SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTH REPORT

OF

2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

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

FOURTH REPORT OF 2009

The Committee presents its Fourth Report of 2009 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:

Civil Aviation Amendment Act 2009

Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009

Transport Safety Investigation Amendment Act 2009

Civil Aviation Amendment Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 3009*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 11 May 2009.

Although the bill has now been passed by both Houses and received Royal Assent on 26 March 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 3 of 2009

Introduced into the House of Representatives on 12 February 2009
Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Transport Safety Investigation Amendment Bill 2009, this bill amends the *Civil Aviation Act 1988* (Civil Aviation Act) to implement recommendations of the National Aviation Policy Green Paper and a recommendation by the Senate Standing Committee on Rural and Regional Affairs and Transport to enhance the corporate governance of the Civil Aviation Safety Authority (CASA), and to improve the administration of CASA's core functions.

In particular, the bill:

- creates a small expert Board of up to five members to be appointed by the Minister for up to three years (the CASA Director of Aviation Safety will be an *ex officio* member);

- provides for the Minister to terminate the appointments of non-Director Board members or the entire Board (other than the Director) in certain circumstances, and for the Board to terminate the appointment of the Director in consultation with the Minister;

- strengthens CASA's enforcement powers across a number of areas, particularly in relation to the negligent consignment or carriage of dangerous goods on aircraft;

- extends the period of Enforceable Voluntary Undertakings (a written undertaking from a holder of a 'civil aviation authorisation' obliging the holder to take specific action demonstrating a meaningful commitment to redress identified safety deficiencies) from six months to one year;

- aligns CASA's investigative powers, and search and seizure procedures, with current Commonwealth criminal justice procedures and practices, and extends powers to allow CASA investigators to use search and seizure powers under Chapter 7 of the Criminal Code;

- ensures that any extension beyond five days of an automatic stay of a CASA decision to vary, suspend or cancel certain civil aviation authorisations is the result of an application to the Administrative Appeals Tribunal (AAT) for a stay, and the AAT's determination of that application; and

- strengthens CASA's capacity to more effectively oversee foreign aircraft operations into, out of, and within Australia.

The bill also makes consequential amendments to the *Aviation Transport Security Act 2004* to ensure consistency with the amendments to the Civil Aviation Act.

The bill also contains application, saving and transitional provisions.

Entry and search powers
Legislative Instruments Act—directions
Schedule 2, items 11-14

Item 11 of Schedule 2 of the bill inserts new Division 1 into Part IIIA of the Civil Aviation Act and items 12-14 enhance current provisions relating to the appointment of investigators and the issue of identity cards. Under the Civil Aviation Act investigators have broad powers which include entry and search powers. In December 2006, the Committee released a report entitled *Entry, Search and Seizure Provisions in Commonwealth Legislation* (*Twelfth Report of 2006*). The Federal Government's response to that report is dated January 2008.

In 2004, the Minister for Justice and Customs issued a *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The entry and search provisions in the *Aviation Transport Security Act 2004* were among the first provisions scrutinised by the Committee in accordance with the *Guide* (see the Committee's Twelfth Report at paragraph 2.60). A previous report of the Committee on *Entry and Search Provisions in Commonwealth Legislation* was published in 2000 (*Fourth Report of 2000*).

Item 13 of Schedule 2 of the bill provides for new subsections in section 32AA, requiring investigators to comply with a direction of CASA in exercising their powers. Investigators are officers of CASA and are not non-government employees (section 32AA and section 3 of the Civil Aviation Act). Proposed new subsection 32AA(4) provides that such a direction by CASA is not a legislative instrument but the explanatory memorandum does not explain the reason for the benefit of readers.

Further, in its Twelfth Report the Committee recommended (Recommendation 7 at paragraph 3.63) that the *Guide* be revised to require legislative provision for the development of guidelines for the implementation of entry, search and seizure powers, and that any such guidelines be tabled in both Houses of the Parliament and published on the relevant agency's website. The Federal Government responded that such material should be at the discretion of individual agencies. The Committee **seeks the Minister's advice** as to whether any consideration was given to making a direction given by CASA to an investigator under proposed new subsection 32AA(3) available for scrutiny.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> I have considered the Committee's comments and have enclosed a written response to each of the elements raised.
>
> Thank you for raising this matter and I trust that the Committee's concerns have been fully addressed.

Entry and search powers
Legislative Instruments Act—directions

The Committee sought the Minister's advice as to whether any consideration was given to making a direction given by CASA to an investigator pursuant to new subsection 32AA(3) available for scrutiny, despite the fact that subsection (4) provides that such directions are not legislative instruments. Such directions, if given, would perforce limit or constrain the exercise of a legislative power, rather than expand or enlarge such an exercise. In the event, it is difficult to see how the explicit characterisation of such directions as not legislative instruments could interfere with the Parliament's scrutiny. At all events, even though such directions are not legislative instruments, pursuant to subsection (4), it is difficult to imagine that the substance of such a direction would not be made readily available for scrutiny in response to a legitimate request.

The Committee thanks the Minister for this response.

