SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2003

20 August 2003

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2003

20 August 2003

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2003

The Committee presents its Eighth Report of 2003 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:

Communications Legislation Amendment Bill (No. 2) 2003

Family Law Amendment Bill 2003

National Transport Commission Bill 2003

Communications Legislation Amendment Bill (No. 2) 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2003*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 19 August 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 8 of 2003

[Introduced into the House of Representatives on 26 June 2003. Portfolio: Communications, Information Technology and the Arts]

The bill amends the *Telecommunications Act 1997*, the *Australian Security Intelligence Organisation Act 1979* and the *Administrative Decisions (Judicial Review) Act 1977* to enhance the security of Australia's telecommunication services and networks and to improve existing arrangements in relation to call data disclosure and interception services.

Non-reviewable decisions
Schedule 1, item 10

Proposed new section 58A of the *Telecommunications Act 1997*, to be inserted by item 10 of Schedule 1 to this bill, would give to the Attorney-General, after consulting the Prime Minister and the Minister administering the Telecommunications Act, a discretion to direct the Australian Communications Authority to refuse to grant a carrier licence to a person. Such a decision by the Attorney-General can only be made if he or she considers that the grant of a licence would be 'prejudicial to security', but there is no means by which that basis for a decision can be tested before any independent body. The *Telecommunications Act 1997* does not provide for a review on the merits of such a decision before the Administrative Appeals Tribunal, and item 1 of Schedule 1 to this bill proposes to amend the *Administrative Decisions (Judicial Review) Act 1977* to remove from the possibility of review under that Act a decision made under the new section 58A.

The Committee **seeks the Minister's advice** as to whether this is the effect of the provision and, if so, the reason for excluding review of such a decision.

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

Relevant extract from the response from the Minister

I note the Committee has raised concerns that the Bill will exclude decisions of the Attorney-General under the proposed new section 58A and subsection 581(3) of the *Telecommunications Act 1997* from review by an independent body and may be in breach of principle 1(a)(iii) of the Committee's terms of reference.

The proposals to exempt decisions by the Attorney-General, either to direct the Australian Communications Authority to refuse to grant a carrier licence, or to direct a carrier or carriage service provider not to use or supply, or to cease using or supplying a carriage service on the basis that it would be prejudicial to security, from review under the *Administrative Decisions (Judicial Review) Act 1997* (AD(JR) Act), are consistent with existing policy. While the AD(JR) Act provides a streamlined form of judicial review, it is not designed to deal effectively with the review of sensitive material.

Decisions made on grounds of security, or which have security implications, under for example, the *Intelligence Services Act 2001; Telecommunications (Interception) Act 1979; Foreign Acquisitions and Takeovers Act 1975;* and *Australian Security Intelligence Organisation Act 1979,* are currently exempt from review under the AD(JR) Act.

There will, however, be a number of avenues for independent review. Judicial review of decisions made by the Attorney-General under the proposed amendments would be available in the Federal Court under section 39B of the *Judiciary Act 1903* and in the High Court under section 75(v) of the Constitution.

In addition, the proposed new sections 35 and 38A of the *Australian Security Intelligence Organisation Act 1979* will enable a carrier licence applicant or a carrier/carriage service provider who is the subject of an adverse or qualified security assessment provided by ASIO to the Attorney-General to seek merits review of that assessment in the Security Appeals Division of the Administrative Appeals Tribunal.

I trust this information is of assistance.

The Committee thanks the Minister for this response. The Committee notes that the proposal is based on a policy relating to the judicial review of decisions based on sensitive material. The Committee considers that this amendment may make rights or liberties dependent upon non-reviewable decisions, but whether it does so *unduly* is a matter for the Senate as a whole.

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

Non-reviewable decisions
Schedule 1, item 27

Proposed new subsection 581(3) of the *Telecommunications Act 1997*, to be inserted by item 27 of Schedule 1 to this bill, would give to the Attorney-General, after consulting the Prime Minister and the Minister administering the Telecommunications Act, a discretion to direct a carriage service provider to deny carriage services to a particular person. As with proposed new section 58A, such a decision by the Attorney-General can only be made if he or she considers that the use of carriage services would be 'prejudicial to security', but there is no means by which that basis for a decision can be tested before any independent body.

The Committee **seeks the Minister's advice** as to whether this is the effect of the provision and, if so, the reason for excluding review of such a decision.

