



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

2002

23 October 2002

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ISSN 0729-6258

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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

THIRTEENTH REPORT OF 2002

The Committee presents its Thirteenth 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:

Trade Practices Amendment (Liability for Recreational Services
Bill 2002

Transport Safety Investigation Bill 2002

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 21 October 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 9 of 2002

This bill was introduced into the House of Representatives on 27 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Trade Practices Act 1974* to allow individuals to waive their contractual right to sue in relation to injury suffered while undertaking hazardous recreational activities.

Provision of incorrect print of bill and late provision of correct print of bill

The Committee commented on this bill in *Alert Digest No. 7 of 2002*, basing its comments on the print of the bill which had been supplied to it in the usual way. Although the bill was debated and passed in the House of Representatives on 28 August 2002, it was not until 9 September 2002 that the Committee secretariat received a substituted "First Reading Print" which was, apparently, the version which was debated in the House of Representatives. Among other differences between the two versions of the bill, one difference is that the substituted version does not contain the proposed new paragraph 68B(1)(d) of the Principal Act upon which the Committee commented in *Alert Digest No. 7 of 2002*.

The differences between the two versions are significant. The Committee, therefore, **seeks the Treasurer's advice** as to why the Committee was not provided with the correct version of the bill until 10 weeks after the bill had been first introduced on 27 June 2002.

Hereunder is the extract from *Alert Digest No. 7 of 2002* in relation to the initial version of the bill, followed by the comments the Committee has made in relation to the substituted version of the bill.

COMMENTS IN RELATION TO FIRST VERSION OF THE BILL

Dilution of liability for death or personal injury

Proposed new section 68B

Proposed new section 68B of the *Trade Practices Act 1974* would enable a corporation to exclude, restrict or modify the obligation, currently imposed by section 74 of the Act, that services will be rendered with due care and skill, and that any materials supplied in connection with those services will be reasonably fit for their purpose. Although the ability of the corporation to exclude, restrict or modify that obligation is limited to the supply of recreational services (as defined in proposed new subsection 68B(2)), the provision may be seen as coming within the Committee's Terms of Reference, especially because the exclusion, restriction or modification of liability is confined to liability for death or personal injury, two interests which are generally given all possible protection. The Parliamentary Secretary who introduced the bill asserted in his second reading speech that the bill "seeks to achieve that balance [between protecting consumers and allowing them to take responsibility for themselves] in a way that will benefit consumers and the many small businesses that are involved in recreational activities." The Committee brings this provision to the attention of Senators, but leaves for consideration by the Senate as a whole whether the bill trespasses unduly on the personal rights currently provided by section 74 of the Act.

Other than this, the Committee makes no further comment on this provision.

Uncertain operation

Proposed new paragraph 68B(1)(d)

Proposed new paragraph 68B(1)(d) would prevent a corporation from excluding, restricting or modifying its liability in cases where the corporation has been grossly negligent. The concept of "gross negligence" is one that the common law has never been asked to define, at least in relation to conduct causing death or personal injury. The Committee, therefore, brings to the attention of Senators the fact that this bill may be productive of considerable uncertainty for a number of years after it has been in force.

Other than this, the Committee makes no further comment on this provision.

COMMENTS IN RELATION TO THE SUBSTITUTED VERSION OF THE BILL

Dilution of liability for death or personal injury Proposed new section 68B

The comments which the Committee made about the version of proposed paragraph 68B(1)(d) which was before it when *Alert Digest No. 7 of 2002* was considered, are now clearly not applicable. However the Committee makes the following comments about the correct version of proposed new section 68B as a whole, being a provision which lessens the liability of corporations for death and personal injury.

While the original version of the bill would have prevented a corporation from excluding its liability for its own gross negligence, the current version of the bill would permit such an exclusion of liability. Under the Bill as passed by the House of Representatives, a corporation which provides recreational services will be permitted to completely exclude any liability for death or personal injury which it might otherwise have been under to those to whom it provides such recreational services, even though the death or personal injury is caused by the gross and wilful lack of care of those acting for the corporation. Furthermore, while the original version of the bill made the ability to exclude, restrict or modify liability subject to the implementation by the corporation of a “reasonable risk management strategy”, this limitation has been omitted from the current version of the bill. Those corporations which provide recreational services may knowingly act in a way which is contrary to any reasonable means of managing the risks of the activity, but exclude their liability for any resultant death or personal injury suffered by their customers.

The one possible saving grace of the current version of the bill is that a corporation will still not be able to exclude its liability for death or personal injury suffered by a minor (ie, a person under eighteen years of age) to whom it provides recreational services. However, that saving grace is the product solely of common law principles of contract law, and not of the bill passed by the House of Representatives.

The Committee, therefore, **seeks the Treasurer’s advice** on these aspects of the bill.

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

Relevant extract from the response from the Minister and Assistant Treasurer

I refer to matters raised by the Scrutiny of Bills Committee in its Alert Digest No 9 of 2002 concerning the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002*. I am responding on behalf of the Treasurer and as Minister responsible the legislation considered by the Committee.

Alert Digest No 7 of 2002 made remarks on a version of the Bill which appeared to be different to that which was introduced into the Parliament. I am advised that this mistake was the result of an inadvertent administrative oversight which occurred in the House of Representatives Table office at a time when that office was subject to significant and unusual work loads at the end of a . Parliamentary Sitting period. I am assured that the likelihood of such an incident being repeated is low.

The error was not discovered until Alert Digest No 7 of 21 August 2002 was examined by a Treasury official. The matter was immediately investigated and the error rectified.

In Alert Digest No 9 of 2002, the Committee commented on the correct version of the proposed new section 68B, referring to it as 'a provision which lessens the liability of corporations for death and personal injury'.

As noted in the Bill's Explanatory Memorandum, the contractual rights which consumers have by virtue of the Trade Practices Act (TPA) were not enacted with any specific intention that they might be used to provide remedies where consumers died or were injured as a result of a breach of a condition or warranty implied by the Act.

