SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SECOND REPORT

OF

2004

3 March 2004

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MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 2004

The Committee presents its Second Report of 2004 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Crime Commission Amendment Bill 2003

Aviation Transport Security Bill 2003

Superannuation Safety Amendment Bill 2003

Australian Crime Commission Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2004*, in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 1 March 2004. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2004

[Introduced into the Senate on 4 December 2003. Portfolio: Attorney-General]

The bill amends the *Australian Crime Commission Act 2002* to facilitate the transition from the National Crime Authority to the Australian Crime Commission (ACC) by addressing transitional and other issues which have arisen since the establishment of the ACC on 1 January 2003.

The bill also amends the *Administrative Decisions (Judicial Review) Act 1977* to exempt certain decisions from being subject to requests for statements of reasons; and the *Australian Postal Corporation Act 1989* to allow disclosure of certain information and documents to the ACC.

Retrospectivity
Schedule 1, item 17

By virtue of item 3 in the table to subclause 2(1) of this bill, the amendments proposed in item 17 of Schedule 1 would commence immediately after the commencement of Schedule 1 to the *Australian Crime Commission Establishment Act 2002*. It appears from the Explanatory Memorandum that this Act commenced on 1 January 2003. As a matter of practice the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case however, the Explanatory Memorandum advises that the proposed amendment fulfils an undertaking which the Minister gave to the Regulations and Ordinances Committee, in that it replaces Regulations which would have had retrospective effect. The amendment addresses transitional matters, providing for the transition of functions from the National Crime Authority to the Australian Crime Commission, and the retrospectivity does not appear to affect any person adversely.

The Committee notes, however, that on page 2 of the Explanatory Memorandum, the note on clause 2 states that the clause:

provides that all provisions commence on the day the Act receives the Royal Assent, other than items 1 to 16 of Schedule 1 (the transitional provisions) which have retrospective application from the date of the establishment of the [Australian Crime Commission] – ie, from 1 January 2003.

That statement is incorrect, but would be correct if "items 1 to 16" were omitted and replaced by "item 17". The Committee therefore draws the Minister's attention to this cross-referencing error in the Explanatory Memorandum.

In the circumstances, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

> Thank you for drawing my attention to an incorrect cross-reference in the Explanatory Memorandum. I will table a correction to the Explanatory Memorandum in Parliament substituting 'item 17' for the reference to 'items 1 to 16' in the note on Clause 2.

The Committee thanks the Minister for this response and for his undertaking to table an amended Explanatory Memorandum.

Decisions no longer subject to judicial review
Schedule 2, item 1

Item 1 of Schedule 2 to this bill would amend the *Administrative Decisions (Judicial Review) Act 1977* to remove from the purview of that Act various decisions under the *Australian Crime Commission Act 2002*. The Australian Crime Commission has replaced the National Crime Authority, but decisions made by that Authority under its constituent Act were not removed from the purview of the *Administrative Decisions (Judicial Review) Act 1977*. The Committee consistently draws attention to provisions which explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee therefore **seeks the Minister's advice** as to the reason for this proposed amendment to the 1977 Act.

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

> You also seek my advice as to the reason for the proposed amendment to Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* ('the AD(JR) Act') to exempt certain decisions made under the *Australian Crime Commission Act 2002* ('the ACC Act') from being subject to requests for statements of reasons under section 13 of the AD(JR) Act.
>
> Section 13 of the AD(JR) Act provides that, in specified circumstances, reasons for an administrative decision may be obtained by an applicant. Schedule 2 of the AD(JR) Act sets out classes of decisions that are exempt from the operation of section 13. The current exemptions include 'decisions relating to the administration of criminal justice'. Item 1 of Schedule 2 of the Bill would amend Schedule 2 of the AD(JR) Act to ensure that decisions made under the ACC Act in connection with intelligence operations or investigations of State offences that have a federal aspect fall within the list of exempt decisions.
>
> In seeking advice as to the reason for the proposed amendment, the Committee notes that decisions of the ACC's predecessor, the National Crime Authority, 'were not removed from the purview of the *Administrative Decisions (Judicial Review) Act 1977'*. That interpretation is not accurate. Decisions in connection with investigations of offences against a law of the Commonwealth or a Territory under the *National Crime Authority Act 1984* (the NCA Act) were exempt from the

operation of section 13 of the AD(JR) Act by virtue of paragraph (e) of Schedule 2 of the AD(JR) Act. Those decisions fell within the exempt class of 'decisions relating to the administration of criminal justice', which includes 'decisions in connection with investigations' (which is limited to offences against a law of the Commonwealth or a Territory).