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

Relevant extract from the response from the Minister

Response same as for Schedule 1, item 10 above.

The Committee thanks the Minister for this response. The Committee again notes that the proposal is based on a policy relating to the judicial review of decisions based on sensitive material. The Committee considers that this amendment may make rights or liberties dependent upon non-reviewable decisions, but whether it does so *unduly* is a matter for the Senate as a whole.

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

Family Law Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 8 July 2001. 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. 2 of 2003

This bill was introduced into the House of Representatives on 12 February 2003 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Family Law Act 1975* to clarify those provisions of the Act dealing with property and financial interests, including:

- providing a clear power for courts exercising jurisdiction under the Act to make orders binding on third parties when dealing with property settlement proceedings under the Act;
- removing the requirement to register parenting plans;
- clarifying the power of the Court to use electronic technology, including video and telephonic links;
- reflecting changes to the structure and operation of the Family Court of Australia;
- improving the parenting compliance regime;
- varying provisions relating to the operation of financial agreements;
- allowing for orders and injunctions to be binding on third parties; and
- making miscellaneous and technical amendments.

The bill also contains application provisions.

Retrospective commencement
Schedules 4, 5 and 7

By virtue of items 6, 8, 10, 12, 14, 15, 17, 20, 22 and 24 in the table to subclause 2(1) of this bill, the amendments proposed by various items in Schedules 4, 5 and 7 would commence immediately after the commencement of Schedule 2 to the *Family Law Amendment Act 2000*, which occurred on 27 December 2000. The Explanatory Memorandum does not indicate whether any of these amendments would adversely affect any person. All that that Memorandum does is to refer to the fact that various items in those Schedules are to commence immediately after the commencement of the 2000 Amendment Act (although it might be noted that the numbering of the items in the various Schedules is not in accordance with the numbering either later in the Explanatory Memorandum or in the bill itself). The Explanatory Memorandum goes on to assert that "the effect of the actual provisions is described below." Unfortunately, that promise is not completely fulfilled. The explanations of the effect of the particular items in each Schedule does not address the fact that the amendment has retrospective effect, and does not advise whether that retrospectivity will adversely affect any person. The Committee therefore **seeks the Attorney-General's advice** on this point.

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

Relevant extract from the response from the Attorney-General

> The Committee has expressed concern that the retrospective provisions in Schedules 4, 5 and 7 may 'trespass unduly on personal rights and liberties'. The Committee is also concerned that the affect of transitional provisions in Schedule 6 will be to import retrospectivity to the provisions in a way that will again 'trespass unduly on personal rights and liberties'. These issues are discussed below.
>
> The Committee also notes an inconsistency in the numbering of the provisions between the Explanatory Memorandum and the Bill. I note that the numbering of the commencement provisions in the Bill and the body of the Explanatory Memorandum is correct. However, there is an error in paragraphs 4 & 5 of Clause 2 of the Explanatory Memorandum where a summary of commencement dates is provided. A draft Correction to the Explanatory Memorandum in relation to this is attached for information.

In relation to retrospectivity, I note that a number of items will operate from the commencement of Schedule 2 of the *Family Law Amendment Act 2000* (FLAA 2000) which occurred on 27 December 2000. This reflects the Government's intention when the FLAA 2000 was enacted. I will address each schedule in detail.

Schedule 4 – parenting compliance

In the FLAA 2000, the Government introduced a three stage parenting compliance regime. One aim of that regime was to facilitate the better enforcement of parenting orders by courts exercising jurisdiction under the *Family Law Act 1975* (the Family Law Act). One difficulty that has emerged with this new regime has been that such courts do not have sufficient flexibility when dealing with the myriad of circumstances surrounding the making of orders affecting children. There are also some technical problems with the new regime as outlined below.

Some of the retrospective amendments in this schedule allow the court greater flexibility in the range of orders and sanctions that they can make to enforce orders. A number of the amendments also address minor drafting errors in the FLAA 2000 and ensure that the original intention of that Act is implemented. Retrospectivity of these provisions will be beneficial to clients seeking to enforce court orders about parenting against a party who has breached the terms of the order, which is a key issue for many family law clients.