The purpose of the Bill is to ensure that the object of the TPA is not subverted for an improper purpose. There is scant evidence of the Act having been used in the past as a vehicle for seeking damages in cases of death or personal injury. However, there is nonetheless a legitimate concern that the rights conferred by the Act might be misused to undermine the significant law reforms currently being undertaken by State and Territory jurisdictions to rectify the defects which are apparent in existing common law regimes.

In particular, there is a widespread community perception that litigants have abused their common law rights to sue for negligence and related causes of action, and that this is a significant factor in the current public liability insurance crisis. The Commonwealth recognises the primary role of the State and Territories in improving the law in this area, and the proposed section 68B is designed merely to underpin State and Territory reforms and ensure just outcomes for the community at large.

Senators should also note that the Bill has been considered by the Review of the Law of Negligence, chaired by Justice Ipp.

The Final Report of the Review of the Law of Negligence found that the Bill was effective in removing the obstacle presented by section 68 to the exclusion of the warranties implied by section 74. However, the Review concluded that that the Bill does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

The Committee thanks the Minister for this response, but raises the following matters in relation to it.

The Committee recognises that there are problems in this area which should be addressed and that the bill proposes to do this. The Committee agrees that it is necessary to balance consumer protection against allowing consumers to take responsibility for their own actions. Nevertheless, the Committee would appreciate further details of its intended operation.

Firstly, it is possible that the bill may result in uncertainty, particularly in relation to exclusion clauses which will be included in consumer contracts in reliance on the new provision. It is likely that this will result in lengthy legal challenges to test the extent of the power. These challenges will be complicated by State and Territory provisions which, as the Minister observes, have a significant role in this area. It is especially likely that difficulties will arise in relation to families, where one family member buys tickets for recreational services for the whole family, including minors. In any event, it appears that the bill will likely cause an increase in litigation, at least in the short term.

Next, the Committee would appreciate amplification of the Minister's advice that the Trade Practices Act (TPA) was not intended to provide remedies where consumers have died or were injured as a result of a breach of a condition or warranty implied by the TPA. Other provisions of the TPA provide for compensation for death or injury.

The Committee also would be grateful for additional advice as to why the Minister describes taking action under the TPA as improper subversion and abuse of common law rights. It may be that the TPA was not intended to be used to facilitate such actions, but that is not the effect of the way it is drafted.

As noted above, the Committee accepts that it may be appropriate for consumers to take more personal responsibility for their actions. However, this should be accompanied by appropriate safeguards. For instance, earlier proposals provided that exclusion clauses could not limit liability for gross negligence. In addition, limiting liability was to be subject to the corporation having a reasonable risk management strategy. The present bill does not include either of these protections.

The Committee **seeks the Minister's further advice** on these aspects of the bill.

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

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 responded to those comments in a letter dated 16 September 2002.

In its *Twelfth Report of 2002*, the Committee commented on the Minister's response. It also decided to seek a briefing on this bill from departmental officers and, if necessary, to report further. On 21 October 2002, the Committee was briefed by officers of the Australian Transport Safety Bureau (ATSB) of the Department of Transport and Regional Services. The Committee thanks the Minister for this prompt response.

The main points which emerged from the briefing are set out at the end of the report on this bill. A proof copy of the Hansard transcript of the briefing is also attached to the back of this report.

For ease of reference, hereunder is an extract from the *Twelfth Report of 2002*, which includes the Minister's response of 16 September together with the Committee's comments, followed by the Committee's comments in relation to the briefing.

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.

The Committee's comments in response to the briefing by Departmental officers

The ATSB emphasised that the relevant powers in the bill related only to "no blame" safety investigations which were recognised by international conventions. The ATSB suggested that such a purpose was a major constraint on the exercise of the powers. The ATSB quoted the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, which recommended that, in considering whether to provide for entry and search, Parliament should take into account proportionality between the object of the power and the degree of intrusion involved. The ATSB submitted that the balance of proportionality favoured the proposed provisions.

The ATSB advised that both Canada and New Zealand provided wider powers for “no blame” safety investigations than for other inquiries.

In any event, the ATSB noted, the bill requires a warrant for most entry powers. The ATSB further advised that the bill provides safeguards for the few cases which would not require a warrant. For instance, any self-incriminating evidence cannot be used in adversarial proceedings. In addition, marine powers of entry and search will now be in primary rather than delegated legislation.

Finally, the ATSB suggested that the powers were proportionate given the practicalities of their exercise.

The Committee, however, remained concerned at the provisions, asking about the process of delegation by the Executive Director, in order to ensure that the delegate was an appropriate person to exercise the power. The Committee developed this line of question to include the lack of nexus in the legislation itself to connect the delegation power to criteria such as qualifications and experience. The Committee noted that under the bill a delegate need have no specific training in accident safety investigation or in search and entry procedures, which need a particular style and approach; basic criteria in relation to these matters should be established.

Another area of concern for the Committee was direct breach of individual rights. The view was expressed that private rights were involved, notwithstanding the “no blame” nature of the investigation. Powers exercised under such investigations still intrude on personal rights.

These breaches of individual rights were exacerbated by the nature of the power conferred, which appeared quite broad. For instance, the entry and search provision applies to any vehicle, whether or not it is at the scene of an accident. In addition, these and other provisions, which may be seen as arbitrary or summary, are not adequately defined. In this context there is no reasonable grounds qualification to the key clause 33. This is in contrast to related legislation.

The Committee also suggested that a warrant can be obtained relatively quickly, on oral testimony. Related legislation also provides for this.

Apart from the briefing, the Committee notes that provisions in the bill relating to identity cards may be deficient in that they do not require persons exercising premises powers to give a proper caution to those affected by them.