Trespass on personal rights and liberties
Schedule 3, item 8, new subsections 30DX(2) and (3)

Under the Civil Aviation Act and regulations, a 'civil aviation authorisation' enables particular activities. The authorisation may be called an Air Operator's Certificate, permission, authority, licence, certificate, rating, endorsement or other name (see section 3 of the Civil Aviation Act). Holders of authorisations may incur demerit points for offences and an authorisation may be cancelled (and reinstated).

New subsections 30DX(2) and (3), to be inserted by item 8 of Schedule 3, extend the accrual of demerit points to persons who do not hold authorisations, but who commit an offence prescribed by the regulations in the three-year period beginning on the day the demerit points would have been incurred, had the authorisation been held at the time the offence was committed.

The explanatory memorandum explains (at pages 15-16) that this ensures 'that a person who would have incurred demerit points against a civil aviation authorisation, but those points are not incurred because the person has not yet acquired that authorisation, or has taken steps to temporarily surrender or transfer such authorisation (so as to prevent demerit points from being incurred), will incur those demerit points in respect of any such after-acquired, or re-acquired authorisation, for a 3 year period after the date on which those points would initially have been incurred, had the person held the authorisation at the time'.

This means that the demerits scheme could be applied to people who are not currently participants in the regulatory scheme and receive no benefit from it. If, and when, they seek authorisation in the future there will be a retrospective accrual of demerits dating back for a three-year period (even though they might have had no intention of holding an authorisation during that period). The Committee **seeks the Minister's advice** as to whether further explanation might be provided as to the circumstances in which it is envisaged that the retrospectivity of the scheme might apply and how the scheme will apply consistently with any retrospective operation.

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

Having regard to the application of the demerit point scheme to after-acquired authorisations, and noting what the Committee recognises as a kind of retrospective application, the Committee sought the Minister's advice as to whether further explanation might be provided as to the circumstances in which it is envisaged that the retrospectivity of the scheme might apply and how the scheme will apply consistently with any retrospective operation.

Two situations are contemplated by the application of the demerit point scheme to after-acquired authorisations. In the first case, the amendments take account of the fact that demerit points are incurred only when an administrative penalty is paid or when a court convicts or finds a person guilty of an offence. Anticipating a decision to pay the penalty, or the likelihood that a person is about to be found guilty or convicted of an offence, the person may voluntarily transfer or surrender his or her authorisation before that event occurs, in which case there is no authorisation on foot to which demerit points might attach. Thereafter, they may arrange to have the authorisation transferred back to them, or they may apply for a fresh or otherwise re-instated authorisation. In the absence of the new provisions, there is nothing to

prevent this kind of process from being used to 'protect' an authorisation from demerit points by allowing the holder to temporarily cease to hold that authorisation, during the period that demerit points would attach, were the authorisation to be held.

The second situation takes account of the fact that demerit points attach to classes of authorisations, rather than to individual authorisations. The rationale for this is based on the recognition that, where a person's conduct has resulted in demerit points being incurred for a particular authorisation (e.g., a commercial pilot licence), that conduct properly justifies the attachment of demerit points to all authorisations in that class (e.g., a private pilot licence and an air transport pilot licence). In the absence of the amended provisions, a person holding only a private and a commercial pilot licence on the day on which he or she incurs demerit points in respect of both of those licences (that is, in respect of that class of authorisation), might well acquire an air transport pilot licence on the following day, 'free' from demerit points, simply because that authorisation was not held on the previous day. This is illogical and arguably problematic in terms of safety.

In both cases, because demerit points remain applicable for 3 years, after which they are purged from the system, the amended legislation provides that the acquisition (or re-acquisition, as the case may be) of an authorisation within that three-year period—but only within that period—will be subject to any demerit points incurred in respect of that class of authorisation, prior to the expiration of that period.

The Committee thanks the Minister for this response, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

Review of decisions
Schedule 3, items 16-20, section 31A

Section 31A of the Civil Aviation Act, to be amended by items 16 to 20 of Schedule 3, will provide for the automatic stay of certain 'reviewable decisions' taken by CASA (decisions to vary, suspend or cancel certain 'civil aviation authorisations') for a period of five days after such a decision has been taken.

Existing provisions in the Civil Aviation Act provide that the automatic stay continues for a period of 90 days if an affected person files an application for review of the decision in the AAT. Item 16 of Schedule 3 amends subsection 31A(4) with the effect that, after CASA has made a decision, it must notify the holder of the civil aviation authorisation of that decision, and there will be a stay on the decision for five business days. The holder must lodge an appeal for review of the decision in the AAT within that five-day period and the stay then has effect until the AAT makes a determination on the stay application.

In his second reading speech, the Minister stated that, where CASA takes enforcement action on safety grounds, holders of civil aviation authorisations will still have the benefit of the five-day stay (and a further automatic stay after that), but only until the AAT can determine the stay application. The Minister explained that the proposed amendments seek to overcome the current situation in which "the routine application of the 'automatic stay' provisions of safety-related decisions have effectively nullified CASA's ability to suspend or cancel the authorisations of operators found to have fallen well below an acceptable level of safety".