Item 2 amends paragraph 65T(1)(b), which relates to the obligations of the court where there is an application to deal with a contravention of an order. An incorrect reference to section 112AD (the general sanctions for failure to comply with an order) is replaced with a reference to Division 13A of Part VII (consequences of failure to comply with orders that affect children). Under the changes made by the FLAA 2000, all remedies for breaches of orders affecting children are now contained in Division 13A. Without this amendment section 65T is effectively inoperative as there never will be an application before the court to deal with an offender under section 112AD, which is in Part XIIIA.

Items 4 and 5 amend the definition of orders affecting children to ensure only contraventions of the listed types of undertakings and subpoenas can be captured under Division 13A of Part VII. As currently drafted the provision may include undertakings and subpoenas that relate to other proceedings under the Family Law Act, such as property settlement proceedings. This was not the Government's original intention.

Items 9 and 10 relate to a change to the definition of primary order to ensure that slight variations of existing orders are still regarded as breaches of the original order. Without this amendment, slight changes to the original order could mean that the three stage parenting compliance regime effectively starts again with each minor change to an order.

Items 11 to 13 ensure that all previous findings of contraventions can be counted as previous contraventions for the purposes of the parenting compliance regime. It has been argued that the existing provisions do not include contraventions of orders

affecting children where a person does not prove that they had a reasonable excuse. Subsection 112AD(1) of the Family Law Act, as it was previously drafted, dealt with contraventions of orders other than residence, contact or specific issues orders. It would have applied, for example, to injunctions made in relation to children. That subsection did not require the person to prove they had a reasonable excuse for contravening the order. Arguably, breaches of such orders are not caught in the current wording of breaches that can be 'counted' for the purposes of the parenting compliance regime in Division 13A of Part VII. This amendment ensures that the original intention of the provisions is implemented.

Items 25 to 27 ensure that arrangements in place with States and Territories extend to include proceedings affecting children. This change does away with the need to bring into force new agreements with the States and Territories with the consequent delays that would ensue.

Schedule 5 – financial agreements

Item 1 amends subsection 90F(1). Section 90F is designed to discourage binding financial agreements, in relation to the maintenance of a party, being made that have the effect of one party relying on an income tested pension rather than on payments from the other party. As currently drafted, the provision requires the court to consider the position of the parties when the agreement was made. There may be many years before the agreement comes into effect.

The amendment to section 90F(1) allows the court to consider the circumstances of the party at the time the agreement takes effect, rather than when it was made. This is contrary to the general rule that if an issue has been dealt with in a financial agreement, the court does not have jurisdiction to make an order. This means that if a party is unable to support himself/herself without government income support, then the court may make a maintenance order, notwithstanding the agreement.

Retrospective amendment to this provision is warranted in the circumstances. The Government's intention has always been to ensure that financial agreements can be set aside by the court in circumstances where the consequence of the agreement is such that a party can only support themselves by relying upon the public purse notwithstanding that their spouse may well be able to make maintenance payments. The retrospective application of this section is expected to have a minimal impact. It is justified given the potential savings in income support.

Item 4 amends section 90L to correct an error in the drafting of FLAA 2000 to ensure that financial agreements are not liable for duty under Commonwealth and State law. This reflects the Government's intention at the time of the FLAA 2000 and should be beneficial to family law clients.

For your information, I further propose to include in the Bill an amendment to section 90C of the Family Law Act, which will also operate retrospectively from the commencement of the FLAA 2000. Section 90C provides for binding financial agreements to be made during a marriage. The Government's intention at the time of introducing this provision in the FLAA 2000, was that such agreements could be

made both before and after the breakdown of a marriage but before the dissolution of marriage. However, there is some uncertainty as to whether section 90C operates to include financial agreements made post-separation but prior to divorce. Thus, I propose that the section be amended to clarify this uncertainty.

The retrospective operation of this amendment is necessary to give effect to the Government's original intention. It does not impact adversely on anyone who has made such a financial agreement, as these parties would have relied on the Government's intention that they were able to make such an agreement during the period after separation but before the dissolution of the marriage.

Schedule 7

The retrospective amendments in Schedule 7 relate to a number of drafting problems unintentionally introduced by the FLAA 2000. Given that these amendments correct minor drafting issues which were not intended, it is appropriate that they be retrospective, otherwise there will potentially be anomalies in the way that parties to family law proceedings are treated.