The types of decisions that I now seek to exempt from the operation of section 13 of the AD(JR) Act are decisions that fall within the functions of the ACC under the ACC Act, but that did not fall within the functions of the NCA under the original NCA Act. The ACC's function of undertaking intelligence operations was never expressly conferred on the NCA under the NCA Act. The function of undertaking investigations concerning offences against a law of a State that has a federal aspect did not exist in the original NCA Act, but was later conferred on the NCA through the *National Crime Authority Amendment Act 2000.* At the time the ACC Act was enacted in late 2002, the consequential amendment to Schedule 2 of the AD(JR) Act had not yet been made to cover that new class of NCA decisions.

My reason for seeking to amend the Schedule 2 of the AD(JR) Act to exempt these new classes of ACC decisions is that they are decisions of essentially the same nature as decisions already exempt under paragraph (e) of Schedule 2 of the AD(JR) Act ('decisions relating to the administration of criminal justice', which includes 'decisions in connection with investigations').

An 'intelligence operation' is defined in the ACC Act as meaning 'the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity'. It is possible that decisions in connection with intelligence operations fall within the existing exemption in Schedule 2 of the AD(JR) Act for being 'decisions relating to the administration of criminal justice', and potentially also 'decisions in connection with investigations'. The proposed amendment seeks to put the exempt status of these types of decisions beyond doubt by expressly providing that decisions in connection with intelligence operations are in a class of decisions that are exempt from section 13.

All decisions of the ACC in connection with the investigation of offences should be exempt from the operation of section 13 of the AD(JR) Act, irrespective of whether the offences are against a law of the Commonwealth or a Territory, or against a law of the state with a federal aspect. The proposed amendment would broaden the scope of the exemptions in Schedule 2 of the AD(JR) Act to this effect. The proposed amendment also reflects the purpose of the ACC legislation, which is to promote a cooperative scheme between all Australian jurisdictions to combat serious and organised crime.

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this response.

Aviation Transport Security Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2003*, in which it made various comments. The Minister for Transport and Regional Services responded to those comments in a letter dated 19 June 2003. The Committee reported on the response in its *First Report of 2004*.

In *Alert Digest No. 1 of 2004*, the Committee drew attention to amendments made in the House of Representatives in relation to undue trespass on personal rights and liberties and apparent wide discretion. The Minister for Transport and Regional Services has responded in a letter dated 27 February 2004. A copy of the letter is attached to this report. An extract from the amendments section of the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Amendments section of Alert Digest No. 1 of 2004

Aviation Transport Security Bill 2003: The House of Representatives amended this bill on 3 December 2003. One amendment codified the power of an airport screening officer to request a person subject to screening to undergo a limited frisk search. Another amendment provided that a person could undergo a frisk search as an alternative to another screening procedure. The remaining amendments raise no issues of concern within the Committee's terms of reference.

The Committee commented on this bill in *Alert Digest No. 5 of 2003* in relation to various issues. The Committee has received a response from the Minister and will report on those issues in its *First Report of 2004*.

Undue trespass on personal rights and liberties
Clauses 95A and 95B

The House of Representatives amended the bill to allow airport screening officers to frisk search a person either as an alternative to the normal screening procedures or because the results of the initial screening indicate that additional screening procedures are necessary. Clause 95A allows a person subject to screening to choose to undergo a frisk search as an alternative to another screening procedure thus catering for persons who, for medical reasons, prefer not to be screened electronically. Clause 95B allows a screening officer to request a person to undergo a frisk search where the results of a screening procedure indicate that additional screening procedures are required to properly screen a person. The Committee notes that under subclause 95B(3) a screening officer cannot require a person to undergo a frisk search or conduct a frisk search of a person without that person's consent.

The reality of this consent may be tendentious, however, given that the person will be left with no alternative but to consent to the search if he or she wishes to pass beyond the screening point. The Explanatory Memorandum provides no information about how a person would be made aware of their rights before a search was carried out and whether they would have any recourse if they were refused passage through the screening point because they did not consent to be searched. The Committee therefore **seeks the Minister's advice** on these matters.