While acknowledging that the amendments are critically important to safety, the Committee remains concerned that the right of review for holders of civil aviation authorisations will be effectively limited to a period of only five business days from the time of notification of any decision. The Committee **seeks the Minister's advice** as to why the five-day period was chosen and whether some further context for the proposed changes might be provided.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they 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

Having regard to the minor change to the 'automatic stay' provisions of the Act introduced by the subject amendment, the Committee made the following comment:

> While acknowledging that the amendments are critically important to safety, the Committee remains concerned that the right of review for holders of civil aviation authorisations will be effectively limited to a period of only five business days from the time of notification of any decision.

This comment is incorrect. All decisions to vary, suspend or cancel a civil aviation authorisation under the *Civil Aviation Act 1988* ('the Act') or the Regulations are subject to review in the Administrative Appeals Tribunal (AAT), and nothing in the legislation has ever operated to limit or restrict that right, or to require that certain action be taken within any period of time — ther than the period of time specified in the Administrative Appeals Tribunal Act — if that right is to be exercised. Even before section 31A was introduced in 2003, there was nothing to prevent a person whose civil aviation authorisation had been varied, suspended or cancelled, and who had lodged an appeal of that decision in the AAT, from applying to the AAT for a stay, pending a determination of the matter on its merits by the Tribunal.

Prior to the introduction of the amendment contemplated by these items, the Act provided that, any decision by CASA to vary, suspend or cancel an authorisation (where the legislation required that the decision in question be preceded by a show cause notice) would be automatically stayed for a period of 5 business days; and if, before the expiration of that period, a person lodged an application for appeal in the AAT, that stay would automatically continue for 90 days, or until the Tribunal determined the matter on the merits. If that 90-day period should expire before the matter had been decided by the Tribunal, the affected person could apply to the Tribunal, under the AAT legislation, for an 'extension' of the stay, under and in accordance with the applicable provisions of the AAT Act.

The amendments to the Act involved here retain the otherwise extraordinary automatic 5-day stay, requiring now only that, in addition to applying for a review of the decision in the AAT, the affected person must also now apply for a stay. A hearing on that application will be held in the normal (and normally expedited) course of events, and the Tribunal must affirmatively decide to grant a stay for any period beyond the date on which the Tribunal hears that stay application. There is no longer an automatic statutory right to a stay of what amounts to at least 90 days. The new regime preserves the extraordinary right of people affected by CASA's decisions to an automatic stay, pending the Tribunal's timely determination of the question as to whether that stay should be continued. The only difference now is that, in addition to lodging an application for review — which requires no demonstration of likely success when matter is heard on its merits, or of any significant disadvantage to the applicant were the decision to be effective pending a determination of the matter on its merits — the affected person must formally apply for a stay, and the Tribunal must consider and determine that application, on its merits. Under the amended arrangements, persons affected by CASA's reviewable decisions still enjoy the added advantage of a 5-day automatic stay period (and longer, in the event the Tribunal cannot hear that application sooner), which other persons affected by decisions reviewable in the AAT do not normally enjoy.

The Committee sought the Minister's advice as to why the five-day period was chosen and whether some further context for the proposed changes might be provided. For the same reasons a five-day period was considered a fair, reasonable and appropriate period within which a person seeking to take advantage of the 90-day automatic stay period afforded under section 31A, before the current amendments were enacted, should be required to lodge an application for review in the AAT, it was considered fair, reasonable and appropriate that the same period

should apply in relation to an affected person's obligation to lodge an application for a stay, as well as a review of the matter on the merits.

The context for the change is significant. Because there is no obligation on a person lodging an application for review in the AAT to do more than to assert that, in their view, CASA's decision was not the correct or preferable decision, the granting of an automatic stay for at least 90 days on the basis of such an application effectively removed any real incentive on the part of the applicant to have the matter determined on its merits sooner rather than later. With a stay in place, there would be no limitation on the applicant's activities, and the longer it might take for the matter to come before the Tribunal for decision, the longer the applicant might continue to operate without any constraints. Once the automatic 90-day period had expired, the fact that operations proceeded unremarkably during that time made it that much more difficult for the Tribunal to refuse to grant a further stay. In the circumstances, there was little incentive on the part of the applicant to have the matter determined by the Tribunal in a timely way, and considerable incentive to delay matters.

Now, however, it will be incumbent on a person affected by a reviewable CASA decision to seek a stay within 5 days of that decision, and to persuade the Tribunal that a continuation of that stay is appropriate in the circumstances. Now, too, even if the Tribunal should decide to extend the stay, it may impose such conditions as may be necessary in the interests of safety, having regard to CASA's submissions on that score. Moreover, because there is nothing 'automatic' about any stay granted after the effluxion of the initial five-day period following on from a decision, it will be very much in an applicant's interest to see the matter fully resolved by the AAT as quickly as practicable.

The Committee thanks the Minister for this response, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2009*. The Special Minister of State responded to the Committee's comments in a letter dated 7 April 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2009

Introduced into the House of Representatives on 12 March 2009
Portfolio: Special Minister of State

Background

This bill primarily amends the funding and disclosure provisions of the *Commonwealth Electoral Act 1918* (Electoral Act). The bill contains measures implementing commitments made in the 2007 federal election campaign, as well as addressing recommendations made by the Joint Standing Committee on Electoral Matters following its inquiry into the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008.