Item 20 corrects a drafting error in the parenting compliance regime provisions of the FLAA 2000. There is an incorrect reference to section 70NM relating to provision of bonds imposed as part of the third stage of the parenting compliance regime. The change is to section 70NJ. This provides the powers of a court when dealing with a person under the third stage of the parenting compliance regime. Subsection 70NJ(4), which gives a court powers to give directions when varying or discharging community service orders, makes reference to community service orders being made under section 70NM. Such orders are made under section 70NL. The provision has no effect as currently drafted. Retrospectivity is required to give the court power to deal with the discharge of such orders that have currently been made.

Item 25 reinstates the courts power to exercise the general powers provided by section 80 when setting aside a transaction designed to defeat the Family Law Act. This was previously available prior to the powers being relocated as a consequence of FLAA 2000. The change was not intended and the amendment is designed to allow the court to exercise these more general powers that it would have been able to do before the relocation of the provision.

Item 26 amends subsection 107(2). Section 107 prevents a person being imprisoned because of a contravention of an order for the payment of money made under the Family Law Act. As previously drafted, subsection 107(2) made it clear that the provisions of subsection 107(1) preventing a person being imprisoned, did not apply to proceedings relating to contempt of the court under what was then Division 3 of Part XIIIA. The FLAA 2000 created a new Part XIIIB dealing with contempt. This change was not reflected in section 107. The amendment ensures that where the Court is considering subsection 107(2) that a person not be imprisoned for failure to comply with various orders that this will not affect the operation of Part XIIIB, which deals with contempt.

Item 30 corrects an error in section 117A. This section provides a court with the power to order reparations to a person where another person has taken a child away or refused to deliver a child in accordance with a residence or contact order. The section was not amended to reflect the creation of Division 13A of Part VII by the FLAA 2000. The provision still incorrectly refers to proceedings for breach of parenting and contact orders under section 112AD in Division 2 of Part XIIIA.

Item 31 reinstates the power of the court, set out in section 117C, to make further orders after an offer of settlement has been made. As currently drafted subsection 117C(2A) effectively prevents the court from making any further orders after an offer has been accepted.

The Committee thanks the Attorney-General for this response. The Committee notes that the impact of the retrospectivity of the amendments proposed by the items noted in Schedules 4 and 7, and by item 4 of Schedule 5, is clearly explained. The response indicates that these items, for the most part, correct technical deficiencies, give the court greater flexibility in enforcing orders or are expected to be beneficial to family law clients. The Committee makes no further comment on these provisions.

By contrast, the Committee notes that the amendment contained in item 1 of Schedule 5 is expected to have 'minimal impact' which is 'justified given the potential savings in income support'. The Committee **seeks the further advice of the Attorney-General** on the impact of this provision.

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

Retrospective operation
Part 1 of Schedule 6, Part 2

By virtue of Part 2 of Schedule 6 to this bill, the amendments proposed by Part 1 of that Schedule will apply to "all marriages, including those that were dissolved before" the date of commencement of that Schedule. However, the Explanatory Memorandum does not advise whether this retrospective application will adversely affect any person. Accordingly, the Committee **seeks the Attorney-General's advice** on this aspect of the provision.

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

Relevant extract from the response from the Attorney-General

Schedule 6 provides for orders and injunctions binding third parties. It is not intended to operate retrospectively. However, there are transitional provisions in Part 2 of the schedule that provide that the new provisions will apply to all marriages, including those dissolved before the commencement date. That is the provisions will apply to any applications relating to property made after 28 days after the Act receives Royal Assent.

The transitional provisions make it clear that the provisions do not re-open any property settlements that have already been concluded or property orders that have been made. The provisions will apply if a property settlement is revoked due to fraud, because it is void, voidable, or unenforceable or because a change in circumstances make it impracticable for the agreement or part of it to be carried out. Parties will not be able to agree to revoke their agreements in order to apply the new provisions.

The application of the transitional arrangements is fair and equitable, as it will not reopen property matters already finalised. The provisions should be beneficial to parties by making the processes for division of property more efficient.

I trust that this information is useful to the Committee.

The Committee thanks the Attorney-General for this response.