Conclusions of the Committee

The Committee concludes that the present provisions of the bill may be considered to trespass unduly on personal rights and liberties in that it fails to implement a number of principles set out in its *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*. These principles could be implemented by either the Act or the regulations, although if the regulations are used then the Act must refer expressly to them. The principles are as follows:

- (a) criteria should be established to ensure delegates have proper qualifications and training;
- (b) there should be a process whereby delegates must not only identify themselves, but also caution people affected as to their rights; and
- (c) any entry and search powers not involving an accident where loss of life has occurred, or which involve a vehicle away from an accident site, should be subject to a reasonable grounds requirement.

The Committee **seeks the further advice of the Minister** on these three matters.

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.

Jan McLucas
Chair



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22 OCT 2002

Senate Standing C'ttee
for the Scrutiny of Bills

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ASSISTANT TREASURER
Senator the Hon Helen Coonan

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

21 OCT 2002

Dear  Senator McLucas

Scrutiny of Bills Alert Digest

I refer to matters raised by the Scrutiny of Bills Committee in its Alert Digest No 9 of 2002 concerning the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002*. I am responding on behalf of the Treasurer and as Minister responsible the legislation considered by the Committee.

Alert Digest No 7 of 2002 made remarks on a version of the Bill which appeared to be different to that which was introduced into the Parliament. I am advised that this mistake was the result of an inadvertent administrative oversight which occurred in the House of Representatives Table office at a time when that office was subject to significant and unusual work loads at the end of a Parliamentary Sitting period. I am assured that the likelihood of such an incident being repeated is low.

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In Alert Digest No 9 of 2002, the Committee commented on the correct version of the proposed new section 68B, referring to it as 'a provision which lessens the liability of corporations for death and personal injury'.

As noted in the Bill's Explanatory Memorandum, the contractual rights which consumers have by virtue of the Trade Practices Act (TPA) were not enacted with any specific intention that they might be used to provide remedies where consumers died or were injured as a result of a breach of a condition or warranty implied by the Act.

The purpose of the Bill is to ensure that the object of the TPA is not subverted for an improper purpose. There is scant evidence of the Act having been used in the past as a vehicle for seeking damages in cases of death or personal injury. However, there is nonetheless a legitimate concern that the rights conferred by the Act might be misused to undermine the significant law reforms currently being undertaken by State and Territory jurisdictions to rectify the defects which are apparent in existing common law regimes.

In particular, there is a widespread community perception that litigants have abused their common law rights to sue for negligence and related causes of action, and that this is a significant factor in the current public liability insurance crisis. The Commonwealth recognises the primary role of the State and Territories in improving the law in this area, and the proposed section 68B is designed merely to underpin State and Territory reforms and ensure just outcomes for the community at large.

Senators should also note that the Bill has been considered by the Review of the Law of Negligence, chaired by Justice Ipp.

The Final Report of the Review of the Law of Negligence found that the Bill was effective in removing the obstacle presented by section 68 to the exclusion of the warranties implied by section 74. However, the Review concluded that that the Bill does not, by itself, exclude, restrict or modify the liability of providers of recreational services. The ordinary law of contract presents various significant obstacles to the achievement of that end.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Helen Coonan', written in a cursive style.

HELEN COONAN



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Transport Safety Investigation Bill 2002

(Private Briefing)

MONDAY, 21 OCTOBER 2002

CANBERRA

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BY AUTHORITY OF THE SENATE

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SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Monday, 21 October 2002

Members: Senator McLucas (*Chairman*), Senators Barnett, Crossin, Johnston, Mason and Murray
Senators in attendance: Senators Crossin, Johnston, McLucas and Murray

Terms of reference for the inquiry:
Transport Safety Investigation Bill 2002

WITNESSES

BILLS, Mr Kym Maynard, Executive Director, Australian Transport Safety Bureau, Department of Transport and Regional Services.....	1
FILOR, Captain Christopher William, Deputy Director, Surface Safety and Inspector of Marine Accidents, Australian Transport Safety Bureau, Department of Transport and Regional Services	1
LAM, Miss Wancy, Senior Lawyer, Australian Transport and Safety Bureau, Department of Transport and Regional Services	1
MACAULAY, Miss Kerry Maree, Team Leader, Transport Safety Investigation, Australian Transport Safety Bureau, Department of Transport and Regional Services.....	1

Committee met at 11.03 a.m.

BILLS, Mr Kym Maynard, Executive Director, Australian Transport Safety Bureau, Department of Transport and Regional Services

FILOR, Captain Christopher William, Deputy Director, Surface Safety and Inspector of Marine Accidents, Australian Transport Safety Bureau, Department of Transport and Regional Services

LAM, Miss Wancy, Senior Lawyer, Australian Transport and Safety Bureau, Department of Transport and Regional Services

MACAULAY, Miss Kerryn Maree, Team Leader, Transport Safety Investigation, Australian Transport Safety Bureau, Department of Transport and Regional Services

CHAIR—I open this meeting of the Senate Standing Committee for the Scrutiny of Bills. I thank officers of the Australian Transport Safety Bureau and the Department of Transport and Regional Services for giving us their time this morning. Before we proceed to questions, would you like to make an opening statement?

Mr Bills—That would be great. I understand that it would be preferable if I distributed copies of it. It is 3½ pages. I apologise, but I wanted it to be as comprehensive as I could. Are you happy for me to read it?

CHAIR—Please do so.

Mr Bills—Thank you for giving us this opportunity. We have carefully read the committee's *Alert Digest* No. 6 of 2002 and the 12th report of 2002 concerning the Transport Safety Investigation Bill 2002, which we call the TSI bill. The committee drew attention to the principles in its fourth report of 2000, *Entry and search provisions in Commonwealth legislation* and principle (1)(a)(i) of its own terms of reference. The *Alert Digest* stated that the committee considered that while the clause 33 proposed power concerning an accident site appeared reasonable, the clause 33 power to enter vehicles appeared wide in the context of subclauses (1) and (6) enabling delegation to a 'suitable person'.