The bill deals with six major issues:

- first, it reduces the disclosure threshold for donors, registered political parties, candidates and others involved in incurring political expenditure from 'more than $10,000' (indexed to the Consumer Price Index annually) to a flat rate of $1,000 to provide transparency and accountability in the donations and expenditure received or incurred by key participants in the political process;

- second, it reduces the current timeframes for the making of returns and the disclosure of gifts and expenditure relating to an election by individual candidates and members of Senate groups and donors who make donations within the election period, from the existing 15 weeks to a period of eight weeks after polling day;

- third, it addresses a loophole in the existing donor disclosure laws, by using an existing definition of related political parties found elsewhere in the Electoral Act, to ensure that donations to different branches of a political party are treated as donations to the same party;

- fourth, it makes unlawful the receipt by registered political parties, candidates and members of a Senate group of gifts of foreign property; and for other key players in the political process, such as associated entities and people incurring political expenditure, to receive overseas gifts that are used solely or substantially to incur political expenditure;

- fifth, it extends the current prohibition on the receipt of anonymous gifts above the threshold to prohibit the receipt of all anonymous gifts above $50 by registered political parties, candidates and members of a Senate group; and makes it unlawful in some situations for people and candidates to incur political expenditure if an anonymous gift above $50 enabled that political expenditure (the receipt of an anonymous gift of $50 or less may only be received in two specified situations); and

- sixth, it aims to address the possibility that some candidates and other groups may obtain a windfall payment of election funding as a result of running for office to give effect to the Federal Government's announcement that any payment of election funding should be tied to actual 'electoral expenditure' that has been incurred.

The bill also introduces a range of new offences to the reporting and disclosure regime and generally increases the level of penalties in the Electoral Act; and extends the existing recovery powers in the Electoral Act for anonymous gifts and loans to the new prohibition on overseas gifts and other unlawful anonymous and undisclosed gifts.

The bill also contains application and saving provisions.

Wide discretion
Schedule 1, item 21, new subsection 298G(3)

Item 21 of Schedule 1 provides for the substitution of Subdivision A, concerning entitlement to election funding; and Subdivision B, concerning claims for election funding. Under Subdivision B, there may be interim and final claims for election funding lodged with the Australian Electoral Commission (AEC) (proposed new section 298B). If the AEC refuses a final claim (proposed new section 298F), an application may be made for reconsideration of the decision (proposed new section 298G).

Proposed new subsection 298G(3) provides that the application for reconsideration must be made within 28 days or, if the AEC extends the period within which the application may be made, within that extended period. The explanatory memorandum explains (at paragraph 92) that, in deciding whether to grant an extension of time, the AEC would have regard to the principles outlined in the case of *Hunter Valley Developments v Cohen* [1984] FCA 176. Proposed new subsection 298G(3) therefore gives the AEC a discretion to extend the time for lodging an application for reconsideration of a decision to refuse a final claim for election funding. This power operates in conjunction with the power of the AEC, under proposed new section 301 (to be inserted by item 25 of Schedule 1), to vary decisions accepting claims.

The Committee considers that this discretionary power of the AEC may make the rights of claimants unduly dependent upon insufficiently defined guidance as to how the power may be exercised. This is of particular concern if the AEC were to delegate its decision on the extension of time. For example, in proposed new section 298H, it is expressly stated that the AEC may not delegate its power to reconsider a claim; however, such a prohibition does not appear in proposed new section 298G in relation to the AEC's power to extend time for an application for reconsideration of a decision refusing a claim. Therefore, the Committee **seeks the Minister's advice** as to whether further explanation for the breadth of the AEC's discretionary power in proposed new section 298G might be provided, including the reasons why it is considered necessary not to limit that power in any particular way.

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

The Committee has raised a concern about the discretion contained in proposed new subsection 298G(3) to extend the time for the making of an application for the reconsideration of a decision refusing a final claim for public funding under proposed new section 298F.

There are several matters that I would draw to the attention of the Committee in addressing the concerns outlined in the letter.

As the Committee acknowledges, the Explanatory Memorandum to the Bill sets out the principles that the Electoral Commission will apply to considering applications for an extension of time. Paragraph 92 of the Explanatory Memorandum refers to the principles for granting an extension of time that were set out in the case of *Hunter Valley Developments v Cohen* [1984] FCA 176. These principles are well-known and are applied by decision-makers and Courts in numerous jurisdictions and under a range of laws. These principles were recently summarised by the Federal Court at paragraph 54 of the decision in the case of *Rahman v Secretary, Department of Education, Employment and Workplace Relations* [2009] FCA 239 as follows:

"The matters which attracted his Honour's attention were set out at 348-349:

1. applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an "acceptable explanation for the delay"; it must be "fair and equitable in the circumstances" to extend time;
2. action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished;
3. any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension;
4. however, the mere absence of prejudice is not enough to justify the grant of an extension; and
5. the merits of the substantial application are to be taken into account in considering whether an extension of time should be granted."

The application of the above principles to matters under proposed new subsection 298G(3) will result in the making of an administrative decision under an enactment. As such, those decisions will be the subject of judicial review (under either the *Administrative Decisions (Judicial Review) Act 1975* or under section 39B of the *Judiciary Act 1903*). Further, as administrative decisions, complaints about the process in making such decisions would fall within the jurisdiction of the Commonwealth Ombudsman.