National Transport Commission Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2003*, in which it made various comments. The Minister for Transport and Regional Services has responded to those comments in a letter dated 26 June 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2003

This bill was introduced into the House of Representatives on 4 June 2003 by the Minister for Regional Services, Territories and Local Government. [Portfolio responsibility: Transport and Regional Services]

Introduced with the National Transport Commission (Consequential Amendments and Transitional Provisions) Bill 2003, the bill proposes to replace the current National Road Transport Commission (NRTC) with a new body, the National Transport Commission (NTC). The NTC will be an independent statutory body with responsibility for developing, monitoring and maintaining uniform or nationally consistent regulatory and operational reforms relating to road, rail and intermodal transport.

The bill also provides a mechanism for setting out model legislation and other instruments in the regulations which have been agreed to by the Australian Transport Commission Ministers. The provisions of the proposed Act are also to be supported by an inter-governmental agreement that is currently being finalised to formalise the cooperative arrangements between the Commonwealth, States and Territories and define the roles and responsibilities of the NTC, the ATC and the different jurisdictions.

The bill largely replicates the NRTC Act and reflects established practice concerning the appointment of Commissioners, remuneration and procedural and reporting requirements for an organisation of this kind.

The bill also includes a broad regulation-making power and a review and report clause.

Commencement
Subclause 2(3)

By virtue of subclause 2(3) of this bill, it is to commence on Proclamation, but may not commence until nine months after Assent. The Explanatory Memorandum gives no indication of the reason for this breach of legislative policy, which is spelt out in clause 18 of Drafting Direction 2002, No. 2, to the effect that any period of delayed commencement longer than six months "should be explained in the Explanatory Memorandum." The Committee **seeks the Minister's advice** as to the reason for this breach of legislative policy.

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

Relevant extract from the response from the Minister

Subclause 2(1)(2) of the Bill provides for Sections 3 to 52 of the Act to commence on a single day to be fixed by Proclamation. Subclause 2(3) provides that if Proclamation does not occur within nine months from the date the Act receives Royal Assent, Sections 3 to 52 will commence on the first day after the end of that nine month period.

A period of nine months was selected because the Act cannot commence until Commonwealth, State and Territory Transport Ministers have signed an Inter-Governmental Agreement. Because of the potential for delay in finalising and signing the Agreement and the separate time-lines for progressing the Bill through Parliament, based on previous experience, a nine month period was estimated as providing sufficient surety that the Act would not commence before the Agreement was signed.

As it stands, subject to the Agreement being signed and passage of the Bill through Parliament, the aim is to commence Sections 3 to 52 by Proclamation on 15 January 2004. This will allow a seamless transition between the National Road Transport Commission and the National Transport Commission following the repeal of the *National Road Transport Commission Act 1991*.

I trust that this explanation clarifies the matter. In future my Department will ensure that Explanatory Memoranda set out the reasons for any Acts having commencements any longer than six months after Royal Assent.

The Committee thanks the Minister for this response and for the undertaking that the reasons for delayed commencements of this nature will in future be set out in relevant Explanatory Memoranda.

Trish Crossin
Chair

SENATOR THE HON RICHARD ALSTON
Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

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

19 AUG 2003

Dear Senator Crossin Trish .

I refer to a letter of 14 August 2003 from Mr Pye, Secretary of the Scrutiny of Bills Standing Committee, drawing attention to concerns raised by the Committee in relation to Communications Legislation Amendment Bill (No. 2) 2003 (the Bill).

I note the Committee has raised concerns that the Bill will exclude decisions of the Attorney-General under the proposed new section 58A and subsection 581(3) of the *Telecommunications Act 1997* from review by an independent body and may be in breach of principle 1(a)(iii) of the Committee's terms of reference.

The proposals to exempt decisions by the Attorney-General, either to direct the Australian Communications Authority to refuse to grant a carrier licence, or to direct a carrier or carriage service provider not to use or supply, or to cease using or supplying a carriage service on the basis that it would be prejudicial to security, from review under the *Administrative Decisions (Judicial Review) Act 1997* (AD(JR) Act), are consistent with existing policy. While the AD(JR) Act provides a streamlined form of judicial review, it is not designed to deal effectively with the review of sensitive material.

Decisions made on grounds of security, or which have security implications, under for example, the *Intelligence Services Act 2001*; *Telecommunications (Interception) Act 1979*; *Foreign Acquisitions and Takeovers Act 1975*; and *Australian Security Intelligence Organisation Act 1979*, are currently exempt from review under the AD(JR) Act.

