the ACS being separately being collected by DIMIA it is possible for DIMIA to require different information be provided.

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

Schedule 7-Amendments relating to access to airline passenger information

A **new section 64AF**, imposing a requirement on international passenger air service operators to provide electronic access to passenger information to the ACS, is inserted in the Customs Act by **item 1 of Schedule 7**. **Proposed subsection 64AF(1)** makes it an offence punishable by a maximum fine of 50 penalty units (\$5500) for an operator of an international passenger air service to fail to provide ongoing access to the ACS to their passenger information. An operator of an international passenger air service will not be taken to have committed an offence under **proposed subsection 64AF(1)** if they cannot access their passenger information. **Note 2 to proposed subsection 64AF(1)** provides that the mandatory requirement on operators of international passenger air services must be complied with even if the information concerned is personal information as defined in the *Privacy Act 1988*²⁸.

It will also be an offence, punishable by a maximum fine of 50 penalty units (\$5500), for an operator of an international passenger air service to fail to provide an authorised officer with all reasonable facilities and assistance necessary to obtain information by way of that access and to understand information obtained (**proposed subsection 64AF(3)**). An operator of an international passenger air service will not be taken to have committed an offence under **proposed subsection 64AF(3)** if they had a reasonable excuse for failing to provide the facilities and assistance (**proposed subsection 64AF(4)**).

Proposed subsection 64AF(5) limits the purposes for which an authorised officer may access information to the performance of his/her functions in accordance with the Customs Act, or a Commonwealth law prescribed by regulations for the purposes of this paragraph. The Government's *Explanatory Memorandum* to the Bill provides two examples of the laws of the Commonwealth which may be prescribed, namely, the *Migration Act 1958* and the *Financial Transactions Reports Act 1988*²⁹.

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The mandatory requirement to provide electronic access to passenger information is imposed in respect of a international passenger air service. The term “international passenger air service is defined by **proposed subsection 64AF(6)** to mean a service of providing air transportation of people:

- by means of Australian international flights (whether or not the operator also operates domestic flights or other international flights);
- for a fee payable by people using the service;
- in accordance with fixed schedule to or from fixed terminals over specific routes; and
- that is available to the general public on a regular basis.

The term “passenger information” is defined by **proposed subsection 64AF(6)** to mean any information the operator of the service keeps electronically relating to:

- flights scheduled by the operator (including information about schedules, departure and arrival terminals, and routes);
- payments by people of fees relating to flights scheduled by the operator;
- people taking, or proposing to take, flights scheduled by the operator;
- passenger check-in, and seating, relating to flights scheduled by the operator;
- numbers of passengers taking, or proposing to take, flights scheduled by the operator;
- baggage, cargo or anything else carried, or proposed to be carried, on flights scheduled by the operator and the tracking and handling of those things; and
- itineraries (including any information about things other than flights scheduled by the operator) for people taking, or proposing to take, flights scheduled by the operator.

This definition is important because it sets the limit of the mandatory requirement to provide electronic access to passenger information imposed on providers of international passenger air services.

Comment:

The amendments proposed by **Schedule 7** of the Bill impose a requirement on international passenger air service operators to provide electronic access to certain passenger information to the ACS. The rationale for these proposed amendments stated by the Government in its Explanatory Memorandum to the Bill is that “[A]ccess to this information would assist Customs to identify

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persons who may be involved in the importing or exporting of prohibited goods or who may otherwise be involved in offences against Commonwealth law (including terrorist activities).³⁰

Based on this rationale and the effect of the proposed amendments, it can be said that the outcomes sought by the Government from the amendments proposed by **Schedule 7** of the Bill are likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- Have all the private international law issues relating to the proposed amendments been resolved (ie. particularly in relation to EU Directive 95/46/EC) (see Concluding Comments)?
- The Government states in its *Explanatory Memorandum* to the Bill that the cost of providing electronic access to the ACS will possibly be less than \$5000 per airline.³¹ How was this figure reached?
- What will be the cost to the ACS of ensuring honest compliance with the proposed requirements?
- Has the ACS adequate resources to make relevant use of the data?
- If there is a cost to business of complying with the additional reporting requirements who will meet that cost?
- Would not the Government's primary objective for the proposed amendments³² be better met by extending the reporting requirements to shipping operators also?
- Australian embassies overseas collect data with respect to certain persons visiting etc., Australia. Will there be a duplication of information-gathering activities occurring between DIMIA and the ACS in respect to airline passenger information?
- Given the Government's primary objective for the proposed amendments³³, will DIMIA, the Australian Defence Force, Australian Federal Police, intelligence agencies and State and Territory police also have access to the information being obtained by the proposed amendments?

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Commencement:

28 days after the day on which the Bill receives the Royal Assent.