The committee acknowledged the minister's detailed response of 16 September 2002 giving reasons for the delegation power and describing the safeguards for its operation but noted its continuing concern at the nature and extent of the power. The 12th report suggests:

There is also no constraint on the power except the subjective opinion of the Executive Director that a person is suitable.

A briefing by departmental officers was sought on these aspects.

In reviewing the committee's fourth report of 2000, we submit that it appears that the special circumstances of an ATSB 'no blame' investigation undertaken for the sole purpose of passenger and other transport safety, are not clearly addressed. The principles outlined relate to bodies that use entry and search powers to seek evidence of serious crime, to support the gathering of evidence to support a prosecution, to determine compliance with legislation in relation to a commercial benefit or to a levy in relation to a serious matter, or to monitor civil

matters which are serious. An investigation by the ATSB is undertaken based on Australia's international marine and aviation obligations such as in annex 13 to the Chicago convention which states:

The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

The objects of the TSI bill, at clause 7 and clause 17, which link to the international conventions, reflect this international commitment to investigate for 'no blame' future transport safety. Clause 28 makes it clear that the powers of concern to the committee may only be exercised for the purposes of an investigation based on clause 23(1) of this type. It is submitted that this is a major constraint on the power in addition to the executive director's subjective opinion. The committee's fourth report, at paragraph 1.33, states:

In considering whether to grant such a power, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two ...

It is submitted that the 'no blame' safety object of an ATSB investigation that seeks only to report on transport safety and to make recommendations that could save many lives in Australia and the rest of the world should be given substantial weight in assessing proportionality. Serious transport accidents such as with a 747 aircraft, a passenger train or a cruise ship can involve hundreds of fatalities and serious injuries and there can be costs and litigation that follow involving hundreds of millions of dollars. Lesser occurrences can also lead to commercial ruin and it is submitted that the proposed powers for entry and search properly have regard to the incentives that may arise to tamper with or remove evidence at an accident site or in a vehicle.

Analogous bodies to the ATSB overseas who have a similar 'no blame' safety investigation role also have broader powers than agencies who may use evidence to review compliance, impose liability or prosecute. For example, the act governing Canada's transportation safety board—CTSB—states:

Where an investigator believes on reasonable grounds that there is, or may be, at or in any place, any thing relevant to the conduct of an investigation of a transportation occurrence, the investigator may ... enter and search that place for any such thing, and seize any such thing that is found in the course of that search.

The legislation governing New Zealand's Transport Accident Investigation Commission—TAIC—provides, other than for a private dwelling or marae where a warrant is required, that:

... the Commission and any person authorised in writing for the purpose by the Commission shall have the power to do the following:

- (a) To enter and inspect any aircraft, rail service vehicle, aerodrome, building, or place where the Commission believes on reasonable grounds that it is necessary to do so for the purpose of investigating an accident or incident...

The powers after entry without warrant include seizing evidence, vehicles and other things that TAIC believes on reasonable grounds will assist in establishing the cause of an accident or incident.

In commenting on the exposure draft of the TSI Bill, the Chief Executive Officer of TAIC wrote:

Does the process of applying to a magistrate for a warrant risk loss of evidence because of delay? Since the ATSB's investigations are for preservation of life rather than blame, is it possible to relax the prescribed process? We have a standing warrant for entry to all buildings except dwellings and marae. It has not led to any problems, and people respect the need to get information quickly. We very rarely need to exercise our powers overtly.

In accordance with the committee's reported principles, the TSI Bill requires a warrant for the entry of most premises without occupier's consent. The proposed special premises powers, without consent or warrant, in clause 33 relate to accident sites and vehicles and are not as broad as those in Canada or New Zealand. Should they be utilised, subclause 36(3) outlines what the executive director may do with respect to requiring the answering of questions or the production and seizure of evidential material that is:

... directly relevant to the investigation concerned and the Executive Director believes, 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 legislation then protects any evidence gathered that is self-incriminating from being used in adversarial legal proceedings—that is clause 47—and there are further protections in part 6 of the TSI Bill concerning the use of restricted information and OBR information, such as cockpit voice recordings.

In accordance with the committee's reported principles, the TSI Bill will place into primary legislation the current powers of entry and search in the Navigation (Marine Casualty) Regulations that allow the ATSB to board a ship without consent or warrant to protect evidence. These regulations also allow for delegation through the appointment as an investigator of:

... a person possessing suitable qualifications and experience in navigation, marine engineering or other fields relevant to the investigation of an incident.

Current Air Navigation Act part 2A powers allow the director from time to time to appoint other persons to be investigators—that is section 19GC; and the director may delegate to an investigator who is not an officer of the department all or any of the director's powers under this act or the regulations—that is section 19GE. In contrast, the TSI Bill in clause 13 places constraints on delegation in relation to clauses 14, 25, 32, 35, 40 and 41, and provides further in subclauses (6) and (7) that:

The Executive Director must not delegate powers to a person unless the Executive Director is satisfied that the person is a suitable person to exercise those powers.

and:

In exercising powers under a delegation, the delegate must comply with any directions of the Executive Director.

It is submitted that this is a substantial change in line with the committee's principles compared with the existing legal framework.

It is recognised, though, that the committee wishes to go beyond considering whether the TSI Bill improves upon the existing position or is less broad than others internationally. However, it is submitted that this and the safety object of the TSI Bill are important considerations. I have outlined why we submit that the committee's fourth report principles mainly cover different types of entry and search from the 'no blame' safety purpose of the ATSB and that the object and individual protections associated with an investigation under the TSI Bill make it incorrect,

we believe, to conclude that there is 'no constraint on the power except the subjective opinion of the Executive Director that a person is suitable'.

I wish now to turn to more practical details that may assist the committee in further considering the issue of breadth and proportionality. Clause 33 type powers are not expected to be required to be used frequently but are nonetheless important. As an example, if there were a major aviation accident with great loss of life—for example, a Japanese 747 aircraft crashing in remote northern Australia—the ATSB would require substantial assistance to investigate it, potentially including from CASA, the ADF, police and Qantas, to mention a few. The US National Transportation Safety Board, as the US is the country of manufacture, and Japanese investigators, as Japan is the country of the operator, have particular participation rights under annex 13 to the Chicago convention.