There will, however, be a number of avenues for independent review. Judicial review of decisions made by the Attorney-General under the proposed amendments would be available in the Federal Court under section 39B of the *Judiciary Act 1903* and in the High Court under section 75(v) of the Constitution.

In addition, the proposed new sections 35 and 38A of the *Australian Security Intelligence Organisation Act 1979* will enable a carrier licence applicant or a carrier/carriage service provider who is the subject of an adverse or qualified security

assessment provided by ASIO to the Attorney-General to seek merits review of that assessment in the Security Appeals Division of the Administrative Appeals Tribunal.

I trust this information is of assistance.

Yours sincerely

RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

ATTORNEY-GENERAL
THE HON DARYL WILLIAMS AM QC MP

RECEIVED
2 0 JUL 2003
Senate Standing C'ttee for the Scrutiny of Bills

- 8 JUL 2003

03/813, 03/228022

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

Dear Senator McLucas

I am writing in response to your letter, of 6 March 2003, which drew my attention to comments from the Committee about the Family Law Amendment Bill 2003 (the Bill) in the *Scrutiny of Bills Alert Digest No. 2 of 2003 (5 March 2003).*

The Committee has expressed concern that the retrospective provisions in Schedules 4, 5 and 7 may 'trespass unduly on personal rights and liberties'. The Committee is also concerned that the affect of transitional provisions in Schedule 6 will be to import retrospectivity to the provisions in a way that will again 'trespass unduly on personal rights and liberties'. These issues are discussed below.

The Committee also notes an inconsistency in the numbering of the provisions between the Explanatory Memorandum and the Bill. I note that the numbering of the commencement provisions in the Bill and the body of the Explanatory Memorandum is correct. However, there is an error in paragraphs 4 & 5 of Clause 2 of the Explanatory Memorandum where a summary of commencement dates is provided. A draft Correction to the Explanatory Memorandum in relation to this is attached for information.

In relation to retrospectivity, I note that a number of items will operate from the commencement of Schedule 2 of the *Family Law Amendment Act 2000* (FLAA 2000) which occurred on 27 December 2000. This reflects the Government's intention when the FLAA 2000 was enacted. I will address each schedule in detail.

Schedule 4 – parenting compliance

In the FLAA 2000, the Government introduced a three stage parenting compliance regime. One aim of that regime was to facilitate the better enforcement of parenting orders by courts exercising jurisdiction under the *Family Law Act 1975* (the Family Law Act). One difficulty that has emerged with this new regime has been that such courts do not have sufficient flexibility when dealing with the myriad of circumstances surrounding the making of orders affecting children. There are also some technical problems with the new regime as outlined below.

Some of the retrospective amendments in this schedule allow the court greater flexibility in the range of orders and sanctions that they can make to enforce orders. A number of the amendments also address minor drafting errors in the FLAA 2000 and ensure that the original intention of that Act is implemented. Retrospectivity of these provisions will be beneficial to clients seeking to enforce court orders about parenting against a party who has breached the terms of the order, which is a key issue for many family law clients.

Item 2 amends paragraph 65T(1)(b), which relates to the obligations of the court where there is an application to deal with a contravention of an order. An incorrect reference to section 112AD (the general sanctions for failure to comply with an order) is replaced with a reference to Division 13A of Part VII (consequences of failure to comply with orders that affect children). Under the changes made by the FLAA 2000, all remedies for breaches of orders affecting children are now contained in Division 13A. Without this amendment section 65T is effectively inoperative as there never will be an application before the court to deal with an offender under section 112AD, which is in Part XIIIA.

Items 4 and 5 amend the definition of orders affecting children to ensure only contraventions of the listed types of undertakings and subpoenas can be captured under Division 13A of Part VII. As currently drafted the provision may include undertakings and subpoenas that relate to other proceedings under the Family Law Act, such as property settlement proceedings. This was not the Government's original intention.

Items 9 and10 relate to a change to the definition of primary order to ensure that slight variations of existing orders are still regarded as breaches of the original order. Without this amendment, slight changes to the original order could mean that the three stage parenting compliance regime effectively starts again with each minor change to an order.