The Committee is concerned that the power to undertake a procedure that has potential to trespass unduly on personal rights and liberties has been extended to airport screening officers without explanation. The supplementary Explanatory Memorandum to these amendments provides no reason for extending this power to persons other than law enforcement officers or why in the situations in which these powers would be used, law enforcement officers would not be asked to conduct the frisk search. The Committee therefore **seeks the Minister's advice** on the reasons for extending the power to search a person to airport screening officers. The Committee **also seeks the Minister's advice** on the qualifications and the training that will be required by screening officers to ensure that they understand the personal and legal responsibilities involved in searching a person.

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

Relevant extract from the response from the Minister

I refer to the Alert Digest No 1 of 2004 of the Senate Standing Committee for the Scrutiny of Bills in relation to Amendments to the Aviation Transport Security Bill 2003, moved in the House of Representatives on 3 December 2003. I appreciate the opportunity to respond to the Committee's comments and regret the delay in responding.

The Committee's comments are in relation to new Clauses 95A and 95B of the Bill, which provide for a frisk search as an alternative screening procedure or an additional screening procedure in the screening of persons boarding an aircraft or entering an area or zone in a security controlled airport.

The proposed clause 95A will enable a person subject to screening to choose to undergo a frisk search as an alternative to another screening procedure. This provision will cater for those persons who, for example, for medical reasons, may prefer not to be screened electronically. Proposed clause 95B allows a screening officer who is unable to clear a person using other screening procedures to ask that person to undergo a frisk search. If the person refuses to undergo a frisk search, the person may not pass the screening point.

The extent of the supplementary frisk search screening officers are authorised to conduct is limited to the necessary to satisfy themselves that the person may or may

not be cleared. For example, they may seek permission to frisk a lower leg (in the case where the person has a steel plate in their knee, for example) but not to extend that to a 'full body search'. These matters will be addressed in the training of screening officers as indicated in this letter.

Consent and Refusal

Under the amendments, the frisk search will only be undertaken with consent. How consent is obtained is a matter for industry and while generally it will be sought orally, it may also be sought by other means such as with consent cards. Pat down searches or frisk searches cannot be undertaken without consent.

If a person can not be cleared, the screening officer may not allow that person to pass through the screening point. To allow a person who has not been cleared onto an aircraft or into a security controlled area or zone would be a breach of the Act as it would fundamentally compromise the cleared zone. The Bill provides no recourse for those refused clearance where that person has not consented to be screened.

The use of Screening Officers versus Law Enforcement Officers

We recognise that the proposed powers depart from the Government's normal policy that law enforcement officers should exercise these powers. However, a number of safeguards have been included to ameliorate the operation of Clause 95B, including that the person who submits to a frisk search must consent to the frisk search, and that the search must take place in a private room by a screening officer of the same sex. Further, in exercising powers under Clause 95B, a screening officer must not use more force or subject a person to greater indignity than is necessary or reasonable. A screening officer commits an offence carrying a maximum penalty of 50 penalty units if the officer does not exercise the power in accordance with the legislation.

Law enforcement officers are not generally available to undertake screening of passengers at airports. In addition, some airports do not have law enforcement officers permanently on site. Based on the safeguards outlined, the unique nature of the airport security environment, the considerable practical difficulties of having law enforcement officers conducting all frisk searches at airports and the industry consultation on which these amendments are based, I consider that in this case, it is appropriate that screening officers should exercise these powers.

Qualifications and Training of Screening Officers

Subclause 94(2) of the Bill requires the Relations to prescribe the qualifications and training of screening officers. The draft Regulations require that screening officers must hold at least a Certificate II in Security Operations, with competencies appropriate for the duties of a screening officer. This qualification includes a competency related to ensuring that screening officers clearly and accurately inform those being screened of the purposes and procedures of the screening process, and that this process is carried out in accordance with legislative requirements.

Upon completion of this training, for the first 40 hours while the screening officer is on duty, a qualified screening officer must supervise the screening officer. The qualified screening officer may not supervise more than one screening officer at a time. During the supervised period, the screener may not make independent screening decisions. At the end of that time the qualified screener must certify that the person is competent as a screening officer.

In addition, a screening officer must be assessed (by a suitably qualified assessor of a registered training organisation), within each 12 month period, as being competent in a number of topics, including conducting limited physical searches, such as those contained in Clauses 95, 95A and 95B of the Bill.

