



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2002

16 October 2002

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MEMBERS OF THE COMMITTEE

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

TWELFTH REPORT OF 2002

The Committee presents its Twelfth Report of 2002 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:

Australian Security Intelligence Organisation Legislation
Amendment (Terrorism) Bill 2002

Taxation Laws Amendment Bill (No. 3) 2002

Transport Safety Investigation Bill 2002

Workplace Relations (Registration and Accountability of
Organisations) Bill 2002

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2002*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 24 September 2002. 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. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Australian Security Intelligence Organisation Act 1979* to strengthen the counter-terrorism capacity of the Australian Security Intelligence Organisation (ASIO). In particular, the bill gives ASIO the ability to seek a warrant to detain and question persons for a period of up to 48 hours for the purposes of investigating terrorism offences. The bill also provides for safeguards in relation to these new powers.

The bill also proposes to amend the *Telecommunications (Interception) Act 1979* in relation to the authorisation of communication of intelligence by persons other than ASIO officers.

Warrants in relation to possible terrorism

Proposed new subsections 34C(3) and (5)

Item 24 of Schedule 1 to this bill proposes to insert new subsection 34C(3) in the *Australian Security Intelligence Organisation Act 1979*. This provision will enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant for the detention and questioning of a person on the grounds that the Attorney-General is satisfied:

- that the issue of the warrant "will substantially assist the collection of intelligence that is important in relation to a terrorism offence", and

- that relying on other methods of collecting that intelligence would be ineffective; and
- (where the warrant authorises the detention of a person) that there are reasonable grounds for believing that, if the person is not detained, he or she may alert a person involved in a terrorism offence to the investigation of that offence, or may not appear before the prescribed authority or may destroy or damage something required to be produced under the warrant.

Each warrant may authorise detention for a maximum period of 48 hours. Proposed subsection 34C(5) provides that, if the Director-General is seeking a further warrant in relation to a person who has already been detained under two consecutive warrants, then the Director-General must seek this warrant from a Deputy President of the Administrative Appeals Tribunal.

These provisions seem to suggest that there is no need for anyone involved in seeking or issuing such a warrant to form a reasonable belief that the relevant person has committed any offence. Indeed that person is to be detained for the purpose of collecting intelligence, not for the purpose of having an offence investigated. A person might be detained, apparently for a number of consecutive periods of 48 hours, simply because he or she may be able to provide information about, for example, the possible future commission of an offence.

In his Second Reading Speech, the Attorney-General justifies these provisions on the basis that it is “necessary to enhance the powers of ASIO to investigate terrorism offences.” While terrorism provides obvious law enforcement challenges, these provisions allow what is, in effect, a new basis for detaining people who need not themselves be suspects and, in any event, are being detained for intelligence gathering rather than investigatory purposes. The Committee, therefore, **seeks the Attorney’s advice** as to the following matters:

- whether ASIO currently has the power to detain persons for questioning or the gathering of intelligence;
- whether any other Australian intelligence or investigatory body has such a power;
- whether any other Australian law enforcement body has such a power; and
- why such a power is necessary.

Pending the Attorney's response, the Committee draws Senators' attention to these provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

I note that I provided an interim response to Senator Crossin, Acting Chair of the Committee, on 13 August 2002 to notify the Committee of my intention to respond to the issues raised in the Alert Digest once the Government's response to the reports of the other Parliamentary Committees that have inquired into the Bill was finalised.

The matters raised by the Committee for my consideration and my responses to them are set out below.

Detention for investigation

1) Does ASIO currently have the power to detain persons for questioning or the gathering of intelligence?

ASIO does not currently have the power to detain persons for questioning or the gathering of intelligence under the authority of a warrant or otherwise. The *Australian Security Intelligence Organisation Act 1979* grants ASIO special investigatory powers to intercept telecommunications, use listening devices and tracking devices, remotely access computers, enter and search premises, and examine postal articles. These powers can only be used under the authority of a warrant sought by the Director-General of Security and signed by the Attorney-General (Part III, Division II).

Proposed sections 34C and 34D of the Bill, as amended in the House, will enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant by a Federal Magistrate or a Federal Judge for the detention and questioning of a person who may have important information in relation to a terrorism offence.

ASIO will not be given the power to arrest or detain people. Only the police will be authorised to take a person into custody and arrange the person's detention (sub-paragraph 34D(2)(b)(i)).

2) Does any other Australian intelligence or investigatory body have the power to detain persons for questioning or the gathering of intelligence?

No Australian intelligence agency has the power to detain persons for questioning or the gathering of intelligence. Under the Bill, ASIO will not have the power to arrest or detain people for any purpose. Only the police will be authorised to take a person into custody and arrange the person's detention (sub-paragraph 34D(2)(b)(i)).

3) Does any other law enforcement body have such a power?

Law enforcement bodies generally have the power to arrest persons suspected of criminal activity, but are not empowered to detain persons not suspected of a crime

but who may otherwise possess information useful to a police investigation (see for example Part 1C of the *Crimes Act 1914*).

4) Why is this power necessary?

The terrorist attacks on the United States on 11 September 2001 represented a profound shift in the international security environment. While there is no known specific threat to Australia, our profile as a terrorist target has risen. Our interests abroad also face a higher level of terrorist threat, as evidenced by the plan in Singapore to attack the Australian High Commission there. ASIO has advised that the heightened threat levels can be expected to remain for some years at least.

We need to be well placed to respond to the new security environment in terms of our operational capabilities, infrastructure and legislative framework. ASIO is not currently empowered to obtain a warrant to question a person who may have information that is important in relation to a terrorist offence. Such a power will help ASIO uncover information before a terrorist offence is perpetrated so that it can be prevented.

It should be noted that persons with information relevant to ASIO's investigation of terrorist activities may at any time voluntarily assist ASIO. Warrants would not be sought in relation to persons who are willing to volunteer any relevant information they may have.

Warrants issued under the Bill will be warrants of last resort. The Attorney-General will not be able to consent to the Director-General's request for a warrant unless satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective (paragraphs 34C(3)(a)&(b)).

Further, a person may not be detained under a warrant unless the Attorney-General is also satisfied that the person:

- may alert another person involved in a terrorism offence of the investigation;
- may not appear before the prescribed authority; or
- may destroy, damage or alter a record or thing that the person may be requested to produce (paragraph 34C(3)(c)).

It should also be noted that a person can be required to appear before a prescribed authority for questioning under warrant without being detained (paragraph 34D(2)(a)).

The Committee thanks the Attorney-General for this response. The Committee also thanks the Attorney-General for advising the Committee that he would provide a response to its comments before the bill is considered in the Senate.