Recently retired ATSB investigators and medical and pathology specialists may also be required to be made delegates of the executive director to assist with the investigation. In most cases, they would be appointed as special investigators under clause 14 and would satisfy criteria intended to be prescribed by the regulations. In addition to these criteria, the executive director must be satisfied for both special investigators and all others exercising delegations, including ATSB investigators, that the person is a suitable person to exercise those powers. If they are not appropriately mature and trained, the executive director may restrict the scope of delegations, including to clause 33, or give directions under subclause 13(7) concerning the circumstances in which powers are to be exercised.

I note in this context that ATSB investigators are mature professionals who typically have been engineers, ship's captains or pilots, among other specialties, and often officers in the ADF before they joined us. The ATSB has recently been nationally accredited as a registered training organisation and has established a diploma in safety investigation to underpin investigator competencies. Investigators from such bodies as the NTSB are also well qualified and have even great experience with major accidents, because of Australia's relatively good major accident transport safety record.

Accidents are random events. The timing and location of accidents cannot be anticipated and they are often at night. Another example where clause 33 powers may need to be used other than by an ATSB investigator would include a serious accident at night involving a foreign ship in a remote area where, unless powers could be exercised by a delegated AMSA officer on the spot, the ship may seek to leave Australian waters before a warrant or ATSB investigator could be obtained.

As a final example, if there were a fatal helicopter accident and someone associated with the operator sought to remove from the scene, in their car, records that may show that the aircraft had exceeded allowable flight hours or had used unsafe parts, there may be a need to enter and search the vehicle without consent and before a warrant could be obtained to protect such vital evidence. If an ATSB investigator were not at hand, a suitable delegate may need to exercise this power. We note that the committee's fourth report states at paragraph 1.61 that:

It is appropriate to grant a power of entry and search to monitor civil matters which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained.

I submit that this is applicable to the TSI Bill in respect of clause 33 and we would be happy to add to answer any questions that the committee may have but have not been adequately covered by this opening statement. Thank you.

CHAIR—Thank you, Mr Bills. Does either Captain Filor or Miss Lam wish to make any comment at this stage?

Capt. Filor—No.

CHAIR—Thank you for that opening statement. Essentially, from our meeting and from our reporting, you would know that there are essentially three issues that come out of the discussions that we have had—probably two and then another that has come into my mind today. The first two are the broader powers, as we saw them, as compared with the current legislation and the process of delegation. But I would like to also pursue that issue of no blame, because that is something that escaped me—I do not know about my colleagues. We will go first to the process of delegation: I have a couple of questions, and then I will hand over to other senators. You have described in your report actual events that may have occurred. How do you go through a process of delegation, if a 747 has crashed somewhere in northern Australia? What do you do?

Mr Bills—Mercifully that has not confronted us yet, but we believe it is important that this legislation deals with that extreme case because, unfortunately, those sorts of cases do happen on a regular basis around the world and Australia may not remain immune. I cannot tell you exactly what we have done in that case in the past, but it would be anticipated that—let us say that it is a US rather than a European or Canadian manufactured aircraft—the NTSB would put together a team that would come out as participants in the investigation. They would notify us of that team. We may say, ‘Could you supplement your team with a couple of other specialties because we may require that additional assistance to bolster the skill sets that we have available.’ For example, there may be a particular power plant specialist in the NTSB who deals with 747 engines and we may have a need, based on the accident, for that sort of specialty. So we would consider the list of people that the NTSB were proposing to send. We would ask about their background and experience and, if they were thought to be suitable, they would need to be delegated powers under our legislation. The international annex 13 convention that Australia has signed up to covers what is meant to happen, but it is only enacted into Australian law through legislation such as this. At that point we would have to decide which of the sections would be suitable for delegations to apply to. There would need to be a reasonably broad delegation, although I would not anticipate it would include delegations for obtaining warrants from magistrates and that sort of thing. But the clause 33 delegation may well be necessary because if, for example, one of these experts from overseas saw someone trying to tamper with evidence or whatever it may be, there would be a need to deal with that immediately.

CHAIR—I suppose the question I am asking is: what process do you have? Do you have a check list that you would go through to identify whether or not that person was an appropriate person to delegate power to?

Mr Bills—We do not have a check list at this point.

CHAIR—That is what I am looking for. What do you look at internally?

Miss Macaulay—I will answer that. In that particular case, those sorts of people would be appointed as special investigators and there is a check list, for want of a better description, in the draft regulations at this time. That includes relevant investigation experience and relevant technical expertise in the field. Their right under international participation would be another relevant check list item, and other expertise particular to the investigation that we require and which we may not, under that particular circumstance, have at that time.

Mr Bills—That is in the draft regulations, so obviously it is not current yet.

Senator MURRAY—But the legislation itself does not make the nexus. It does not say that you will connect the delegation to the skills, expertise or qualifications necessary.

Mr Bills—Clause 14 says that the executive director has to be satisfied that the person satisfies the criteria prescribed by the regulations. So that is correct; it is not in the legislation as such.

Senator MURRAY—But, even so, it does not make the nexus. The implication from what you have just said, Miss Macaulay, is that it would happen automatically. This section 14 says it may happen, and the committee's concern in this area would boil down to who would be appointed and what their skills and expertise would be. If you look in the actual delegation section, it just specifies that they have to be, under section 13(3), an SES employee, APS executive level 1 or 2 et cetera—or a special investigator. What we would look for in a delegation is that you make the nexus between your regulations and your specifications. I am sorry to have interrupted, but that is a concern.

Mr Bills—I guess we were concerned that, if there were to be such a major event, it may be difficult to foresee in advance exactly what every criterion should be, but we would try and specify the broad headings in the regulations as much as we could.