The codification of powers contained in the Bill will require the industry to upgrade its training requirements. The Department of Transport and Regional Services has agreed to work with the industry to develop new training modules appropriate to the new legislative requirements.

The Committee thanks the Minister for this response and notes that although the proposal to allow screening officers to frisk search a person is a departure from normal Government policy, guidelines will be developed to assist those officers when exercising the powers under this bill. The Committee recognises that this practice has been introduced to improve the security of the airport environment but considers the exercise of this power should also be monitored periodically to ensure that it does not adversely affect the reasonable rights of individuals.

In relation to the Minister's advice that a frisk search may only take place with the consent of the person, the Committee is still concerned that the reality of the consent made in some cases may be tendentious.

In the meantime, the Committee continues to draw Senators' attention to this provision as it may breach principle 1(a)(i) of its terms of reference in relation to personal rights and liberties.

The Committee considers that its consideration of these amendments would have been assisted if this explanation had been included in the Supplementary Explanatory Memorandum to this bill.

Extract from Amendments section of Alert Digest No. 1 of 2004

Apparent wide discretion
Subclause 95B(2)

The Committee also notes that the supplementary Explanatory Memorandum advises that a person would be subject to a 'limited frisk search'. Subclause 95B(2) provides that a screening officer 'may conduct the search only to the extent necessary to complete the proper screening of the person'. The extent of the search would appear be left to the discretion of the screening officer. The Committee therefore **seeks the Minister's advice** on whether guidelines will be developed to assist screening officers in such situations.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Extent of a frisk search

Under the current legislative regime (paragraph 20A(1)(a) of the *Air Navigation Act 1920*), the Secretary is required to make an instrument setting out the manner and occasion of screening of people, vehicles or goods. The Bill provides a similar requirement in Clause 44(2)(j), although in the case of the Bill, it may be either a Regulation or an instrument made by the Secretary. The manner and occasion of screening instrument provides an outline of industry wide standards on screening people, vehicles and goods.

Such an instrument will be made following commencement of the Bill, and will deal in detail with the exercise of powers under Clauses 95A and 955. This instrument will become the Australian screening standard and will be adhered to by all screening authorities.

Further, the manner of screening instrument is used by screening authorities to develop standard operating practices (SOPs). The SOPs provide a greater level of detail and are designed to be used in the workplace.

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

The Committee thanks the Minister for this response and notes the advice that clause 44(2)(j) will allow the manner and occasion of screening of people, vehicles or goods to be determined either by regulation or an instrument made by the Secretary. The Committee is concerned that guidance on the conduct and extent of a frisk search may be determined by instruments that are not subject to the same level of transparency and scrutiny. While the *Acts Interpretation Act 1901* subjects regulations to gazettal and parliamentary scrutiny, subclause 44(3) of this bill does not impose the same requirements on the instruments made by the Secretary. The Committee also notes that these instruments may not be subject to parliamentary scrutiny under the *Legislative Instruments Act* 2003 unless they are determined to be of a legislative character or were declared to be disallowable before that Act commences in 2005. The Committee considers that there is merit in providing for the disallowance of these instruments, as this allows the expertise of the Regulations and Ordinances Committee to be brought to bear should any contentious issues arise in the administration of the scheme. The Committee therefore leaves to the Senate the question of whether an instrument made by the Secretary under subclause 44(3) should be subject to parliamentary scrutiny.

In the meantime, the Committee continues to draw Senators' attention to this provision as it may breach principle 1(a)(v) of its terms of reference in relation to parliamentary scrutiny.

The Committee also considers that its consideration of these amendments would have been assisted if this explanation had been included in the Supplementary Explanatory Memorandum to this bill.

Superannuation Safety Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 2003*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 1 March 2004. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 16 of 2003

[Introduced into the House of Representatives on 27 November 2003. Portfolio: Treasury]

The bill amends the *Superannuation Industry (Supervisions) Act 1993* to:

- provide for the licensing by the trustees of superannuation entities regulated by the Australian Prudential Authority (APRA) and the registration of those entities;
- require trustee licensees to develop and maintain risk management strategies governing the trustee's operations and risk management plans for each fund under the trustee's control;
- provide for enforcement powers, including penalty provisions;
- prescribe standards applicable to the operation and amalgamation of regulated superannuation funds, approved deposit funds and pooled superannuation trusts; and
- clarify the application of the law to groups of trustees.