The Attorney-General's reply includes advice of amendments to the bill in the House of Representatives implementing the Government's response to recommendations of the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS and the DSD. These amendments improve safeguards in relation to the issue of warrants for detention and questioning. The Attorney-General explains the effect of these provisions as amended and responds to specific questions posed by the Committee.

The Committee notes the Attorney-General's advice, but concludes that the provisions, even after amendment, may continue to be seen to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Senate must therefore decide whether such breaches are acceptable when weighed against the policy objectives of the bill.

Rights of persons in detention

Proposed new subsections 34F(8) and (9)

Proposed new subsection 34F(8) provides that a person who has been taken into custody or detained is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. However, proposed new subsection 34F(9) preserves the right of a detainee to communicate with the Inspector-General of Intelligence and Security (if the person wishes to make a complaint about ASIO) and the Ombudsman (if the person wishes to complain about the Australian Federal Police).

Proposed new subsection 34D(4) states that a warrant may specify someone whom the detainee is permitted to contact by reference to the fact that he or she is the person's legal adviser, but this does not limit the ways in which the warrant may specify persons whom the detainee is permitted to contact. In addition, proposed new paragraph 34F(1)(d) states that a prescribed authority may make a direction permitting the detainee to contact a specified person (emphasis added).

The Explanatory Memorandum states that these provisions have been included because the person detained "may have critical information concerning terrorism offences and contact could alert other persons involved in such activities ... the security of the community, rather than the ordinary rights of the individual ... are paramount".

Clearly, under these provisions, it is possible that a person may be detained, with no right to seek legal advice or communicate with anyone else, under a series of consecutive warrants, even though there is no suggestion that they themselves have committed any offence.

In addition, where a person has been detained, the bill authorises a police officer to conduct a strip search of a person if the police officer suspects on reasonable grounds that the person has a “seizable item”, and that it is necessary to conduct a strip search in order to recover that item, and if a prescribed authority has approved the conduct of the search. Necessary and reasonable force may be used. A seizable item is defined as “anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody”. Under this provision detained persons would, again, appear to be subject to the same (if not greater) search powers than are persons suspected of criminal offences.

The Committee notes that the Chief Justice of the High Court, in a keynote address delivered to the International Conference on Regulation Reform Management and Scrutiny of Legislation in July 2001, observed that:

crackdown legislation is rarely opposed and rarely scrutinised, and this is the area that that produces above all, in my experience, the unintended consequence. Indeed, there is a kind of rule of parliamentary democracy or of the nature of parliamentary democracy that I think would be formulated: the more popular the legislation the more likely the unintended consequence.

The protection of the community from terrorism is obviously a vital concern. However a community that fails to accord its citizens due process, and to protect their rights, even in extreme circumstances, runs the risk of becoming a community different in nature from that which currently exists.

While the Attorney-General expresses his confidence that this bill “recognises the need to maintain the balance between the security of the community and individual rights and to avoid the potential for abuse,” the Committee remains concerned about the potential for unintended consequences in such ‘exceptional’ legislation. The Committee, therefore, **seeks the Attorney’s advice** as to the following matters:

- whether there are any other provisions in Australian criminal law which deny persons access to legal representation or the right to communicate with anyone;
- why it is appropriate that what are essentially police powers (including detention and strip search) should be extended to organisations concerned with the collection of intelligence; and

- (given the Committee's recommendation in its *Fourth Report of 2000* that, unless there are exceptional circumstances involving clear physical danger, persons subject to a search should be provided with written information as to their rights and responsibilities in relation to the search), why this bill makes no provision for detainees to be provided with this information.

Pending the Attorney's response, the Committee draws Senators' attention to these provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

Rights of persons in detention

- 5) Are there any other provisions in Australian criminal law which deny persons access to legal representation or the right to communicate with anyone?**

Rights of communication under other Australian criminal laws

The right of detained persons to communicate with other persons in certain circumstances is modified by the *Crimes Act 1914* and the *Customs Act 1901*.

Crimes Act 1914

Section 23G of the *Crimes Act 1914* provides that an investigating official must inform a person who is under arrest or who is a protected suspect that the person has the right to communicate with a friend, relative or legal practitioner of the person's choice. The official must also take steps to facilitate communication with a friend, relative or legal practitioner of the person's choice if the person wishes to exercise these rights.

However, these requirements do not apply if the official believes on reasonable grounds that:

- compliance is likely to result in an accomplice of the person taking steps to avoid apprehension or is likely to lead to certain acts which would interfere with evidence or a witness (paragraph 23L(1)(a)); or
- the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by complying with the requirements (paragraph 23L(1)(b)).

Customs Act 1901

Subdivisions B and C, Division 1B of Part XII of the *Customs Act 1901* provide for the detention of persons for the purposes of conducting an internal or external search on the order of a Justice, Magistrate or authorised officer. A person so detained ordinarily has the right to communicate with another person. However, a Customs

officer or police officer may prevent communication with a person other than a lawyer if the officer believes on reasonable grounds that the communication should be stopped to safeguard the processes of law enforcement or to protect the life and safety of any person (sections 219R and 219W).

Rights of communication under the Bill

A warrant that requires a person to be taken into custody and brought before a prescribed authority for questioning must specify all persons who may be contacted by the detained person. This includes whether or not the person may contact a lawyer.

The Government has amended the Bill by way of Government amendment in the House of Representatives to provide that all warrants must allow a detained person to contact an ‘approved lawyer’ at any time whilst they are in custody or detention (subsection 34C(3B)). An approved lawyer will be a lawyer of at least 5 years standing who is approved by the Attorney-General after receiving an appropriate security clearance (section 34AA).

The ability of adults who are detained to communicate with a lawyer may be delayed for 48 hours where the Attorney-General is satisfied on reasonable grounds that it is likely that a terrorism offence is being committed or is about to be committed which may have serious consequences and that it is appropriate in all the circumstances that the person not be permitted to contact a lawyer (subsection 34C(3C)). This may be necessary in some cases where the urgency of the investigation is such that allowing a detained person to contact a lawyer may prejudice the investigation or the ability of law enforcement agencies to prevent the attack. Persons whose access to an approved lawyer is delayed will still be entitled to the protection of all of the other safeguards in the Bill. After 48 hours, all persons subject to a warrant will have the absolute right to contact an approved lawyer.

Young people between the ages of 14 and 18 who are detained will have the right to contact an approved lawyer and to have a parent, guardian or other representative present whilst they are questioned. A young person’s right to contact an approved lawyer and a parent, guardian or other representative cannot be delayed in any circumstances.

6) Why is it appropriate that what are essentially police powers (including detention and strip search) should be extended to organisations concerned with the collection of intelligence?

The Bill does not grant ASIO police powers.