The schema contained in item 21 of the Bill is that a delegate of the Electoral Commission will make the initial decisions on both interim and final claims for public funding. It is envisaged that delegates of the Electoral Commission will be tasked with making those decisions. However, to ensure that there is no perception of bias, decisions dealing with applications for reconsideration will be made by the

Electoral Commission itself under proposed new section 298H. The requirement in proposed new subsection 298H(4) is that the Electoral Commission is unable to delegate the power to deal with an application for the reconsideration of the decision refusing a final claim.

An application under new section 298G must be made in writing to the Electoral Commission. Proposed new subsection 298H(1) requires that the Electoral Commission itself is to reconsider all applications for reconsideration. While it may be arguable that an application for a reconsideration that is made outside the 28 day period is not an application that is required to be considered by the Electoral Commission under proposed new subsection 298H(1), it is clearly the intent of the Bill that all such applications, including those for an extension of time under proposed new subsection 298G(3) would be also considered by the Electoral Commission itself. This intent is also reflected at paragraph 92 of the Explanatory Memorandum to the Bill which states that it would be the Electoral Commission that is to consider applications for extension of the 28 day time period for lodging a written application.

Further support for the above approach can be found in an examination of the approach taken by the Courts and other administrative review bodies in considering applications for an extension of time. Due to the nature of the principles contained in the case of *Hunter Valley Developments v Cohen* (particularly the final principle) it is often necessary for an application for an extension of time to be considered together with the substantive application itself. As the Electoral Commission is required to be the decision-maker on the substantive application for a reconsideration of a decision refusing a claim for public funding under proposed new section 298H, the related application for an extension of time would also need to be considered by the Electoral Commission as it is unable to delegate this decision-making power.

In conclusion, the above schema, principles and process for determining decisions on all applications for extension of time under proposed new subsection 298G(3) would appear to have the necessary degree of certainty and accountability to ensure that the rights of claimants are fully protected.

The extension of time concept is not new and is contained in numerous other laws in a range of jurisdictions. This concept is well-known. The ability of claimants to seek judicial review by the Courts and lodging complaints with the Commonwealth Ombudsman will ensure that the clearly defined principles espoused by the Courts will be applied to decisions relating to applications for extension of time in such a manner to address the Committee's concerns.

I appreciate the Committee's input on this matter and I trust that this information is of assistance to you.

The Committee thanks the Minister for this very comprehensive response.

Transport Safety Investigation Amendment Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 3009*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 5 May 2009.

Although the bill has now been passed by both Houses and received Royal Assent on 26 March 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 3 of 2009

Introduced into the House of Representatives on 12 February 2009
Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Civil Aviation Amendment Bill 2009, this bill amends the *Transport Safety Investigation Act 2003* (Transport Safety Investigation Act) to establish the Australian Transport Safety Bureau (ATSB) as a statutory agency within the meaning of the *Public Service Act 1999*. The ATSB will be established with a Commission structure and will come into existence on 1 July 2009.

In particular, the bill:

- abolishes the position of Executive Director of Transport Safety Investigation and provides for the appointment of a Chief Commissioner and two part-time Commissioners to be responsible for administering the functions of the Transport Safety Investigation Act and exercising its investigation powers;

- allows the Minister to provide notice of his or her views on the appropriate strategic direction for the ATSB, to which the ATSB must have regard;

- allows the ATSB to have operational independence with respect to the exercise of its investigation powers, and functional independence with respect to the administration of its resources; and

- requires that any formal recommendations made by the ATSB must be responded to within 90 days.

The bill also makes consequential amendments to the *Air Services Act 1995*, the *Australian Maritime Safety Authority Act 1990*, the *Civil Aviation Act 1988* and the *Inspector of Transport Security Act 2006* where there are references to the Executive Director of Transport Safety Investigation. These references will be replaced with references to the ATSB or the Chief Commissioner as required for the circumstances of the exercise of the relevant power or performance of the function.

The bill also provides for transitional provisions so that investigations commenced under legislation existing before the new laws come into effect on 1 July 2009 can be continued by the ATSB.

Insufficient parliamentary scrutiny
Schedule 1, item 62, new subsection 63E

The Chief Commissioner may appoint special investigators if they satisfy criteria specified by the regulations (proposed new subsection 63E). A person to whom a power is delegated (including powers delegated to special investigators) under new subsection 63B (discussed above) is a staff member of the ATSB (see item 16 of Schedule 1 which amends section 3) so certain benefits follow, including legal representation at coronial inquiries (proposed new section 68).

While the bill provides for an annual report by the ATSB on various matters, including prescribed particulars of matters investigated and a description of investigations (proposed new section 63A), there appears to be no specific mechanism in the bill which provides for any reporting to the Parliament on the use of special investigators. The Committee therefore **seeks the Minister's advice** in relation to whether heightened parliamentary scrutiny might be appropriate in the circumstances. In particular, given the breadth of the bill's delegation power in relation to special investigators, the Committee **seeks the Minister's advice** as to whether a specific reporting mechanism – for example, a separate document tabled in both Houses of the Parliament on an annual basis containing details of all relevant activities of special investigators – might be considered in order to promote transparency and openness in this area.

The Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee's *Alert Digest No. 3 of 2009* (11 March 2009) raises questions about schedule 1, items 62, 84 and 89. As royal assent has been provided, I will make reference to the provisions of the *Transport Safety Investigation Amendment Act 2009* (TSIA Act) in answering the Committee's questions.

Schedule 1, item 62, new section 63E

The Committee has asked whether a separate document tabled in both Houses of the Parliament annually — containing details of all relevant activities of special investigators — might be considered appropriate in order to promote transparency and openness in this area. In response, I note that section 63E will only replace the existing section 14 power to appoint special investigators when the TSIA Act comes into effect on 1 July 2009. Presently, there is no requirement to report on the use of special investigators.

However, in the interests of transparency, these details could be included in the annual report which must be prepared in accordance with section 63A. The Committee has drawn attention to the fact that under paragraph 63A(2)(a), particulars may be prescribed in relation to the transport safety matters investigated by the ATSB during the financial year. I will undertake to ensure that regulations are made to prescribe a requirement to report on the use of special investigators in those investigations.

As a matter of practice, the ATSB Annual Review is already made publicly available. Similarly, the annual report produced in accordance with section 63A will be made publicly available. Based on information provided in the annual report, a sufficient level of parliamentary scrutiny would come from the opportunity during Senate Estimates to ask questions of the ATSB relating to the use of special investigators.

The Committee thanks the Minister for this response, and is particularly pleased to note the Minister's undertaking to ensure that regulations will be made to prescribe a requirement to report on the use of special investigators in transport safety matters investigated by the ATSB during each financial year.

Delegation of administrative power
Schedule 1, items 84 and 89, new subsections 52(5) and 64(5)

Paragraph 94 of the explanatory memorandum explains that items 71 to 103 of Schedule 1, which contain amendments to the *Inspector of Transport Security Act 2006*, concern the transfer of powers and functions from the Executive Director of Transport Safety Investigations to the ATSB and the Chief Commissioner. Item 89 refers to proposed new subsection 64(5) which provides that the Minister must not give a person or government agency, or table in the Parliament, any part of a final report that contains restricted information given to the Inspector of Transport Security by the ATSB without the prior 'agreement' of the Chief Commissioner if the disclosure may compromise an investigation or have a substantial adverse effect on the conduct of operations of the ATSB. Similarly, item 84 refers to proposed new subsection 52(5) which repeats the requirement that the Minister obtain the 'agreement' of the Chief Commissioner before giving information in any part of an interim report to a person or government agency or tabling the interim report in the Parliament in similar circumstances.

There is some limit on the exercise of the Minister's discretion in these circumstances and the Committee **seeks the Minister's advice** whether these provisions contain an unnecessary fetter on the Minister and, if so, whether 'advice' or 'recommendations' from the Chief Commissioner to the Minister might also be considered.

The Committee draws Senators' attention to the provisions, as they 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

> The Committee questioned the *Inspector of Transport Security Act 2006* (ITS Act) limitation on the Minister's discretion to table interim and final reports in parliament and provide interim reports to any person or government agency. The limitation is with respect to those reports that contain restricted information given to the Inspector of Transport Security by the ATSB. In these circumstances, before tabling a report or providing it to any person or government agency, the ATSB Chief Commissioner's agreement is required where the disclosure of the restricted information may compromise an

investigation being conducted by the ATSB; or have a substantial adverse affect on the proper and efficient conduct of the ATSB's operations.

These provisions do not contain an unnecessary fetter on the Minister and I do not propose that 'advice' or 'recommendations' from the Chief Commissioner would be a suitable alternative to seeking his or her agreement in the relevant circumstances. As the original Explanatory Memorandum to the Inspector of Transport Security Bill 2006 advised for sections 52 and 64, the limitations are in keeping with subsection 9(2). Subsection 9(2) of the ITS Act provides that it is an object of the Act that the Inspector's investigations are not to interfere with the investigations of other agencies.

Preservation of control over restricted information by the ATSB is also consistent with schedule 1, item 24, new section 12AB of the TSIA Act, which states that the ATSB is not subject to direction from anyone in relation to the performance of its functions or exercise of its powers. This includes directions from the Minister other than a direction under section 21 of the TSI Act to commence an investigation. The independence required for the ATSB to carry out its functions includes limiting any external direction affecting the ATSB's ability to protect restricted information. If the ATSB's capacity to protect restricted information is compromised, sensitive safety information may not be forthcoming in the future.

I trust this has clarified the matters the Committee has raised. I acknowledge that the Committee is giving careful consideration to the Transport Safety Investigation Amendment Bill 2009 and I look forward to hearing the outcome.

The Committee thanks the Minister for this response.

Senator the Hon Helen Coonan
Chair

The Hon Anthony Albanese MP
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

RECEIVED
1 2 MAY 2009
Senate Standing Ctee
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11 MAY 2009

Reference: 02153-2009

Ms Julie Dennett
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Thank you for your letter dated 12 March 2009 drawing my attention to comments made by the Scrutiny of Bills Committee on the Civil Aviation Amendment Bill 2009 in the Committee's *Alert Digest No.3 of 2009*.