The bill also amends the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervisions) Act 1993* to expand the reporting requirements for actuaries and auditors in respect of defined benefit funds.

The bill also contains transitional provisions.

Cancellation of a licence
Proposed paragraphs 29G(2)(d) and (f)

Paragraphs 29G(2)(d) and (f) provide for the cancellation of a registrable superannuation entity (RSE) licence if APRA has reason to believe that the licensee will breach a condition imposed on the licence or will fail to comply with a direction under section 29EB of the Act. It would appear from these provisions that a decision to cancel a licence may be made simply because APRA believes something is not going to happen. The Explanatory Memorandum provides limited information on the operation of these provisions. In particular, it does not indicate the basis on which APRA would make such decisions, nor whether there is a process whereby a licensee would receive prior notification of the intention to cancel the licence and be given the opportunity to remedy the alleged breach or make submissions to APRA before that licence is cancelled. The Committee notes that the decision to cancel a licence is subject to review. This process may, however, be rendered irrelevant if a licensee seeks a review but it becomes apparent that the events could not possibly happen. The Committee **seeks the Minister's advice** on the operation of these provisions.

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 insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

As the Committee is aware, proposed section 29G of the Bill gives APRA the power to cancel in writing Registrable Superannuation Entity (RSE) licences in certain circumstances. These circumstances include where the Australian Prudential Regulation Authority (APRA) has reason to believe that the RSE licensee:

- has breached or will breach a condition imposed on the licence; or
- has failed or will fail to comply with a direction from APRA under proposed section 29EB of the Bill.

A decision to cancel an RSE licensee's RSE license requires the prior consent of the Minister before it can be effected. The decision is also a reviewable decision by the Administrative Appeals Tribunal (see Schedule 1, Part 1 Item 13 of the Bill). In addition, where an RSE licensee is also the holder of an Australian Financial Services Licence (AFSL), proposed section 29GA requires APRA to consult first

with the Australian Securities and Investments Commission (ASIC) if, in APRA's opinion, the cancellation might reasonably be expected to affect the licensee's ability to provide financial services.

These provisions are designed to give APRA powers which are similar to those it currently has in relation to Approved Trustees under section 28 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). In particular, paragraph 28(2)(b) provides APRA with the power to revoke a Trustee's approval if APRA is satisfied, on reasonable grounds, that the trustee can no longer be relied on to perform, in a proper manner, the duties of the trustee of each relevant entity of which the trustee is the trustee. The provisions are also consistent with APRA's powers under paragraph 133(2)(b) of the SIS Act, which allow APRA to suspend or remove the trustee of a superannuation entity where it appears to the Regulator that conduct that has been, is being, or is proposed to be, engaged in by the trustee or any of the trustees may result in the financial position of the entity or of any other superannuation entity becoming unsatisfactory.

The provisions have been drafted along the same lines as paragraph 915C(aa) of the *Corporations Act 2001*, which enables ASIC to suspend or cancel an AFSL where ASIC has reason to believe that the licensee will not comply with their obligations under section 912A of the Act. ASIC must first give the licensee an opportunity to appear, or be represented, at a hearing and to make submissions before suspending or cancelling a licence under these provisions.

While there is no explicit requirement included in the Bill for APRA to give the licensee an opportunity to make representations or submissions before it undertakes to cancel the licensee's licence, APRA's decision would clearly be reviewable if there was a failure to accord procedural fairness to the licensee. This is because such a decision would affect the legal rights of the licensee (see for example, *Kioa v West* (1985) 159 CLR 550).

Under normal circumstances, I am advised that APRA would require the licensee to show cause as to why its licence should not be cancelled, and allow the licensee time to respond. However, in extreme circumstances where members' superannuation assets are at immediate risk, APRA may dispense with its normal practice of requiring a licensee to show cause before taking a decision to cancel the licensee's licence. Again, this is consistent with existing natural justice principles (see for example, *Marine Hull & Liability Insurance Co Ltd v Hurford* 62 ALR 253). In addition, it is also incumbent on the Minister to offer natural justice to a licensee prior to approving a request from APRA to consent to the cancellation of the licensee's RSE licence.

I trust that this information is of assistance to the Committee.

The Committee thanks the Minister for this response.