If a warrant requires any police functions to be carried out, they must be done by a police officer. For example, if a warrant provides for a person to be taken into custody, a police officer will take the person into custody and arrange their detention (sub-paragraph 34D(2)(b)(i)). The prescribed authority may give directions about the arrangements for the person’s detention, but such a direction may not result in detention being arranged by a person who is not a police officer (paragraph 34F(4)(b)).

In some circumstances an ordinary or strip search of a person subject to a warrant may be carried out. These searches may only be carried out by a police officer. There are strict rules determining when (section 34L) and how (section 34M) a strip search may be conducted which are based on existing provisions in the *Crimes Act 1914*.

7) Why doesn't the Bill provide for persons subject to a search to be provided with written information as to their rights and responsibilities in relation to a search?

Sections 34L and 34M of the Bill provide for a police officer to conduct an ordinary search or a strip search. These provisions are consistent with sections 3ZH and 3ZI of the *Crimes Act 1914*, which do not require that a person subject to a search be provided with written information as to their rights and responsibilities.

A strip-search may be conducted by a police officer on the approval of a prescribed authority if a police officer suspects on reasonable grounds that it is necessary to retrieve a seizeable item reasonably suspected to be on the person (section 34L). The search must be conducted by a police officer of the same sex as the person being searched and must not be conducted in the presence or view of a person of the opposite sex, other than a medical practitioner (paragraph 34M(1)(c) and subsection 34M(3)). The search must not involve a body cavity search, the removal of more garments than is reasonably necessary or more visual inspection than is reasonably necessary (paragraphs 34M(1)(g)-(i)). A police officer who strip searches a person will be liable to a maximum penalty of two years imprisonment if the officer knowingly breaches the search rules or conducts the search without either the approval of the prescribed authority or the person's consent (subsections 34NB(5)&(6)).

There are special rules to protect children in relation to the conduct of a strip-search. Children under 14 may not be strip-searched in any circumstances (paragraph 34M(1)(e)). Young people over 14 but under 18 may only be searched in the presence of a parent, guardian or other representative (paragraph 34M(1)(f)).

The Committee thanks the Attorney-General for this response and for advising the Committee that he would provide the response before the Senate considers the bill.

As with the other matters raised by the Committee in its scrutiny of this bill, the Committee took the step of asking a number of specific questions, rather than seeking generalised advice. Again, in a similar way to his responses to these other comments by the Committee, the Attorney-General advises of the effect of amendments of the original provisions.

There is no doubt that the amendments increase protection for persons in detention, when compared to the earlier provisions. Also, the Attorney-General has provided lengthy and thorough replies to the Committee's questions. Nevertheless, the Committee concludes that the provisions, after amendment, may still be seen to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. It is for the Senate to decide whether, on balance, the breaches are acceptable in light of the policy intentions of the bill.

**Abrogation of the privilege against self-incrimination
Proposed new subsections 34G(8) and (9)**

Proposed new subsection 34G(8) of this bill will abrogate the privilege against self-incrimination for a person from whom a “prescribed authority” has sought information under proposed new subsection 34G(3).

In addition, proposed new subsection 34G(9) does not impose the usual limits on the circumstances in which information so provided is admissible in evidence in proceedings against the person who has been compelled to provide it. In general terms, any such information, or any document or thing produced, is not admissible in criminal proceedings other than proceedings for an offence against section 34G, or a terrorism offence. The section also permits any information acquired indirectly from the information gained by the operation of subsection (8) to be used for any purpose whatever.

The Explanatory Memorandum justifies this provision by asserting that the “protection of the community from [the violence of terrorism] is, in this special case, considered to be more important than the privilege against self-incrimination.” While the protection of the community from the violence of terrorism is obviously of vital concern, the Committee **seeks the Attorney’s advice** as to why this can only be achieved by removing the long-standing protections of use and derivative use immunity.

Pending the Attorney’s response, the Committee draws Senators’ attention to these provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Relevant extract from the response from the Attorney-General

Abrogation of the privilege against self-incrimination

8) Why can the protection of the community from the violence of terrorism only be achieved by removing the long-standing protections of use and derivative use immunity?

One of the primary aims of the Bill is to provide ASIO with access to information about a terrorist attack that it would not otherwise have for the purposes of preventing the attack. It is therefore important that persons questioned under the Bill cannot fail or refuse to provide information, records or things that are requested of them under a warrant. A person who is being questioned before a prescribed authority cannot fail to give information or produce a record or thing on the ground that doing so might tend to incriminate the person (subsection 34G(8)).

The Government has amended the Bill by way of Government amendment in the House of Representatives to provide that any information provided by a person under a warrant may only be adduced in evidence against the person in proceedings for an offence relating to the failure to provide information, records or things to a prescribed authority (subsection 34G(9)). This means that admissions of involvement in terrorist activities made during the course of questioning under a warrant will not be able to be adduced in evidence against the person in any subsequent terrorist prosecution.

However, the Bill does not provide an immunity against the admission of evidence subsequently derived from something a person says or produces before a prescribed authority. Such information may be extremely useful in preventing terrorist offences or prosecuting terrorists. If derivative use immunity were available, the value of the information obtained during an investigation would be diminished. Also, it would be likely that potential arguments about how an investigative lead arose would prevent the authorities from pursuing valuable information that could prevent a terrorist attack or lead to the prosecution of a terrorist.

I hope this information is of assistance to the Committee's inquiry and I look forward to reading its final report.

The Committee thanks the Attorney-General for this response, which advises that the original provision has been amended to restrict the circumstances in which self-incriminating evidence is admissible in proceedings against the person who has been compelled to provide it.

However, the bill still does not provide for derivative use immunity, which may appear to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. As with the other apparent breaches of the Committee's principles in this bill, it is for the Senate to weigh the breaches against the intended policy outcomes of the bill.

Taxation Laws Amendment Bill (No. 3) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 24 September 2002. 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. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Part 1 of Schedule 1 to the bill proposes to amend the *A New Tax System (Goods and Services Tax) Act 1999* so that the GST does not apply to a supply made in return for a supply, by an Australian government agency, of a right to develop land. GST will also not apply to the corresponding supply of the right to develop land.

Part 2 of Schedule 1 amends the *A New Tax System (Goods and Services Tax Transition) Act 1999* and *Income Tax Assessment Act 1997* to provide a one-off credit to businesses that held rental cars on 1 July 2000.

Part 3 of Schedule 1 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that certain transferred tax losses, net capital losses, and excess foreign tax credits relating to the 2001-2002 income years and later income years are not subject to GST.

Schedule 2 proposes to amend the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* in relation to taxation of general insurance companies and workers' compensation self-insurers.

Schedule 3 proposes to amend the *Income Tax Assessment Act 1936* to broaden the eligibility criteria for accessing the intercorporate dividend rebate.

The bill also contains application and transitional provisions.