Schedule 8-Amendments relating to vessel monitoring systems

Fisheries management authorities, such as Australia's Fisheries Management Authority, are progressively requiring commercial fishing operators to fit their vessels with radio equipment to enable participation in a Vessel Monitoring System (VMS). VMS is intended to allow shore-based users to find a vessel's position, course and speed and facilitates the interchange of fishing data.

In Australia, VMS is supported by a satellite communications system operated by Inmarsat through a system of four geostationary satellites, and which can provide a range of marine radio communications including those relating to distress and safety.

Item 1 of Schedule 8 of the Bill inserts a **new section 167B**, dealing with the provision of vessel monitoring system information to the ACS, in the *Fisheries Management Act 1991*. The proposed section applies to any information relating to vessels that the Australian Fisheries Management Authority (AFMA) has got by way of a VMS. **Proposed subsection 167B** provides that the AFMA may give to the ACS information relating to boats that it has got by way of a VMS where it considers that providing such information would help the ACS perform a function or activity of the ACS that relates to civil surveillance.

It may be noted that the Minister in the Second Reading Speech to this Bill states:

This amendment implements one of the recommendations made by the Joint Committee of Public Accounts and Audit in its Review of Coastwatch.³⁴

On 22 August 2001 the Joint Committee of Public Accounts and Audit tabled its report *Review of Coastwatch* in the House of Representatives and the Senate³⁵.

Recommendation 5 of the Joint Committee's Report states:

Coastwatch should be able to access in a timely manner, vessel monitoring system data, therefore:

Commonwealth legislation enabling the automatic monitoring of vessels should be amended to ensure the information passes on to Coastwatch; and the Commonwealth Government should enter into negotiations with State Governments with a view to enabling Coastwatch to have access to vessel monitoring system data.³⁶

Comment:

The amendments proposed by **Schedule 8** of the Bill provide the ACS with access to Vessel Monitoring System information held by

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the Australian Fisheries Management Authority. The stated rationale for this amendment given by the Government in its Explanatory Memorandum to the Bill is that the information will assist the ACS to perform its civil surveillance functions.³⁷ Additionally, the Government states in the Second Reading Speech to the Bill that the proposed amendments implement one of the recommendations made by the Joint Committee of Public Accounts and Audit in its *Review of Coastwatch*.³⁸

Based on this rationale and the effect of the proposed amendments, it can be said that the outcomes sought by the Government from the amendments proposed by **Schedule 8** of the Bill are likely to be met. However, the scope of the proposed amendments raises a number of questions which the Government's *Explanatory Memorandum* does not appear to answer, including:

- Would not the Government objectives for the Bill, the proposed amendments and border security policy be more effectively achieved if agencies in addition to the ACS had access to the vessel monitoring system information?

Commencement:

On a day to be fixed by Proclamation, or failing that, six months after Royal Assent.

Schedule 9-Amendments relating to the definition of Officer of Customs

Section 4(1) of the Customs Act defines the term “officer of Customs” to mean a person:

- (a) employed in the Customs; or
- (b) authorised in writing by the CEO under this Act to perform all of the functions of an officer of Customs;

and includes:

- (c) in relation to a provision of a Customs Act (other than a diesel fuel rebate provision), a person authorised in writing by the CEO under this Act to perform the functions of an officer of Customs under that provision; or
- (d) in relation to a power conferred by a provision of a Customs Act (other than a diesel fuel rebate provision), a person authorised in writing by the CEO under this Act to perform the functions of an officer of Customs in relation to the exercise of that power.

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A **new paragraph 4(1)(ba)** is inserted in the Customs Act by **item 1 of Schedule 9** which extends the definition of officer of Customs to include a person who from time to time holds, occupies, or performs the duties of an office or position (whether or not in or for the Commonwealth) specified in writing by the CEO of the ACS, even if the position does not come into existence until after the CEO has specified it.

New paragraphs 4(1)(c) and 4(1)(d) are substituted in the Customs Act by **item 2 of Schedule 9** the effect of which are to extend the definition of officer of Customs, for the purposes of a provision of a Customs Act, to include persons who from time to time hold, occupy, or perform the duties of an office or position (whether or not in or for the Commonwealth) specified in writing by the CEO of the ACS, even if the position does not come into existence until after the CEO has specified it.

Commencement:

On Royal Assent.