Trish Crossin
Chair

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

03/12810

1 MAR 2004

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

Dear Senator Crossin Trish,

I refer to the letter dated 12 February from the Acting Secretary of your Committee to my Senior Adviser about the Australian Crime Commission Amendment Bill 2003 (the Bill). The letter invites my response to comments about the Bill in the Scrutiny of Bills Alert Digest No 1 of 2004.

Explanatory Memorandum – note on Clause 2

Thank you for drawing my attention to an incorrect cross-reference in the Explanatory Memorandum. I will table a correction to the Explanatory Memorandum in Parliament substituting 'item 17' for the reference to 'items 1 to 16' in the note on Clause 2.

Schedule 2, item 1 – Decisions no longer subject to judicial review

You also seek my advice as to the reason for the proposed amendment to Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* ('the AD(JR) Act') to exempt certain decisions made under the *Australian Crime Commission Act 2002* ('the ACC Act') from being subject to requests for statements of reasons under section 13 of the AD(JR) Act.

Section 13 of the AD(JR) Act provides that, in specified circumstances, reasons for an administrative decision may be obtained by an applicant. Schedule 2 of the AD(JR) Act sets out classes of decisions that are exempt from the operation of section 13. The current exemptions include 'decisions relating to the administration of criminal justice'. Item 1 of Schedule 2 of the Bill would amend Schedule 2 of the AD(JR) Act to ensure that decisions made under the ACC Act in connection with intelligence operations or investigations of State offences that have a federal aspect fall within the list of exempt decisions.

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In seeking advice as to the reason for the proposed amendment, the Committee notes that decisions of the ACC's predecessor, the National Crime Authority, 'were not removed from the purview of the *Administrative Decisions (Judicial Review) Act 1977*'. That interpretation is not accurate. Decisions in connection with investigations of offences against a law of the Commonwealth or a Territory under the *National Crime Authority Act 1984* (the NCA Act) were exempt from the operation of section 13 of the AD(JR) Act by virtue of paragraph (e) of Schedule 2 of the AD(JR) Act. Those decisions fell within the exempt class of 'decisions relating to the administration of criminal justice', which includes 'decisions in connection with investigations' (which is limited to offences against a law of the Commonwealth or a Territory).

The types of decisions that I now seek to exempt from the operation of section 13 of the AD(JR) Act are decisions that fall within the functions of the ACC under the ACC Act, but that did not fall within the functions of the NCA under the original NCA Act. The ACC's function of undertaking intelligence operations was never expressly conferred on the NCA under the NCA Act. The function of undertaking investigations concerning offences against a law of a State that has a federal aspect did not exist in the original NCA Act, but was later conferred on the NCA through the *National Crime Authority Amendment Act 2000*. At the time the ACC Act was enacted in late 2002, the consequential amendment to Schedule 2 of the AD(JR) Act had not yet been made to cover that new class of NCA decisions.

My reason for seeking to amend the Schedule 2 of the AD(JR) Act to exempt these new classes of ACC decisions is that they are decisions of essentially the same nature as decisions already exempt under paragraph (e) of Schedule 2 of the AD(JR) Act ('decisions relating to the administration of criminal justice', which includes 'decisions in connection with investigations').

An 'intelligence operation' is defined in the ACC Act as meaning 'the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity'. It is possible that decisions in connection with intelligence operations fall within the existing exemption in Schedule 2 of the AD(JR) Act for being 'decisions relating to the administration of criminal justice', and potentially also 'decisions in connection with investigations'. The proposed amendment seeks to put the exempt status of these types of decisions beyond doubt by expressly providing that decisions in connection with intelligence operations are in a class of decisions that are exempt from section 13.

All decisions of the ACC in connection with the investigation of offences should be exempt from the operation of section 13 of the AD(JR) Act, irrespective of whether the offences are against a law of the Commonwealth or a Territory, or against a law of the state with a federal aspect. The proposed amendment would broaden the scope of the exemptions in Schedule 2 of the AD(JR) Act to this effect. The proposed amendment also reflects the purpose of the ACC legislation, which is to promote a cooperative scheme between all Australian jurisdictions to combat serious and organised crime.

I trust this information is of assistance to the Committee.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

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

27 FEB 2004

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

Dear Senator Crossin

I refer to the Alert Digest No 1 of 2004 of the Senate Standing Committee for the Scrutiny of Bills in relation to Amendments to the Aviation Transport Security Bill 2003, moved in the House of Representatives on 3 December 2003. I appreciate the opportunity to respond to the Committee's comments and regret the delay in responding.