Retrospective application Schedule 2

The amendments proposed in Schedule 2 to the bill affect general insurance companies and are intended to ensure that the provision for outstanding claims is worked out on a present value basis, and that gross premium income is included in assessable income in the year it is received or receivable – net premium income that relates to risk exposure in subsequent years is to be deferred.

By virtue of a series of application provisions (specifically clauses 321-30, 321-35, 321-65 and 323-25 of proposed new Schedule 2J to the *Income Tax Assessment Act 1936*), these amendments are to apply retrospectively to various years of income, from 1991-92, 1995-96, 1999-2000 and 1996-97.

The Explanatory Memorandum states that the methodology underlying the amendments “is consistent with the methodology used to determine outstanding claims for accounting purposes and was accepted by the general insurance industry as being appropriate for income tax purposes”. However, the use of this methodology was challenged in the *Mercantile Mutual case (FCT v Mercantile Mutual Insurance (Workers Compensation) Ltd)*, where the court concluded that the law allowed a current year deduction for the nominal amount that is estimated to be paid out in the future rather than the present value of that amount, which is what is actually set aside.

While the Explanatory Memorandum indicates that these amendments will have no financial impact, it also observes that they “confirm a long standing view of the law and protect the revenue that otherwise would be at risk”. It is not clear whether anyone will be detrimentally affected by provisions, some which will apply to income years 10 years ago. The Committee, therefore, **seeks the Minister’s advice** as to whether anyone may be detrimentally affected by the retrospective operation of these provisions.

Pending the Minister’s advice, the Committee draws Senators’ attention to these provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Relevant extract from the response from the Minister and Assistant Treasurer

I refer to the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No. 4 of 15 May 2002 concerning the retrospective

application or commencement of Schedule 2 to the Taxation Laws Amendment Bill (No. 3) 2002.

The Committee has raised concerns that the retrospective application or commencement of the Schedule may be considered to trespass unduly on the personal rights and liberties.

The amendments in Schedule 2 confirm a long standing view of the application of the income tax law to general insurance activities as outlined in Taxation Ruling IT 2663, which took effect in the 1991/92 income year. Insurance companies agreed with the position as stated in the ruling and have been lodging returns on the basis of the ruling ever since. The same principles were extended to the reinsurance activities in Taxation Ruling TR 95/5 and to self insurers in Taxation Determination TD 97/14.

The Insurance Council of Australia supports the measures in the bill and the dates of effect of those measures. The amendments will give general insurers certainty about the application of the income tax law and ensure that the law is applied consistently to all general insurers.

General insurers are entitled to an income tax deduction for outstanding claims - that is, claims that a general insurer is liable to pay arising from an insured event that occurred in the year or earlier years but that have not been paid or settled at the end of the income year.

In relation to deductions for outstanding claims, the amendments provide that, consistent with a key principle of Taxation Ruling IT 2663, the amount of the deduction for outstanding claims in the current income year is, broadly, the present value of the estimated amount needed to pay out those claims in the future - that is, the amount that is actually set aside and invested today to pay those future claims.

This overturns the result in *Federal Commissioner of Taxation v Mercantile Mutual Insurance (Workers Compensation) Ltd & Anor* 99 ATC 4404. In that case the Court concluded that the income tax law allows a deduction in the current year for, broadly, the nominal amount that is estimated to be paid out in the future.

However, as noted above, insurance companies continued to apply the position as outlined in IT 2663, rather than adopting the views expressed by the Federal Court. Insurance companies should therefore find that Schedule 2 validates their current practice rather than requiring them to amend assessments or pay extra tax.

The court decision related to the 1991-1992 and prior income years. Subject to the provisions in the income tax law relating to amended assessments, taxpayers can rely on that court decision in respect of the 1990-1991 and prior income years and be entitled to the benefit of transitional arrangements associated with the commencement of the measures in the bill.

A general insurance policy typically straddles 2 or more income years and the premium income needs to be apportioned over the risk period for income tax purposes.

The amendments in Schedule 2 to the bill confirm that, consistent with a second key principle in Taxation Ruling IT 2663, net premiums are spread over income years based on risk exposure in each income year.

To overcome difficulties with the interaction between the prepayment provisions in the income tax law and the principles used by general insurers to apportion premium income, the amendments relating to the apportionment of the premium income apply from the 1999-2000 income year.

I trust this information will be of assistance to the Committee.

The Committee thanks the Minister and Assistant Treasurer for this response.

Transport Safety Investigation Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2002*, in which it made various comments. The Minister for Transport and Regional Services has responded to those comments in a letter dated 16 September 2002. 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. 6 of 2002

This bill was introduced into the House of Representatives on 20 June 2002 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to establish an updated aviation, marine and rail transport safety regime for Australia based on the principles of international best practice. The regime includes provisions for the reporting of transport safety matters, conducting of safety investigations, making of safety action statements and publication of investigation results; and consolidates the Australian Transport Safety Bureau's investigation powers. The bill also contains regulation making provisions.

Delegation of power

Clause 33

Clause 33 of this bill would permit the Executive Director of Transport Safety Investigation (or his or her delegate, who may be any person, so long only as the Executive Director is satisfied that the delegate is a suitable person to exercise the power – see subclauses 13(1) and (6)) to enter “special premises” without a warrant and without the occupier's consent. “Special premises” are defined as an accident site or vehicle. The power to enter an accident site appears reasonable but the power to enter vehicles appears wide. The Committee therefore **seeks the Minister's advice** as to the circumstances in which the power to enter vehicles will be exercised and any safeguards in the legislation for its operation.

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

Thank you for the letter of 27 June 2002, from the Standing Committee for the Scrutiny of Bills, concerning Clause 33 of the *Transport Safety Investigation Bill 2002* (the *TSI Bill*). I am pleased to provide assistance to the Committee on this matter.

Clause 33 of the *TSI Bill* gives the Executive Director power to enter 'special premises' without the occupier's consent and without obtaining a warrant. The Executive Director is proposed to be able to do so with such assistance, and by such force, as is necessary and reasonable. Clause 3 of the Bill defines 'special premises' as accident site premises or a vehicle. The Clause 33 power is somewhat broader than existing powers under Part 2A of the *Air Navigation Act 1920* and the *Navigation (Marine Casualty) Regulations 1990*. For example, Regulation 11 of the *Navigation (Marine Casualty) Regulations* refers to the ability of the inspector or an investigator to board a ship without consent or a warrant to protect evidence that will be removed, destroyed or interfered with before consent or a warrant can be obtained.