Senator MURRAY—But that is why the legislation should not be specific. It is in the regulations, the guidelines, the practices, the procedures and the manuals that this specificity applies. But we do not see a connection between the legislation and that.

Miss Macaulay—Clause 14 in relation to special investigators links directly to—

Senator MURRAY—But it says 'may'.

Mr Bills—Yes.

Senator JOHNSTON—Or does 'may' mean 'shall' in this instance?

Miss Macaulay—'May' in that instance is discretionary for the purposes of whether we need somebody or not. In the case where we feel it is appropriate to appoint somebody else, they then have to follow that set of criteria in determining whether they are suitable or not.

Mr Bills—I think that is certainly the way it is intended to be read—that you may appoint a special investigator—but if you are wanting to do that you need to be satisfied that the person satisfies the criteria prescribed by the regulations.

Senator MURRAY—But go back to section 13: you decide to delegate; you do not appoint a special investigator; those persons could have just general skills and abilities and no specific training in accidental safety investigation or how you conduct yourself in search and entry, where you need a particular style, approach and training. It does not reflect on the people; it reflects on the provisions that back their ability to do the job. You just do not link them sufficiently. The committee does not have a problem with what you are on about; it is the issue of delegation and how people are to be trained, skilled and selected. Once again, my experience with legislation is that it does not need to be particular to the legislation; you just have to have the link to the proper procedures, manuals or regulations that you create.

Mr Bills—I understand your point. We believe that in a major accident scenario we are going to be calling upon a number of others in the department and elsewhere to assist us and already we are doing desktop exercises for that sort of accident, and involving others in it as part of our training. We intend to train more broadly those that we expect to be involved, but the difficulty we have is that it is hard to foresee exactly every category of person that we may need in such an extreme situation. Let us say that 100 or 200 people are killed or seriously injured; that will be a massive undertaking and we believe it is hard to specify exactly the criteria other than linking it to the regulations as proposed.

Senator MURRAY—You do that with respect to the special investigator.

Mr Bills—Yes.

Senator MURRAY—You do not do it with respect to any other person delegated and who is not a special investigator.

Mr Bills—Other than the requirement on whoever is the executive director to make sure that they are a suitable person.

Senator MURRAY—And you can lay out those criteria: basic training capacity, experience or skills. It is not for us to determine what those are—you would know what those should be. In the same way as you have spelt them out in the broad, I assume, for special investigators, we would expect them to be spelt out for non-special investigators. By ‘we’ I mean the parliament; it is not for us to tell you what to do.

Mr Bills—Sure. The committee may choose to propose, if I understand you correctly, that there be a regulation spelling that out as well. Is that what you are saying?

Senator MURRAY—I cannot speak for my colleagues, but that is what is missing for me.

Senator JOHNSTON—You cannot do that in regulations, but you have to have a head of power that will establish the authority for the regulation to operate, so you have to sort the head of power out correctly.

I have some significant problems. You say that there is a no blame object in the bill. I note that in 7(1)(d), the report is going to be published. I expect that a licensing authority will take into account a report in the reissue of any licence to a private operator. It seems clear to me that private rights are involved, notwithstanding the no blame aspect to the bill. In addition, the coroner clearly has authority to call for the report in section 66. The coroner will have before

him a number of people representing private rights interests. Notwithstanding the no blame foundation stone, it is clear that you will be dealing extensively with private rights in the administration of these accident sites, premises and whatever else.

On that basis, I have some great problems with the way the bill is configured in contrast to what has gone before on this subject. The Air Navigation Act has very clear definitions when summary powers—if we can call them that—are to be exercised. It seems to me that you are saying that, because we have a no blame principle or object, we can therefore say to the committee and to parliament that these powers are somewhat less of an intrusion or abrogation of civil rights for citizens, and I am thinking particularly of small business operators in transport. I just do not think that that follows. I do not think that people are going to read the report in a vacuum.

If the coroner can call evidence and the director has to issue a certificate to prevent them from being compellable under section 64, he is going to be loath to do that if their evidence is absolutely crucial in a civil suit following a coronial inquest. Can you see where I am leading to in all this? Notwithstanding that you do not want to go there, you are going to end up in civil litigation. It seems very clear to me that that is the ultimate destination of all of this, particularly with serious accidents.

You mentioned that the conventions have reasonable ground provisions—the Chicago convention, the Canadian definition et cetera. We do not even have that in section 33. There are no reasonable grounds. Section 33 is completely out of context. Its only control appears to be section 28. When I looked for a definition of investigation in section 28, I found that the definition is, ‘an investigation under this act.’ That circuitous line tells me that this legislation has a lot of intrinsic arbitrary provisions that are in stark contrast to the Navigation (Marine Casualty) Regulations. The previous formula has always been that the administering officer has the powers set out. He then has to seek consent to use them and if he does not get consent he gets a warrant. I think that it would take 10 minutes to obtain a warrant. You can do it on oral evidence. The provisions in the other two acts allow for oral testimony to obtain a warrant. I would not imagine any magistrate being reluctant with a professional safety officer saying, ‘We need to seal all these sites. We need to close this pastoral lease down’ and here I am thinking of the plane with the air pressurisation problem that crashed in Queensland. It seems to me that all of that can be done very expeditiously and succinctly. To be perfectly blunt, the bill is poorly drafted. Section 33 stands alone and I cannot make head nor tail of it. The words ‘reasonable’ and ‘necessary’ are completely out of context. There is the reference to such force as is reasonable and necessary so you either need an axe or a chainsaw. That is a flippant example, but it is very poorly drafted.

Senator MURRAY—Can you check whether ‘special premises’ can mean a vehicle that is not at the site of an accident?

Miss Macaulay—That is correct.

Senator JOHNSTON—Again, if you look at the definitions, you are quite right. The definition of ‘accident’ seems to me to be full of lawyers’ feasts, if I can say that. There are words like ‘serious injury’—that is a terribly subjective test—whereas in the Air Navigation Act you spell out extensively what an accident actually is.