The Committee's comments are in relation to new Clauses 95A and 95B of the Bill, which provide for a frisk search as an alternative screening procedure or an additional screening procedure in the screening of persons boarding an aircraft or entering an area or zone in a security controlled airport.

The proposed clause 95A will enable a person subject to screening to choose to undergo a frisk search as an alternative to another screening procedure. This provision will cater for those persons who, for example, for medical reasons, may prefer not to be screened electronically. Proposed clause 95B allows a screening officer who is unable to clear a person using other screening procedures to ask that person to undergo a frisk search. If the person refuses to undergo a frisk search, the person may not pass the screening point.

The extent of the supplementary frisk search screening officers are authorised to conduct is limited to the necessary to satisfy themselves that the person may or may not be cleared. For example, they may seek permission to frisk a lower leg (in the case where the person has a steel plate in their knee, for example) but not to extend that to a 'full body search'. These matters will be addressed in the training of screening officers as indicated in this letter.

Consent and Refusal

Under the amendments, the frisk search will only be undertaken with consent. How consent is obtained is a matter for industry and while generally it will be sought orally, it may also be sought by other means such as with consent cards. Pat down searches or frisk searches cannot be undertaken without consent.

If a person can not be cleared, the screening officer may not allow that person to pass through the screening point. To allow a person who has not been cleared onto an aircraft or into a security controlled area or zone would be a breach of the Act as it would fundamentally

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compromise the cleared zone. The Bill provides no recourse for those refused clearance where that person has not consented to be screened.

The use of Screening Officers versus Law Enforcement Officers

We recognise that the proposed powers depart from the Government's normal policy that law enforcement officers should exercise these powers. However, a number of safeguards have been included to ameliorate the operation of Clause 95B, including that the person who submits to a frisk search must consent to the frisk search, and that the search must take place in a private room by a screening officer of the same sex. Further, in exercising powers under Clause 95B, a screening officer must not use more force or subject a person to greater indignity than is necessary or reasonable. A screening officer commits an offence carrying a maximum penalty of 50 penalty units if the officer does not exercise the power in accordance with the legislation.

Law enforcement officers are not generally available to undertake screening of passengers at airports. In addition, some airports do not have law enforcement officers permanently on site. Based on the safeguards outlined, the unique nature of the airport security environment, the considerable practical difficulties of having law enforcement officers conducting all frisk searches at airports and the industry consultation on which these amendments are based, I consider that in this case, it is appropriate that screening officers should exercise these powers.

Qualifications and Training of Screening Officers

Subclause 94(2) of the Bill requires the Regulations to prescribe the qualifications and training of screening officers. The draft Regulations require that screening officers must hold at least a Certificate II in Security Operations, with competencies appropriate for the duties of a screening officer. This qualification includes a competency related to ensuring that screening officers clearly and accurately inform those being screened of the purposes and procedures of the screening process, and that this process is carried out in accordance with legislative requirements.

Upon completion of this training, for the first 40 hours while the screening officer is on duty, a qualified screening officer must supervise the screening officer. The qualified screening officer may not supervise more than one screening officer at a time. During the supervised period, the screener may not make independent screening decisions. At the end of that time the qualified screener must certify that the person is competent as a screening officer.

In addition, a screening officer must be assessed (by a suitably qualified assessor of a registered training organisation), within each 12 month period, as being competent in a number of topics, including conducting limited physical searches, such as those contained in Clauses 95, 95A and 95B of the Bill.

The codification of powers contained in the Bill will require the industry to upgrade its training requirements. The Department of Transport and Regional Services has agreed to work with the industry to develop new training modules appropriate to the new legislative requirements.

Extent of a frisk search

Under the current legislative regime (paragraph 20A(1)(a) of the *Air Navigation Act 1920*), the Secretary is required to make an instrument setting out the manner and occasion of screening of people, vehicles or goods. The Bill provides a similar requirement in Clause 44(2)(j), although in the case of the Bill, it may be either a Regulation or an instrument made

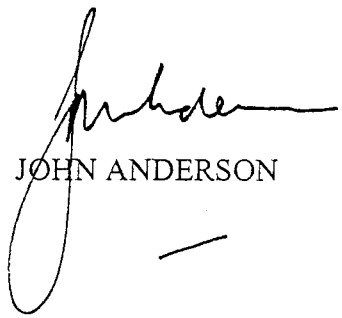
by the Secretary. The manner and occasion of screening instrument provides an outline of industry wide standards on screening people, vehicles and goods.