The power to enter 'special premises' without consent or a warrant is in the *TSI Bill* to allow an investigator to gain access to accident sites in order to preserve and collect, as soon as possible, potentially vital evidence relevant to an investigation. It may be impossible or impracticable to obtain consent or a warrant where evidence is perishable and needs to be preserved immediately. As explained in the Explanatory Memorandum, this power extends to vehicles, which, by their highly mobile nature, may also need to be quickly accessed in case they are removed to a less accessible location where relevant evidence may be removed or destroyed simply by virtue of the vehicle relocating. Further, in a major transport accident involving large-scale loss of life or damage, subsequent litigation can include criminal proceedings and/or civil claims for billions of dollars. There are therefore strong incentives to tamper with evidence and immediate powers of entry are needed to ensure evidence is preserved. I note that the definition of 'special premises' in the *TSI Bill* to include a vehicle, is consistent with the definition of 'premises' for investigative purposes under other Commonwealth legislation, such as the *Export Control Act 1982*.

Powers under Clause 33 may appear to be broader than some Commonwealth legislative provisions allowing entry to vehicles without the occupier's consent or a warrant. For example, other similar Commonwealth legislative provisions permit such entry only in limited circumstances such as where there are reasonable grounds for suspecting there is evidential material in the vehicle and the circumstances are serious or urgent. However, the broader nature of Clause 33 is justified by the 'no blame' future safety object of ATSB investigations. Consistent with the 'no blame' object, there are strict limits placed on the use of OBR evidence, and Restricted Information is further protected. ATSB reports cannot be used in civil or criminal proceedings. The search and entry provisions in the *TSI Bill* were closely scrutinised

by the Attorney-General's Department during the drafting process, and Clause 33 was not considered to trespass unduly on personal rights and liberties.

The *TSI Bill* contains sufficient general safeguards to prevent an abuse of the power provided under Clause 33. Firstly, Clause 28 has the effect of limiting the exercise of the power to the purposes of an investigation under the *TSI Bill*. Secondly, subclauses 13(1) and (6) have the effect of confining the Executive Director's delegation to a suitable person for the exercise of the power. Such a delegation is likely to be made only where it is essential, for example, where there is an accident in a remote location and it is necessary to delegate powers to an appropriately qualified person in order to collect perishable evidence and to interview witnesses before their memory fades. Additionally, Clause 16 requires the Executive Director, or the Executive Director's delegate, to have regard to the desirability of minimising any resulting disruption to transport by means of transport vehicles.

With regard to the seizure of evidential material, as a result of an exercise of power under Clause 33, Paragraph 36(3)(b) requires that the material be directly relevant to the investigation concerned and the Executive Director must believe on reasonable grounds that it is necessary to seize the material in order to prevent it being interfered with or to prevent its concealment, loss, deterioration or destruction.

The inclusion of Clause 33 in the *TSI Bill* is consistent with international obligations. The current text of Annex 13 to the *Convention on International Civil Aviation (Chicago Convention)*, to which Australia is a party, includes standards and recommended procedures that are applicable from 1 November 2001. For example, paragraph 5.6 of Annex 13 provides that:

“The investigator-in-charge shall have unhampered access to the wreckage and unrestricted control over it to ensure that a detailed examination can be made without delay by authorized personnel participating in the investigation.”

Clause 33 is thus in line with equivalent powers in other jurisdictions, such as New Zealand.

With the safeguards provided in the *TSI Bill*, I believe Clause 33 will not be used excessively or outside the context of what is necessary for the conduct of a transport safety investigation.

Thank you for seeking clarification on this matter from me.

The Committee thanks the Minister for this detailed response, which gives reasons for the delegation power and describes the safeguards for its operation. The Committee, however, remains concerned at the nature and extent of the power. As the Minister notes, the power is broader than similar powers in related legislation. There is also no constraint on the power except the subjective opinion of the Executive Director that a person is suitable.

The Committee therefore **seeks from the Minister** a briefing from departmental officers on these aspects of the bill. After the briefing the Committee may report further on the bill.

The Committee also draws to the attention of the Senate its *Fourth Report of 2000, Entry and Search Provisions in Commonwealth Legislation*. That report advises that the power to enter and search premises is exceptional and not to be granted as a matter of course. The report provides a set of principles with which search and entry provisions should conform. The provisions in the present bill, however, may not comply with all of these principles.

In the meantime, the Committee continues to draw 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.

Workplace Relations (Registration and Accountability of Organisations) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2002*, in which it made various comments. The Minister for Employment and Workplace Relations has responded to those comments in a letter dated 1 August 2002. 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. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to incorporate into a separate piece of legislation, provisions of the *Workplace Relations Act 1996* which relate to the registration, amalgamation and internal administration and regulation of registered organisations, including election processes and duties of officers and employees of those organisations.

The bill also amends those provisions, particularly in relation to financial accountability and disclosure and democratic control; and in relation to penalties for breaches of the proposed Act.

Strict liability offences

Subclauses 258(2), and 337(2)

Subclauses 258(2) and 337(2) specify that strict criminal liability applies to aspects of the offences (non-compliance with an order to provide information or documents) created by those clauses. The Explanatory Memorandum provides no reason for this departure from the normal principle of the criminal law, ie that liability depends upon proof of the intention or recklessness of the accused person. The Committee, therefore, **seeks the Minister advice** as to why strict liability has been applied to this element of these offences.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee sought my advice as to why strict liability has been applied to elements of the offences.

In short, strict liability applies to elements of the offences in line with the recently implemented criminal code.

For example, subclause 258(1)(b) applies when a person fails to comply with a request of an auditor. Strict liability has been applied to this paragraph because it would render the provision virtually inoperable if it were necessary to establish that the person intended to not comply with the request.

Moreover, it should be noted that subclause 258(3) provides a defence of reasonable excuse for not complying with the request, thereby ameliorating any perceived harshness of the imposition of strict liability.

Finally, it should be noted that, in the equivalent provisions in place prior to the implementation of the criminal code, intention was never an element of the offence created by section 258(1)(b). However, under the criminal code, it is necessary to identify elements of an offence to which strict liability applies. Accordingly, while it may appear that there has been a change in the makeup of the offence, this is actually not the case.

Identical issues arise in relation to subclause 337(2).

I hope this information addresses the Committee's concerns.

The Committee thanks the Minister for this response.

Jan McLucas
Chair



ATTORNEY-GENERAL
THE HON. DARYL WILLIAMS AM QC MP

RECEIVED

27 SEP 2002

Senate Standing C'ttee
for the Scrutiny of Bills

02/5509 ISL RG

24 SEP 2002

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

Copy: Committee Secretary
Secretariat at scrutiny.sen@aph.gov.au

Dear Senator McLucas

I refer to the letter dated 16 May 2002 from the Secretary of your committee, Mr David Creed, to my Senior Adviser seeking my response to the Scrutiny of Bills Alert Digest No. 4 of 2002 (15 May 2002) concerning the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (the Bill).