I have considered the Committee's comments and have enclosed a written response to each of the elements raised.

Thank you for raising this matter and I trust that the Committee's concerns have been fully addressed.

Yours sincerely

ANTHONY ALBANESE

Enc

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RESPONSES TO ALERT DIGEST ISSUES

Entry and search powers

Legislative Instruments Act--directions
Schedule 2, items 11-14

The Committee sought the Minister's advice as to whether any consideration was given to making a direction given by CASA to an investigator pursuant to new subsection 32AA(3) available for scrutiny, despite the fact that subsection (4) provides that such directions are not legislative instruments. Such directions, if given, would perforce limit or constrain the exercise of a legislative power, rather than expand or enlarge such an exercise. In the event, it is difficult to see how the explicit characterisation of such directions as not legislative instruments could interfere with the Parliament's scrutiny. At all events, even though such directions are not legislative instruments, pursuant to subsection (4), it is difficult to imagine that the substance of such a direction would not be made readily available for scrutiny in response to a legitimate request.

Trespass on personal rights and liberties

Schedule 3, item 8, new subsection 30DX(2) and (3)

Having regard to the application of the demerit point scheme to after-acquired authorisations, and noting what the Committee recognises as a kind of retrospective application, the Committee sought the Minister's advice as to whether further explanation might be provided as to the circumstances in which it is envisaged that the retrospectivity of the scheme might apply and how the scheme will apply consistently with any retrospective operation.

Two situations are contemplated by the application of the demerit point scheme to after-acquired authorisations. In the first case, the amendments take account of the fact that demerit points are incurred only when an administrative penalty is paid or when a court convicts or finds a person guilty of an offence. Anticipating a decision to pay the penalty, or the likelihood that a person is about to be found guilty or convicted of an offence, the person may voluntarily transfer or surrender his or her authorisation before that event occurs, in which case there is no authorisation on foot to which demerit points might attach. Thereafter, they may arrange to have the authorisation transferred back to them, or they may apply for a fresh or otherwise re-instated authorisation. In the absence of the new provisions, there is nothing to prevent this kind of process from being used to 'protect' an authorisation from demerit points by allowing the holder to temporarily cease to hold that authorisation, during the period that demerit points would attach, were the authorisation to be held.

The second situation takes account of the fact that demerit points attach to classes of authorisations, rather than to individual authorisations. The rationale for this is based on the recognition that, where a person's conduct has resulted in demerit points being incurred for a particular authorisation (e.g., a commercial pilot licence), that conduct properly justifies the attachment of demerit points to all authorisations in that class (e.g., a private pilot licence and an air transport pilot licence). In the absence of the amended provisions, a person holding only a private and a commercial pilot licence on the day on which he or she incurs demerit points in respect of both of those licences (that is, in respect of that class of authorisation), might well acquire an air transport pilot licence on the following day, 'free' from demerit points, simply because that authorisation was not held on the previous day. This is illogical and arguably problematic in terms of safety.

In both cases, because demerit points remain applicable for 3 years, after which they are purged from the system, the amended legislation provides that the acquisition (or re-acquisition, as the case may be) of an authorisation within that three-year period--but only within that period--will be subject to any demerit points incurred in respect of that class of authorisation, prior to the expiration of that period.

Review of decisions

Schedule 3, items 16-20, section 31A

Having regard to the minor change to the 'automatic stay' provisions of the Act introduced by the subject amendment, the Committee made the following comment:

> While acknowledging that the amendments are critically important to safety, the Committee remains concerned that the right of review for holders of civil aviation authorisations will be effectively limited to a period of only five business days from the time of notification of any decision.

This comment is incorrect. All decisions to vary, suspend or cancel a civil aviation authorisation under the *Civil Aviation Act 1988* ('the Act') or the Regulations are subject to review in the Administrative Appeals Tribunal (AAT), and nothing in the legislation has ever operated to limit or restrict that right, or to require that certain action be taken within any period of time - other than the period of time specified in the Administrative Appeals Tribunal Act - if that right is to be exercised. Even before section 31A was introduced in 2003, there was nothing to prevent a person whose civil aviation authorisation had been varied, suspended or cancelled, and who had lodged an appeal of that decision in the AAT, from applying to the AAT for a stay, pending a determination of the matter on its merits by the Tribunal.

Prior to the introduction of the amendment contemplated by these items, the Act provided that, any decision by CASA to vary, suspend or cancel an authorisation (where the legislation required that the decision in question be preceded by a show cause notice) would be automatically stayed for a period of 5 business days; and if, before the expiration of that period, a person lodged an application for appeal in the AAT, that stay would automatically continue for 90 days, or until the Tribunal determined the matter on the merits. If that 90-day period should expire before the matter had been decided by the Tribunal, the affected person could apply to the Tribunal, under the AAT legislation, for an 'extension' of the stay, under and in accordance with the applicable provisions of the AAT Act.