Items 11 to 13 ensure that all previous findings of contraventions can be counted as previous contraventions for the purposes of the parenting compliance regime. It has been argued that the existing provisions do not include contraventions of orders affecting children where a person does not prove that they had a reasonable excuse. Subsection 112AD(1) of the Family Law Act, as it was previously drafted, dealt with contraventions of orders other than residence, contact or specific issues orders. It would have applied, for example, to injunctions made in relation to children. That subsection did not require the person to prove they had a reasonable excuse for contravening the order. Arguably, breaches of such orders are not caught in the current wording of breaches that can be 'counted' for the purposes of the parenting compliance regime in Division 13A of Part VII. This amendment ensures that the original intention of the provisions is implemented.

Items 25 to 27 ensure that arrangements in place with States and Territories extend to include proceedings affecting children. This change does away with the need to bring into force new agreements with the States and Territories with the consequent delays that would ensue.

Schedule 5 – financial agreements

Item 1 amends subsection 90F(1). Section 90F is designed to discourage binding financial agreements, in relation to the maintenance of a party, being made that have the effect of one party relying on an income tested pension rather than on payments from the other party. As currently drafted, the provision requires the court to consider the position of the parties when the agreement was made. There may be many years before the agreement comes into effect.

The amendment to section 90F(1) allows the court to consider the circumstances of the party at the time the agreement takes effect, rather than when it was made. This is contrary to the general rule that if an issue has been dealt with in a financial agreement, the court does not have jurisdiction to make an order. This means that if a party is unable to support himself/herself without government income support, then the court may make a maintenance order, notwithstanding the agreement.

Retrospective amendment to this provision is warranted in the circumstances. The Government's intention has always been to ensure that financial agreements can be set aside by the court in circumstances where the consequence of the agreement is such that a party can only support themselves by relying upon the public purse notwithstanding that their spouse may well be able to make maintenance payments. The retrospective application of this section is expected to have a minimal impact. It is justified given the potential savings in income support.

Item 4 amends section 90L to correct an error in the drafting of FLAA 2000 to ensure that financial agreements are not liable for duty under Commonwealth and State law. This reflects the Government's intention at the time of the FLAA 2000 and should be beneficial to family law clients.

For your information, I further propose to include in the Bill an amendment to section 90C of the Family Law Act, which will also operate retrospectively from the commencement of the FLAA 2000. Section 90C provides for binding financial agreements to be made during a marriage. The Government's intention at the time of introducing this provision in the FLAA 2000, was that such agreements could be made both before and after the breakdown of a marriage but before the dissolution of marriage. However, there is some uncertainty as to whether section 90C operates to include financial agreements made post-separation but prior to divorce. Thus, I propose that the section be amended to clarify this uncertainty.

The retrospective operation of this amendment is necessary to give effect to the Government's original intention. It does not impact adversely on anyone who has made such a financial agreement, as these parties would have relied on the Government's intention that they were able to make such an agreement during the period after separation but before the dissolution of the marriage.

Schedule 7

The retrospective amendments in Schedule 7 relate to a number of drafting problems unintentionally introduced by the FLAA 2000. Given that these amendments correct minor drafting issues which were not intended, it is appropriate that they be retrospective, otherwise there will potentially be anomalies in the way that parties to family law proceedings are treated.

Item 20 corrects a drafting error in the parenting compliance regime provisions of the FLAA 2000. There is an incorrect reference to section 70NM relating to provision of bonds imposed as part of the third stage of the parenting compliance regime. The change is to section 70NJ. This provides the powers of a court when dealing with a person under the third stage of the parenting compliance regime. Subsection 70NJ(4), which gives a court powers to give directions when varying or discharging community service orders, makes reference to community service orders being made under section 70NM. Such orders are made under

section 70NL. The provision has no effect as currently drafted. Retrospectivity is required to give the court power to deal with the discharge of such orders that have currently been made.

Item 25 reinstates the courts power to exercise the general powers provided by section 80 when setting aside a transaction designed to defeat the Family Law Act. This was previously available prior to the powers being relocated as a consequence of FLAA 2000. The change was not intended and the amendment is designed to allow the court to exercise these more general powers that it would have been able to do before the relocation of the provision.

Item 26 amends subsection 107(2). Section 107 prevents a person being imprisoned because of a contravention of an order for the payment of money made under the Family Law Act. As previously drafted, subsection 107(2) made it clear that the provisions of subsection 107(1) preventing a person being imprisoned, did not apply to proceedings relating to contempt of the court under what was then Division 3 of Part XIIIA. The FLAA 2000 created a new Part XIIIB dealing with contempt. This change was not reflected in section 107. The amendment ensures that where the Court is considering subsection 107(2) that a person not be imprisoned for failure to comply with various orders that this will not affect the operation of Part XIIIB, which deals with contempt.