I note that I provided an interim response to Senator Crossin, Acting Chair of the Committee, on 13 August 2002 to notify the Committee of my intention to respond to the issues raised in the Alert Digest once the Government's response to the reports of the other Parliamentary Committees that have inquired into the Bill was finalised.

The matters raised by the Committee for my consideration and my responses to them are set out below.

Detention for investigation

1) Does ASIO currently have the power to detain persons for questioning or the gathering of intelligence?

ASIO does not currently have the power to detain persons for questioning or the gathering of intelligence under the authority of a warrant or otherwise. The *Australian Security Intelligence Organisation Act 1979* grants ASIO special investigatory powers to intercept telecommunications, use listening devices and tracking devices, remotely access computers, enter and search premises, and examine postal articles. These powers can only be used under the authority of a warrant sought by the Director-General of Security and signed by the Attorney-General (Part III, Division II).

Proposed sections 34C and 34D of the Bill, as amended in the House, will enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant

by a Federal Magistrate or a Federal Judge for the detention and questioning of a person who may have important information in relation to a terrorism offence.

ASIO will not be given the power to arrest or detain people. Only the police will be authorised to take a person into custody and arrange the person's detention (sub-paragraph 34D(2)(b)(i)).

2) Does any other Australian intelligence or investigatory body have the power to detain persons for questioning or the gathering of intelligence?

No Australian intelligence agency has the power to detain persons for questioning or the gathering of intelligence. Under the Bill, ASIO will not have the power to arrest or detain people for any purpose. Only the police will be authorised to take a person into custody and arrange the person's detention (sub-paragraph 34D(2)(b)(i)).

3) Does any other law enforcement body have such a power?

Law enforcement bodies generally have the power to arrest persons suspected of criminal activity, but are not empowered to detain persons not suspected of a crime but who may otherwise possess information useful to a police investigation (see for example Part 1C of the *Crimes Act 1914*).

4) Why is this power necessary?

The terrorist attacks on the United States on 11 September 2001 represented a profound shift in the international security environment. While there is no known specific threat to Australia, our profile as a terrorist target has risen. Our interests abroad also face a higher level of terrorist threat, as evidenced by the plan in Singapore to attack the Australian High Commission there. ASIO has advised that the heightened threat levels can be expected to remain for some years at least.

We need to be well placed to respond to the new security environment in terms of our operational capabilities, infrastructure and legislative framework. ASIO is not currently empowered to obtain a warrant to question a person who may have information that is important in relation to a terrorist offence. Such a power will help ASIO uncover information before a terrorist offence is perpetrated so that it can be prevented.

It should be noted that persons with information relevant to ASIO's investigation of terrorist activities may at any time voluntarily assist ASIO. Warrants would not be sought in relation to persons who are willing to volunteer any relevant information they may have.

Warrants issued under the Bill will be warrants of last resort. The Attorney-General will not be able to consent to the Director-General's request for a warrant unless satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective (paragraphs 34C(3)(a)&(b)).

Further, a person may not be detained under a warrant unless the Attorney-General is also satisfied that the person:

- may alert another person involved in a terrorism offence of the investigation;

- may not appear before the prescribed authority; or
- may destroy, damage or alter a record or thing that the person may be requested to produce (paragraph 34C(3)(c)).

It should also be noted that a person can be required to appear before a prescribed authority for questioning under warrant without being detained (paragraph 34D(2)(a)).

Rights of persons in detention

5) Are there any other provisions in Australian criminal law which deny persons access to legal representation or the right to communicate with anyone?

Rights of communication under other Australian criminal laws

The right of detained persons to communicate with other persons in certain circumstances is modified by the *Crimes Act 1914* and the *Customs Act 1901*.

Crimes Act 1914

Section 23G of the *Crimes Act 1914* provides that an investigating official must inform a person who is under arrest or who is a protected suspect that the person has the right to communicate with a friend, relative or legal practitioner of the person's choice. The official must also take steps to facilitate communication with a friend, relative or legal practitioner of the person's choice if the person wishes to exercise these rights.

However, these requirements do not apply if the official believes on reasonable grounds that:

- compliance is likely to result in an accomplice of the person taking steps to avoid apprehension or is likely to lead to certain acts which would interfere with evidence or a witness (paragraph 23L(1)(a)); or
- the questioning is so urgent, having regard to the safety of other people, that it should not be delayed by complying with the requirements (paragraph 23L(1)(b)).

Customs Act 1901

Subdivisions B and C, Division 1B of Part XII of the *Customs Act 1901* provide for the detention of persons for the purposes of conducting an internal or external search on the order of a Justice, Magistrate or authorised officer. A person so detained ordinarily has the right to communicate with another person. However, a Customs officer or police officer may prevent communication with a person other than a lawyer if the officer believes on reasonable grounds that the communication should be stopped to safeguard the processes of law enforcement or to protect the life and safety of any person (sections 219R and 219W).

Rights of communication under the Bill

A warrant that requires a person to be taken into custody and brought before a prescribed authority for questioning must specify all persons who may be contacted by the detained person. This includes whether or not the person may contact a lawyer.

The Government has amended the Bill by way of Government amendment in the House of Representatives to provide that all warrants must allow a detained person to contact an 'approved lawyer' at any time whilst they are in custody or detention (subsection 34C(3B)). An approved lawyer will be a lawyer of at least 5 years standing who is approved by the Attorney-General after receiving an appropriate security clearance (section 34AA).

The ability of adults who are detained to communicate with a lawyer may be delayed for 48 hours where the Attorney-General is satisfied on reasonable grounds that it is likely that a terrorism offence is being committed or is about to be committed which may have serious consequences and that it is appropriate in all the circumstances that the person not be permitted to contact a lawyer (subsection 34C(3C)). This may be necessary in some cases where the urgency of the investigation is such that allowing a detained person to contact a lawyer may prejudice the investigation or the ability of law enforcement agencies to prevent the attack. Persons whose access to an approved lawyer is delayed will still be entitled to the protection of all of the other safeguards in the Bill. After 48 hours, all persons subject to a warrant will have the absolute right to contact an approved lawyer.

Young people between the ages of 14 and 18 who are detained will have the right to contact an approved lawyer and to have a parent, guardian or other representative present whilst they are questioned. A young person's right to contact an approved lawyer and a parent, guardian or other representative cannot be delayed in any circumstances.

6) Why is it appropriate that what are essentially police powers (including detention and strip search) should be extended to organisations concerned with the collection of intelligence?

The Bill does not grant ASIO police powers.

If a warrant requires any police functions to be carried out, they must be done by a police officer. For example, if a warrant provides for a person to be taken into custody, a police officer will take the person into custody and arrange their detention (sub-paragraph 34D(2)(b)(i)). The prescribed authority may give directions about the arrangements for the person's detention, but such a direction may not result in detention being arranged by a person who is not a police officer (paragraph 34F(4)(b)).