Mr Bills—There are quite a few questions and I will lose the thread—

Senator JOHNSTON—Let us go back to the private rights issue. I think the private rights issue is the nub of the whole thing, because that is what generates the concern that we hold, I suspect.

Mr Bills—I have a list of the questions so far. If I miss some, I am sure you will come back to me. The object of the TSI Bill, I believe, is an important qualifier, as I said in my opening statement. I think that is a key thing that needs to be picked up. The second point, in terms of being drawn into civil and criminal litigation, is that the TSI Bill as drafted specifically prevents that occurring. The only process that we can be involved in is a coronial process. The basis for that is that coroners' legislation around the country is couched in terms of an inquiry to determine the reasons for the deaths, so there is a substantial overlap with our work. We believe that it would be unreasonable for us not to be involved in that process and for our report not to be able to be used in that process, but it cannot be used in other civil or criminal litigation. That is, I think, a key point.

Senator JOHNSTON—That is only if the director grants a certificate. Correct me if I am wrong.

Miss Macaulay—That is only in relation to the appearance of staff members.

Mr Bills—But the final report cannot be used in criminal or civil litigation. I think you prefaced your question by saying that this report will be used, even if we do not want it to be. I am sure one of my colleagues will find that clause while I am going through the other points. In terms of clause 33 and the point that it stands on its own, my understanding—and I am not a lawyer—is that the clause has to be read in terms of the object of the bill; it cannot be taken out of context alone. Section 28, to which you referred, refers to a linkage to the investigation, which is defined as an investigation under this act. Therefore, it has to be a no-blame investigation under this act, not some other sort of investigation and not an investigation that does not involve a clause 23(1) transport accident safety matter. I think that is the context for clause 33, and I do not believe you can pull it or any other clause out and look at it alone. In terms of the definitions of 'accident' and 'serious injury', you are correct that there is less in this draft of the bill compared with the existing legislation. The reason for that is that the detail is in the draft regulations, so there is a linkage to the regulations for those matters.

Miss Macaulay—In fact, it is articulated in greater detail in the regulations and under current legislation.

Senator JOHNSTON—So what is the definition of 'accident' in the regulations?

Mr Bills—I will dig that out for you.

Senator MURRAY—To clarify, are the regulations disallowable?

Mr Bills—Yes, they are. This is only a draft and it is yet to go through the full consultation process with stakeholders and to be agreed by the minister. It is an immediately reportable matter, which is one of the more serious types and includes accidents, near collisions, incidents in which controlled flight into terrain was narrowly avoided, the rejection of a take-off from a

closed or occupied runway, a landing or attempted landing on a closed or occupied runway, significant failure to achieve predicted performance during take-off or initial climb and so forth. That is for commercial passenger or freight aircraft operation, but the broader definition that applies to those types of aircraft and more broadly includes the death of or serious injury to a person on board the aircraft—I am summarising slightly—an aircraft being missing, an aircraft suffering serious damage or structural failure or an aircraft being inaccessible if there are reasonable grounds to believe the aircraft has been seriously damaged. So as Miss Macaulay was saying—there is actually quite a lot of extra detail that I have not read out—it is far more detailed than in the current legislation to make it much clearer. I am sorry—I must have missed something from your questions.

Senator JOHNSTON—You mentioned in your opening remarks—I thought, very properly—looking at what international standards there are in a similar vein. You said that the Canadian transport safety board uses reasonable grounds. You also said that the Chicago Convention calls for reasonable grounds. The New Zealanders use reasonable grounds. But we do not use reasonable grounds?

Mr Bills—Section 36(3) shows what applies on special premises—namely, the accident sites or vehicles—where there has been an entry without warrant. Section 36(3)(b) says that the Executive Director may:

- (b) seize that evidential material, or any other evidential material found on the premises, if the material is directly relevant to the investigation concerned and the Executive Director believes, on reasonable grounds, that it is necessary to seize the material in order to prevent it being interfered with ...

et cetera.

Senator JOHNSTON—That is the seizure of material under reasonable grounds; but the entry is not made under reasonable grounds.

Senator MURRAY—If I could stop you there and go back to the point I was after earlier. That section that you have just read refers to special premises, which can include a vehicle that has not been the subject of an accident?

Mr Bills—Yes. It would apply in the case of the third example I gave in my opening statement, that of the helicopter—where someone had put some key evidence in their vehicle and was attempting to leave the site with it. In that case, we could enter that vehicle and seize that material.

Miss Macaulay—So there still needs to be a direct link to the investigation itself.

Mr Bills—But it does not have to be the accident vehicle; that is correct.

Senator JOHNSTON—The seizure is fine on reasonable grounds, but the actual entry is not on reasonable grounds.

Mr Bills—Section 33 says:

The Executive Director may do so with such assistance, and by such force, as is necessary and reasonable.

So I guess there is a 'reasonable' nexus there.

Senator JOHNSTON—I do not think there is; I really do not think there is. The force has to be reasonable and necessary, but there are no reasonable grounds for the exercising of the power.

Mr Bills—Other than the fact that it has to be an investigation under this bill.

Senator JOHNSTON—That is in contrast to the citations you have given us.

Mr Bills—The only thing is that it does have to be linked to the object of this bill. In that sense, an executive director or delegate cannot go off on a frolic of their own that is unrelated to a transport safety no-blame investigation—one that is not related to a particular accident or incident as defined in section 23(1).

Senator JOHNSTON—That is the point I am making. Your minister has said that section 28 is a safeguard. Under division 1, section 28 says:

The powers in this Part may only be exercised for the purposes of an investigation.

The bill's definition of 'investigation' is:

... an investigation under this Act.

Mr Bills—Correct—which means that it has to conform to the object of this act. It cannot be some other—

Senator JOHNSTON—How can you define it—because that means it does not have a definition? Correct me if I am wrong.