Such an instrument will be made following commencement of the Bill, and will deal in detail with the exercise of powers under Clauses 95A and 95B. This instrument will become the Australian screening standard and will be adhered to by all screening authorities.

Further, the manner of screening instrument is used by screening authorities to develop standard operating practices (SOPs). The SOPs provide a greater level of detail and are designed to be used in the workplace.

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

Yours sincerely



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. 1 MAR 2004

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

Dear Senator Crossin

Superannuation Safety Amendment Bill 2003

Thank you for your letter of 4 December 2003 concerning the Standing Committee for the Scrutiny of Bills' comments on the Superannuation Safety Amendment Bill 2003 (the Bill), contained in the *Scrutiny of Bills Alert Digest No. 16 of 2003*. I note that the Committee is seeking my advice on the operation of proposed paragraphs 29G(2)(d) and (f), contained in Schedule 1, Part 1, Item 29 of the Bill.

As the Committee is aware, proposed section 29G of the Bill gives APRA the power to cancel in writing Registrable Superannuation Entity (RSE) licences in certain circumstances. These circumstances include where the Australian Prudential Regulation Authority (APRA) has reason to believe that the RSE licensee:

- has breached or will breach a condition imposed on the licence; or
- has failed or will fail to comply with a direction from APRA under proposed section 29EB of the Bill.

A decision to cancel an RSE licensee's RSE license requires the prior consent of the Minister before it can be effected. The decision is also a reviewable decision by the Administrative Appeals Tribunal (see Schedule 1, Part 1 Item 13 of the Bill). In addition, where an RSE licensee is also the holder of an Australian Financial Services Licence (AFSL), proposed section 29GA requires APRA to consult first with the Australian Securities and Investments Commission (ASIC) if, in APRA's opinion, the cancellation might reasonably be expected to affect the licensee's ability to provide financial services.

These provisions are designed to give APRA powers which are similar to those it currently has in relation to Approved Trustees under section 28 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). In particular, paragraph 28(2)(b) provides APRA with the power to revoke a Trustee's approval if APRA is satisfied, on reasonable grounds, that the trustee can no longer be relied on to perform, in a proper manner, the duties of the trustee of each relevant entity of which the trustee is the trustee. The provisions are also consistent with APRA's powers under paragraph 133(2)(b) of the SIS Act, which allow APRA to suspend or remove the trustee of a superannuation

entity where it appears to the Regulator that conduct that has been, is being, or is proposed to be, engaged in by the trustee or any of the trustees may result in the financial position of the entity or of any other superannuation entity becoming unsatisfactory.

The provisions have been drafted along the same lines as paragraph 915C(aa) of the *Corporations Act 2001*, which enables ASIC to suspend or cancel an AFSL where ASIC has reason to believe that the licensee will not comply with their obligations under section 912A of the Act. ASIC must first give the licensee an opportunity to appear, or be represented, at a hearing and to make submissions before suspending or cancelling a licence under these provisions.

While there is no explicit requirement included in the Bill for APRA to give the licensee an opportunity to make representations or submissions before it undertakes to cancel the licensee's licence, APRA's decision would clearly be reviewable if there was a failure to accord procedural fairness to the licensee. This is because such a decision would affect the legal rights of the licensee (see for example, *Kioa v West* (1985) 159 CLR 550).

Under normal circumstances, I am advised that APRA would require the licensee to show cause as to why its licence should not be cancelled, and allow the licensee time to respond. However, in extreme circumstances where members' superannuation assets are at immediate risk, APRA may dispense with its normal practice of requiring a licensee to show cause before taking a decision to cancel the licensee's licence. Again, this is consistent with existing natural justice principles (see for example, *Marine Hull & Liability Insurance Co Ltd v Hurford* 62 ALR 253). In addition, it is also incumbent on the Minister to offer natural justice to a licensee prior to approving a request from APRA to consent to the cancellation of the licensee's RSE licence.

I trust that this information is of assistance to the Committee.

Yours sincerely

HELEN COONAN