In some circumstances an ordinary or strip search of a person subject to a warrant may be carried out. These searches may only be carried out by a police officer. There are strict rules determining when (section 34L) and how (section 34M) a strip search may be conducted which are based on existing provisions in the *Crimes Act 1914*.

7) Why doesn't the Bill provide for persons subject to a search to be provided with written information as to their rights and responsibilities in relation to a search?

Sections 34L and 34M of the Bill provide for a police officer to conduct an ordinary search or a strip search. These provisions are consistent with sections 3ZH and 3ZI of the *Crimes Act 1914*, which do not require that a person subject to a search be provided with written information as to their rights and responsibilities.

A strip-search may be conducted by a police officer on the approval of a prescribed authority if a police officer suspects on reasonable grounds that it is necessary to retrieve a seizable item reasonably suspected to be on the person (section 34L). The search must be conducted by a police officer of the same sex as the person being searched and must not be conducted in the presence or view of a person of the opposite sex, other than a medical practitioner (paragraph 34M(1)(c) and subsection 34M(3)). The search must not involve a body cavity search, the removal of more garments than is reasonably necessary or more visual inspection than is reasonably necessary (paragraphs 34M(1)(g)-(i)). A police officer who strip searches

a person will be liable to a maximum penalty of two years imprisonment if the officer knowingly breaches the search rules or conducts the search without either the approval of the prescribed authority or the person's consent (subsections 34NB(5)&(6)).

There are special rules to protect children in relation to the conduct of a strip-search. Children under 14 may not be strip-searched in any circumstances (paragraph 34M(1)(e)). Young people over 14 but under 18 may only be searched in the presence of a parent, guardian or other representative (paragraph 34M(1)(f)).

Abrogation of the privilege against self-incrimination

8) Why can the protection of the community from the violence of terrorism only be achieved by removing the long-standing protections of use and derivative use immunity?

One of the primary aims of the Bill is to provide ASIO with access to information about a terrorist attack that it would not otherwise have for the purposes of preventing the attack. It is therefore important that persons questioned under the Bill cannot fail or refuse to provide information, records or things that are requested of them under a warrant. A person who is being questioned before a prescribed authority cannot fail to give information or produce a record or thing on the ground that doing so might tend to incriminate the person (subsection 34G(8)).

The Government has amended the Bill by way of Government amendment in the House of Representatives to provide that any information provided by a person under a warrant may only be adduced in evidence against the person in proceedings for an offence relating to the failure to provide information, records or things to a prescribed authority (subsection 34G(9)). This means that admissions of involvement in terrorist activities made during the course of questioning under a warrant will not be able to be adduced in evidence against the person in any subsequent terrorist prosecution.

However, the Bill does not provide an immunity against the admission of evidence subsequently derived from something a person says or produces before a prescribed authority. Such information may be extremely useful in preventing terrorist offences or prosecuting terrorists. If derivative use immunity were available, the value of the information obtained during an investigation would be diminished. Also, it would be likely that potential arguments about how an investigative lead arose would prevent the authorities from pursuing valuable information that could prevent a terrorist attack or lead to the prosecution of a terrorist.

I hope this information is of assistance to the Committee's inquiry and I look forward to reading its final report.

Yours sincerely



DARYL WILLIAMS



RECEIVED

27 SEP 2002

Senate Standing Ctee
for the Scrutiny of Bills

MINISTER FOR REVENUE AND
ASSISTANT TREASURER

PARLIAMENT HOUSE
CANBERRA ACT 2600

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Senator J McLucas
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

24 SEP 2002

Dear Senator McLucas

Taxation Laws Amendment Bill (No. 3) 2002

I refer to the concerns expressed by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No. 4 of 15 May 2002 concerning the retrospective application or commencement of Schedule 2 to the Taxation Laws Amendment Bill (No. 3) 2002.

The Committee has raised concerns that the retrospective application or commencement of the Schedule may be considered to trespass unduly on the personal rights and liberties.

The amendments in Schedule 2 confirm a long standing view of the application of the income tax law to general insurance activities as outlined in Taxation Ruling IT 2663, which took effect in the 1991/92 income year. Insurance companies agreed with the position as stated in the ruling and have been lodging returns on the basis of the ruling ever since. The same principles were extended to the reinsurance activities in Taxation Ruling TR 95/5 and to self insurers in Taxation Determination TD 97/14.

The Insurance Council of Australia supports the measures in the bill and the dates of effect of those measures. The amendments will give general insurers certainty about the application of the income tax law and ensure that the law is applied consistently to all general insurers.

General insurers are entitled to an income tax deduction for outstanding claims – that is, claims that a general insurer is liable to pay arising from an insured event that occurred in the year or earlier years but that have not been paid or settled at the end of the income year.

In relation to deductions for outstanding claims, the amendments provide that, consistent with a key principle of Taxation Ruling IT 2663, the amount of the deduction for outstanding claims in the current income year is, broadly, the present value of the estimated amount needed to pay out those claims in the future – that is, the amount that is actually set aside and invested today to pay those future claims.

This overturns the result in *Federal Commissioner of Taxation v Mercantile Mutual Insurance (Workers Compensation) Ltd & Anor* 99 ATC 4404. In that case the Court concluded that the

2.

income tax law allows a deduction in the current year for, broadly, the nominal amount that is estimated to be paid out in the future.

However, as noted above, insurance companies continued to apply the position as outlined in IT 2663, rather than adopting the views expressed by the Federal Court. Insurance companies should therefore find that Schedule 2 validates their current practice rather than requiring them to amend assessments or pay extra tax.

The court decision related to the 1991-1992 and prior income years. Subject to the provisions in the income tax law relating to amended assessments, taxpayers can rely on that court decision in respect of the 1990-1991 and prior income years and be entitled to the benefit of transitional arrangements associated with the commencement of the measures in the bill.

A general insurance policy typically straddles 2 or more income years and the premium income needs to be apportioned over the risk period for income tax purposes.

The amendments in Schedule 2 to the bill confirm that, consistent with a second key principle in Taxation Ruling IT 2663, net premiums are spread over income years based on risk exposure in each income year.

To overcome difficulties with the interaction between the prepayment provisions in the income tax law and the principles used by general insurers to apportion premium income, the amendments relating to the apportionment of the premium income apply from the 1999-2000 income year.

I trust this information will be of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Helen Coonan', written in a cursive style with a long horizontal line extending to the right.