Concluding Comments

European Council Directive 95/46/EC

The reader of the Government's *Explanatory Memorandum* to the Bill may note references to European Council Directive 95/46/EC.³⁹

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, also known as the EU Privacy Directive, took effect on October 25, 1998. The Directive requires all EU member states to enact comprehensive privacy legislation requiring private and public organizations to implement personal data policies. For the text of the EU Privacy Directive see:

http://www.privacy.org/pi/intl_orgs/ec/final_EU_Data_Protection.html

Significant provisions include:

- Data must be collected and possessed for specified, legitimate purposes and kept no longer than necessary to fulfil the stated purpose
- The data transfers policy restricts authorised users of personal information from transferring that information to third parties without the permission of the individual providing the data, or data subject. In the case of data transfers across national boundaries, the Directive prohibits data transfers outright to any country lacking an “adequate level of protection,” as determined by the EU

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- The special protection policy requires restrictions on, and special government scrutiny of, data collection and processing activities of information identifying “racial or ethnic origin, political opinions, religious or philosophical beliefs . . . [or] concerning health or sex life.” Under the Directive, such data collection or processing is generally forbidden outright
- Each EU member state must create an independent public authority to supervise personal data protection. The EU will oversee the Directive’s implementation and will engage in EU-level review of its provisions
- Organizations processing data must appoint a “data controller” responsible for all data processing, who must register with government authorities, and
- A data subject must have the right to:
 - (1) access information about himself;
 - (2) correct inaccuracies; and
 - (3) object to the information’s use.

Article 1 of the Directive requires member states to protect the “fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.” In essence, the EU has made privacy a fundamental human right.

The Directive and its implementing legislation is important because under its terms all EU member states as well as any non-member states doing business in the EU are required to follow minimum standards with respect to safeguarding personal data. In particular, Article 25 of the Directive forbids any transfer of personal data from the EU to countries that do not guarantee or do not have in place adequate safeguards for such data. For countries like Australia, where privacy laws do not conform to the EU’s privacy regime, the Directive poses real problems because Australian companies can be denied access to the EU market or be subjected to penalties for failing to protect the privacy of EU citizens. Financial services, information management, travel, E-commerce, and health care companies are the most affected.

The Directive is of relevance to this Bill because the Government is seeking to mandate that parties carrying passengers to Australia who fall within the jurisdiction of the Directive provide the ACS with access to Passenger Name Record (PNR) information. There is thus scope for parties subject to the provisions proposed by this Bill to be in breach of the Directive. The Government states in the *Explanatory Memorandum* to the Bill that:

Airlines carrying passengers who fall within the jurisdiction of European Union Privacy legislation are concerned that they could be in breach of European Council

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Directive 95/46/EC relating to a person's right to privacy by providing Customs with access to PNR information.⁴⁰

The Government believes however that through mandating that parties carrying passengers to Australia provide the ACS with access to PNR that concerns about breaching the Directive can be overcome. The Government hangs this belief on Article 7 of the Directive⁴¹ which allows for personal information to be processed, if processing is necessary for compliance with legal obligation to which the controller is subject. Article 7 states:

Member States shall provide that personal data may be processed only if:

- (a) the data subject has given his consent unambiguously;
- or
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject entering into a contract.;
- or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- or
- (d) processing is necessary in order to protect the vital interests of the data subject;
- or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;
- or
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).⁴²

It should be noted that while parties subject to EU jurisdiction carrying passengers to Australia may not be in breach of the Directive because of compliance with an Australian legal obligation, they continue to remain subject to the Directive. This fact may have a number of implications. For example, Article 10 of the Directive provides:

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already knows:

- (a) the identity of the controller and of his representative, if any,
- (b) the purposes of the processing for which the data are intended,
- (c) any further information such as
 - the recipients or categories of recipients of the data;

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- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of the failure to reply;

- the existence of the right of access to and the right to rectify the data concerning him

in so far as they are necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.⁴³

Directive Articles such as the above (see also Articles 11 and 12⁴⁴) raise the question of whether parties subject to EU jurisdiction carrying passengers to Australia would have to inform passengers of matters including:

- the identities of the recipients or categories of recipients of the data;
- the existence, or otherwise, of a right of access to and the right to rectify the data concerning them; and
- the purposes of the processing of the data.

While Article 13 of the Directive provides that member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 10-12 when such a restriction constitutes a necessary measure to safeguard matters including:

- national security
- defence;
- public security, and
- the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

it is unclear from the Government's *Explanatory Memorandum* to the Bill to what extent, if at all, EU States have adopted measures to restrict the scope of obligations and rights provided under the Directive and the extent to which compliance with these rights and obligations may undermine the stated objective of the Bill, namely:

... to enable Customs to identify high risk passengers while, at the same time, processing and clearing arriving and departing low risk passengers expeditiously.⁴⁵

Endnotes

- 1 Introduced on 13 March 2002. The original Bill [the Security Legislation Amendment (Terrorism) Bill 2002], which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of

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Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General. This discrepancy meant that the Bill's introduction was inconsistent with House of Representatives' Standing Orders. The withdrawal and re-introduction were designed to address this problem. See Mr Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp. 1138–9.