Mr Bills—My understanding is that it means it is not some other sort of investigation such as a police investigation, a regulators' investigation or some other type of investigation that is basically seeking evidence to prosecute someone or to otherwise affect their rights. Under this act, it has to be an investigation purely for future safety.

Senator JOHNSTON—Why would you not say an investigation was of an accident?

Miss Macaulay—Because an investigation can be of things other than what is traditionally known as an accident.

Senator JOHNSTON—So that we can go into premises without a warrant and not on reasonable grounds, for reasons other than an accident?

Miss Macaulay—If it is a serious incident, we may wish to do so.

Senator JOHNSTON—What is a serious incident? I am just looking at the bill.

Mr Bills—It is that list of things which I started to read out from the draft regulations. A near miss involving two large passenger aircraft may be more significant in safety terms than an

accident involving a smaller aircraft where a pilot did not load the correct amount of fuel or where a helicopter ran into powerlines. It is obviously a tragedy for the people involved, but those types of things tend to recur and an investigation of them does not have potentially as much future safety benefit as an investigation of a serious incident like a near miss.

Senator JOHNSTON—If you are right, and there are no private rights involved and it is all post facto—that is, the accident or the serious incident has occurred—why do you need the powers? If there is no blame and you do not have a problem with people hiding evidence, because there is no blame—

Mr Bills—We do have a problem with people hiding evidence.

Senator JOHNSTON—Why would they do that? Have you not told them there is no blame?

Mr Bills—Yes.

Miss Macaulay—They are not necessarily hiding it so as to hide it from us.

Senator JOHNSTON—They are hiding it so as to hide it from whom?

Mr Bills—From others who may do a parallel investigation, such as the police or a regulator.

Senator JOHNSTON—But you are closing the site down and you cannot access the site without your director's permission. He is not going to give that permission until you have done your report. Why is there a need to have these draconian powers in circumstances where nothing flows from them, as you would say?

Mr Bills—The example I gave of the helicopter, where someone has loaded some material into their private car before the site has closed down and is driving off with it—

Senator JOHNSTON—The point I am making is that there is nothing you can do about that under your scheme.

Mr Bills—Yes, there is.

Senator JOHNSTON—Your report has no consequences that flow in terms of criminality or private rights.

Miss Macaulay—But that is not the issue. The issue is trying to get to the bottom of why the accident happened so that we can save other lives in the future.

Senator JOHNSTON—Who is going to learn from that? The report has to be published, doesn't it?

Mr Bills—Yes.

Senator JOHNSTON—So if you clearly identify fault in your report, as I trust you would do, don't we end up in a private rights scenario? The no-blame situation falls away. I cannot see that you can have it both ways.

Mr Bills—Normally, we would obtain whatever evidence we can, including evidence that may incriminate people, so that our report covers all the relevant evidence and people can learn the future safety lessons that are there to be learned.

Senator JOHNSTON—And those gathering witnesses, your special investigators, will give evidence before the coroner?

Mr Bills—They could, yes.

Senator JOHNSTON—Can you see the argument that I am trying to mount that you are clearly in litigation?

Mr Bills—If serious criminal activity had occurred and it was clearly criminal and not related to an aircraft safety issue, we would not investigate in the first place; we would let the police do it. In a grey area, there could be a parallel investigation involving the police or a regulator. They would be the ones who would get involved in that subsequent litigation rather than us. They would use all the normal protections like reading people their rights and all the rest of it before obtaining evidence or taking witness statements.

Senator MURRAY—My view is that either the act or the regulations—and if the regulations are to be used then the act has to refer to the specific regulations—need to ensure a number of principles that we spelt out in our search and entry report. These are: firstly, the proper delegation of powers to people properly trained and able to do the job that is asked of them; secondly, the provision to persons on whom those powers are exercised of a cautioning process, whereby a piece of paper or a card of some sort is offered which says these are your rights or obligations so that people affected by a search and entry can clearly understand what is going on; and, thirdly, that in circumstances which are unclear as to whether it is a major disaster or whatever—that is, where an accident has not occurred—any rights exercised are exercised on reasonable grounds, which I think is one of the issues that Senator Johnston has been on about.

I can see a situation where, to use your example, there is a near miss in the sky, the pilot lands and is driving off in his car and some overzealous person uses reasonable force to stop him and search his car. I would like to know why and under what circumstances those things can occur. I am not sure whether the bill makes the proper connections through to regulations and sensible practice, which the department would obviously seek to carry out. I am sorry, Madam Chair, but I have to go to another committee.

CHAIR—I have also completed my questioning. Do you have any further comments?

Mr Bills—No.

CHAIR—You do not want to keep going?

Mr Bills—No.

Prof. Davis—I would like to pick up on one comment that Senator Murray made. Subsection 13(3) of the bill says:

(3) The Executive Director must not delegate his or her powers under section 32 to anyone other than:

(a) an SES employee; or

(b) a person who holds or performs the duties of an APS Executive Level 1 or 2 position or an equivalent position; or

(c) a person employed by any authority or body constituted by or under a law of the Commonwealth, where the skills and responsibilities that are expected of the person are equivalent to, or exceed, the skills and responsibilities expected of a person covered by paragraph (a) or (b); or

(d) a special investigator.

Yet under section 33 the executive director can delegate his or her powers to anyone at all. Might not Senator Murray's point, at least in relation to the width of delegation, be picked up by including the delegation of powers under section 33, as well as under section 32, in subsection 13(3), because then at least it would limit the range of people to whom the executive director can delegate their powers, both in relation to asking questions under section 32 and entering special premises under section 33.

Mr Bills—I am not in a position to negotiate changes to the legislation because it is a whole of government document.

Prof. Davis—I am just raising the possibility that, because special investigators, under section 14, must have the qualifications as listed in the regulations, at least that provides some limit on the extent of delegation.

CHAIR—Again, thank you very much for your time. Your evidence has been very useful to the committee.

Committee adjourned at 11.53 a.m.