HELEN COONAN



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

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17 SEP 2002

Senate Standing C'ttee
for the Scrutiny of Bills

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

16 SEP 2002

Dear Senator McLucas

Thank you for the letter of 27 June 2002, from the Standing Committee for the Scrutiny of Bills, concerning Clause 33 of the *Transport Safety Investigation Bill 2002* (the *TSI Bill*). I am pleased to provide assistance to the Committee on this matter.

Clause 33 of the *TSI Bill* gives the Executive Director power to enter 'special premises' without the occupier's consent and without obtaining a warrant. The Executive Director is proposed to be able to do so with such assistance, and by such force, as is necessary and reasonable. Clause 3 of the Bill defines 'special premises' as accident site premises or a vehicle. The Clause 33 power is somewhat broader than existing powers under Part 2A of the *Air Navigation Act 1920* and the *Navigation (Marine Casualty) Regulations 1990*. For example, Regulation 11 of the *Navigation (Marine Casualty) Regulations* refers to the ability of the inspector or an investigator to board a ship without consent or a warrant to protect evidence that will be removed, destroyed or interfered with before consent or a warrant can be obtained.

The power to enter 'special premises' without consent or a warrant is in the *TSI Bill* to allow an investigator to gain access to accident sites in order to preserve and collect, as soon as possible, potentially vital evidence relevant to an investigation. It may be impossible or impracticable to obtain consent or a warrant where evidence is perishable and needs to be preserved immediately. As explained in the Explanatory Memorandum, this power extends to vehicles, which, by their highly mobile nature, may also need to be quickly accessed in case they are removed to a less accessible location where relevant evidence may be removed or destroyed simply by virtue of the vehicle relocating. Further, in a major transport accident involving large-scale loss of life or damage, subsequent litigation can include criminal proceedings and/or civil claims for billions of dollars. There are therefore strong incentives to tamper with evidence and immediate powers of entry are needed to ensure evidence is preserved. I note that the definition of 'special premises' in the *TSI Bill* to include a vehicle, is consistent with the definition of 'premises' for investigative purposes under other Commonwealth legislation, such as the *Export Control Act 1982*.

Powers under Clause 33 may appear to be broader than some Commonwealth legislative provisions allowing entry to vehicles without the occupier's consent or a warrant. For example, other similar Commonwealth legislative provisions permit such entry only in limited



circumstances such as where there are reasonable grounds for suspecting there is evidential material in the vehicle and the circumstances are serious or urgent. However, the broader nature of Clause 33 is justified by the 'no blame' future safety object of ATSB investigations. Consistent with the 'no blame' object, there are strict limits placed on the use of OBR evidence, and Restricted Information is further protected. ATSB reports cannot be used in civil or criminal proceedings. The search and entry provisions in the *TSI Bill* were closely scrutinised by the Attorney-General's Department during the drafting process, and Clause 33 was not considered to trespass unduly on personal rights and liberties.

The *TSI Bill* contains sufficient general safeguards to prevent an abuse of the power provided under Clause 33. Firstly, Clause 28 has the effect of limiting the exercise of the power to the purposes of an investigation under the *TSI Bill*. Secondly, subclauses 13(1) and (6) have the effect of confining the Executive Director's delegation to a suitable person for the exercise of the power. Such a delegation is likely to be made only where it is essential, for example, where there is an accident in a remote location and it is necessary to delegate powers to an appropriately qualified person in order to collect perishable evidence and to interview witnesses before their memory fades. Additionally, Clause 16 requires the Executive Director, or the Executive Director's delegate, to have regard to the desirability of minimising any resulting disruption to transport by means of transport vehicles.

With regard to the seizure of evidential material, as a result of an exercise of power under Clause 33, Paragraph 36(3)(b) requires that the material be directly relevant to the investigation concerned and the Executive Director must believe on reasonable grounds that it is necessary to seize the material in order to prevent it being interfered with or to prevent its concealment, loss, deterioration or destruction.

The inclusion of Clause 33 in the *TSI Bill* is consistent with international obligations. The current text of Annex 13 to the *Convention on International Civil Aviation (Chicago Convention)*, to which Australia is a party, includes standards and recommended procedures that are applicable from 1 November 2001. For example, paragraph 5.6 of Annex 13 provides that:

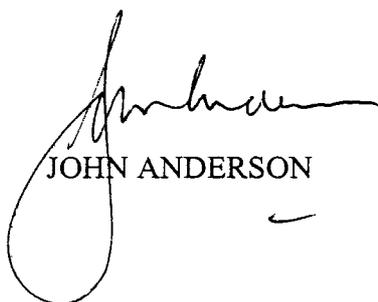
"The investigator-in-charge shall have unhampered access to the wreckage and unrestricted control over it to ensure that a detailed examination can be made without delay by authorized personnel participating in the investigation."

Clause 33 is thus in line with equivalent powers in other jurisdictions, such as New Zealand.

With the safeguards provided in the *TSI Bill*, I believe Clause 33 will not be used excessively or outside the context of what is necessary for the conduct of a transport safety investigation.

Thank you for seeking clarification on this matter from me.

Yours sincerely



JOHN ANDERSON



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19 AUG 2002

Senate Standing C'ttee
for the Scrutiny of Bills

THE HON TONY ABBOTT MP

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS

Leader of the House of Representatives

Minister Assisting the Prime Minister for the Public Service

PARLIAMENT HOUSE
CANBERRA ACT 2600

- 1 AUG 2002

Senator Trish Crossin
Acting Chairman
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 concerning the Workplace Relations (Registration and Accountability of Organisations) Bill 2002 (the Bill) contained in the Scrutiny of Bills Alert Digest No. 4 of 2002 (15 May 2002).

The Alert Digest draws attention to the strict liability offences in subclauses 258(2) and 337(2) of the Bill, querying whether they may be considered to trespass unduly on personal rights and liberties. The Committee sought my advice as to why strict liability has been applied to elements of the offences.

In short, strict liability applies to elements of the offences in line with the recently implemented criminal code.

For example, subclause 258(1)(b) applies when a person fails to comply with a request of an auditor. Strict liability has been applied to this paragraph because it would render the provision virtually inoperable if it were necessary to establish that the person intended to not comply with the request.

Moreover, it should be noted that subclause 258(3) provides a defence of reasonable excuse for not complying with the request, thereby ameliorating any perceived harshness of the imposition of strict liability.

Finally, it should be noted that, in the equivalent provisions in place prior to the implementation of the criminal code, intention was never an element of the offence created by section 258(1)(b). However, under the criminal code, it is necessary to identify elements of an offence to which strict liability applies. Accordingly, while it may appear that there has been a change in the makeup of the offence, this is actually not the case.

Identical issues arise in relation to subclause 337(2).

I hope this information addresses the Committee's concerns.

Yours sincerely

A handwritten signature in black ink, consisting of a long horizontal line followed by the letters 'T' and 'A' in a stylized, cursive script.

TONY ABBOTT