- 2 Introduced into the House of Representatives on 21 March 2002.
- 3 See **item 7, Schedule 1**, Telecommunications Interception Legislation Amendment Bill 2002.
- 4 As stated above, the Anti-hoax Bill has received Royal Assent.
- 5 Attorney-General, *News Release*, 'National Move to Combat Terror', 7 April 2002. The Attorney's News Release can be found at:
http://www.ag.gov.au/aghome/agnews/2002newsag/37_02.htm (accessed 15 April 2002).
- 6 The Government states at p. 7 of the *Explanatory Memorandum* to the Bill that:
The primary objective is to enable Customs to identify high risk passengers while, at the same time, processing and clearing arriving and departing low risk passengers expeditiously.
- 7 The term 'Collector' is defined by section 8 of the *Customs Act 1901* to mean the CEO of the ACS, the principal ACS officer for a State or Territory, or any ACS officer doing duty in the matter in relation to which the expression is used.
- 8 Section 15 of the *Customs Act 1901* provides that the CEO may by notice published in the Commonwealth *Gazette* appoint: ports and fix the limits of those ports; airports and fix the limits of those ports; wharves and fix the limits of those wharves; and appoint boarding stations for the boarding of ships and aircraft by ACS officers.
- 9 Section 234A of the Customs Act makes it an offence for an unauthorised person to enter a section 234AA place, or entering on or being in or on a ship, aircraft, or wharf at which, or part of a wharf next to where, a ship is berthed, at times when passenger baggage is being examined.
- 10 *Explanatory Memorandum*, p. 12.
- 11 *Explanatory Memorandum*, p. 15.
- 12 *Explanatory Memorandum*, p. 15.
- 13 House of Representatives, *Hansard*, 12 March 2002, p. 970.
- 14 *Explanatory Memorandum*, p. 18.
- 15 *Explanatory Memorandum*, p. 19.
- 16 *Explanatory Memorandum*, p. 19.
- 17 See: paragraphs 229(1)(b) and (n) of the *Customs Act 1901*.
- 18 *Explanatory Memorandum*, p. 19.
- 19 *Explanatory Memorandum*, p. 19.

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- 20 <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp13.htm#doc1>
- 21 *Explanatory Memorandum*, p. 31.
- 22 House of Representatives, *Hansard*, 12 March 2002, p. 970.
- 23 *Explanatory Memorandum*, p. 31.
- 24 *Explanatory Memorandum*, p. 19.
- 25 Subsection 64(1) of the *Customs Act 1901* requires the master or owner of a ship to report the impending arrival of the ship to the ACS:
if the journey from the last port is likely to take not less than 48 hours-not later than 48 hours before its arrival; and if the journey from the last port is likely to take less than 48 hours-not later than 24 hours before its arrival.
Subsection 64(2) of the *Customs Act 1901* requires the pilot or owner of an aircraft that is due to arrive at an airport in Australia to report the impending arrival of the aircraft to the ACS:
if the journey from the last airport is likely to take not less than 3 hours-not later than 3 hours before its arrival; and
if the journey from the last airport is likely to take less than 3 hours-not later than one hour before its arrival.
- 26 *Explanatory Memorandum*, p. 33.
- 27 House of Representatives, *Hansard*, 12 March 2002, p. 970.
- 28 Section 6 of the *Privacy Act 1988* defines the term “*personal information*” to mean information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion
- 29 *Explanatory Memorandum*, p. 47.
- 30 *Explanatory Memorandum*, p. 45.
- 31 *Explanatory Memorandum*, p. 7.
- 32 *Explanatory Memorandum*, p. 7.
- 33 *Explanatory Memorandum*, p. 7.
- 34 House of Representatives, *Hansard*, 12 March 2002, p. 970.
- 35 <http://www.aph.gov.au/house/committee/jpaa/coastwatch/contents.htm>
- 36 <http://www.aph.gov.au/house/committee/jpaa/coastwatch/execsum.htm>
- 37 *Explanatory Memorandum*, p. 47.
- 38 House of Representatives, *Hansard*, 12 March 2002, p. 970
- 39 *Explanatory Memorandum*, pp. 6-7 and 9.
- 40 *Explanatory Memorandum*, p. 7.

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- 41 *Explanatory Memorandum*, p. 6.
- 42 http://www.privacy.org/pi/intl_orgs/ec/final_EU_Data_Protection.html
- 43 http://www.privacy.org/pi/intl_orgs/ec/final_EU_Data_Protection.html
- 44 http://www.privacy.org/pi/intl_orgs/ec/final_EU_Data_Protection.html
- 45 *Explanatory Memorandum*, p. 7.

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