Item 30 corrects an error in section 117A. This section provides a court with the power to order reparations to a person where another person has taken a child away or refused to deliver a child in accordance with a residence or contact order. The section was not amended to reflect the creation of Division 13A of Part VII by the FLAA 2000. The provision still incorrectly refers to proceedings for breach of parenting and contact orders under section 112AD in Division 2 of Part XIIIA.

Item 31 reinstates the power of the court, set out in section 117C, to make further orders after an offer of settlement has been made. As currently drafted subsection 117C(2A) effectively prevents the court from making any further orders after an offer has been accepted.

Schedule 6

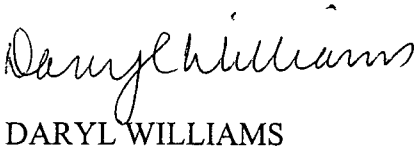
Schedule 6 provides for orders and injunctions binding third parties. It is not intended to operate retrospectively. However, there are transitional provisions in Part 2 of the schedule that provide that the new provisions will apply to all marriages, including those dissolved before the commencement date. That is the provisions will apply to any applications relating to property made after 28 days after the Act receives Royal Assent.

The transitional provisions make it clear that the provisions do not re-open any property settlements that have already been concluded or property orders that have been made. The provisions will apply if a property settlement is revoked due to fraud, because it is void, voidable, or unenforceable or because a change in circumstances make it impracticable for the agreement or part of it to be carried out. Parties will not be able to agree to revoke their agreements in order to apply the new provisions.

The application of the transitional arrangements is fair and equitable, as it will not reopen property matters already finalised. The provisions should be beneficial to parties by making the processes for division of property more efficient.

I trust that this information is useful to the Committee.

Yours sincerely



DARYL WILLIAMS

2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILY LAW AMENDMENT BILL 2003

CORRECTION TO THE

EXPLANATORY MEMORANDUM

CLAUSE 2 COMMENCEMENT

Paragraph 4 – omit "2AA, 2C,3-5,11-17, 19AA and 19A" substitute "3, 6-8, 14-19 and 23-24", omit "26-28 and 32-34" substitute "27-29 and 32-35"

Paragraph 5 - omit "2AA, 2B, 6-9, 18,19,20,20-22", substitute "4-5, 9-13, 20-22, 25-27", omit "25, 25A, 29 and 31" substitute "25-26 and 30-31" to correct a typographical error in the Explanatory Memorandum.

(Circulated by authority of the Attorney-General,
the Hon Daryl Williams AM QC MP)

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

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

26 JUN 2003

Dear Senator Crossin

I refer to a letter dated 19 June 2003 from the Secretary to your Committee to my Senior Adviser concerning comments in the Scrutiny of Bills Alert Digest No. 6 of 2003 (18 June 2003) about the National Transport Commission Bill 2003.

Subclause 2(1)(2) of the Bill provides for Sections 3 to 52 of the Act to commence on a single day to be fixed by Proclamation. Subclause 2(3) provides that if Proclamation does not occur within nine months from the date the Act receives Royal Assent, Sections 3 to 52 will commence on the first day after the end of that nine month period.

A period of nine months was selected because the Act cannot commence until Commonwealth, State and Territory Transport Ministers have signed an Inter-Governmental Agreement. Because of the potential for delay in finalising and signing the Agreement and the separate time-lines for progressing the Bill through Parliament, based on previous experience, a nine month period was estimated as providing sufficient surety that the Act would not commence before the Agreement was signed.

As it stands, subject to the Agreement being signed and passage of the Bill through Parliament, the aim is to commence Sections 3 to 52 by Proclamation on 15 January 2004. This will allow a seamless transition between the National Road Transport Commission and the National Transport Commission following the repeal of the *National Road Transport Commission Act 1991.*

I trust that this explanation clarifies the matter. In future my Department will ensure that Explanatory Memoranda set out the reasons for any Acts having commencements any longer than six months after Royal Assent.

Yours sincerely

JOHN ANDERSON

Parliament House, Canberra ACT 2600
Tel: (02) 6277 7680 Fax: (02) 6273 4126
john.anderson.mp@aph.gov.au