The amendments to the Act involved here retain the otherwise extraordinary automatic 5-day stay, requiring now only that, in addition to applying for a review of the decision in the AAT, the affected person must also now apply for a stay. A hearing on that application will be held in the normal (and normally expedited) course of events, and the Tribunal must affirmatively decide to grant a stay for any period beyond the date on which the Tribunal hears that stay application. There is no longer an automatic statutory right to a stay of what amounts to at least 90 days. The new regime preserves the extraordinary right of people affected by CASA's decisions to an automatic stay, pending the Tribunal's timely determination of the question as to whether that stay should be continued. The only difference now is that, in addition to lodging an application for review - which requires no demonstration of likely success when the matter is heard on its merits, or of any significant disadvantage to the applicant were the decision to be effective pending a determination of the matter on its merits - the affected person must formally apply for a stay, and the Tribunal must consider and determine that application, on its merits. Under the amended arrangements, persons affected by CASA's reviewable decisions still enjoy the added advantage of a 5-day automatic stay period (and longer, in the event the Tribunal cannot hear that application sooner), which other persons affected by decisions reviewable in the AAT do not normally enjoy.

The Committee sought the Minister's advice as to why the five-day period was chosen and whether some further context for the proposed changes might be provided. For the same reasons a five-day period was considered a fair, reasonable and appropriate period within which a person seeking to take advantage of the 90-day automatic stay period afforded under section 31A, before the current amendments were enacted, should be required to lodge an application for review in the AAT, it was considered fair, reasonable and appropriate that the same period should apply in relation to an affected person's obligation to lodge an application for a stay, as well as a review of the matter on the merits.

The context for the change is significant. Because there is no obligation on a person lodging an application for review in the AAT to do more than to assert that, in their view, CASA's decision was not the correct or preferable decision, the granting of an automatic stay for at least 90 days on the basis of such an application effectively removed any real incentive on the part of the applicant to have the matter determined on its merits sooner rather than later. With a stay in place, there would be no limitation on the applicant's activities, and the longer it might take for the matter to come before the Tribunal for decision, the longer the applicant might continue to operate without any constraints. Once the automatic 90-day period had expired, the fact that operations proceeded unremarkably during that made it that much more difficult for the Tribunal to refuse to grant a further stay. In the circumstances, there was little incentive on the part of the applicant to have the matter determined by the Tribunal in a timely way, and considerable incentive to delay matters.

Now, however, it will be incumbent on a person affected by a reviewable CASA decision to seek a stay within 5 days of that decision, and to persuade the Tribunal that a continuation of that stay is appropriate in the circumstances. Now, too, even if the Tribunal should decide to extend the stay, it may impose such conditions as may be necessary in the interests of safety, having regard to CASA's submissions on that score. Moreover, because there is nothing 'automatic' about any stay granted after the effluxion of the initial five-day period following on from a decision, it will be very much in an applicant's interest to see the matter fully resolved by the AAT as quickly as practicable.

Senator the Hon John Faulkner

Special Minister of State
Cabinet Secretary

RECEIVED
27 APR 2009
Senate Standing Ctee for the Scrutiny of Bills

Senator the Hon. Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the comments in the Scrutiny of Bills Committee's *Alert Digest No. 4 of 2009* (18 March 2009) in relation to the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009* ('the Bill').

In particular, the Committee has raised a concern about the discretion contained in proposed new subsection 298G(3) to extend the time for the making of an application for the reconsideration of a decision refusing a final claim for public funding under proposed new section 298F.

There are several matters that I would draw to the attention of the Committee in addressing the concerns outlined in the letter.

As the Committee acknowledges, the Explanatory Memorandum to the Bill sets out the principles that the Electoral Commission will apply to considering applications for an extension of time. Paragraph 92 of the Explanatory Memorandum refers to the principles for granting an extension of time that were set out in the case of *Hunter Valley Developments v Cohen* [1984] FCA 176. These principles are well-known and are applied by decision-makers and Courts in numerous jurisdictions and under a range of laws. These principles were recently summarised by the Federal Court at paragraph 54 of the decision in the case of *Rahman v Secretary, Department of Education, Employment and Workplace Relations* [2009] FCA 239 as follows:

> "The matters which attracted his Honour's attention were set out at 348-349:
> 1. applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an "acceptable explanation for the delay"; it must be "fair and equitable in the circumstances" to extend time;
> 2. action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished;
> 3. any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension;

4. however, the mere absence of prejudice is not enough to justify the grant of an extension; and
5. the merits of the substantial application are to be taken into account in considering whether an extension of time should be granted."

The application of the above principles to matters under proposed new subsection 298G(3) will result in the making of an administrative decision under an enactment. As such, those decisions will be the subject of judicial review (under either the *Administrative Decisions (Judicial Review) Act 1975* or under section 39B of the *Judiciary Act 1903*). Further, as administrative decisions, complaints about the process in making such decisions would fall within the jurisdiction of the Commonwealth Ombudsman.

The schema contained in item 21 of the Bill is that a delegate of the Electoral Commission will make the initial decisions on both interim and final claims for public funding. It is envisaged that delegates of the Electoral Commission will be tasked with making those decisions. However, to ensure that there is no perception of bias, decisions dealing with applications for reconsideration will be made by the Electoral Commission itself under proposed new section 298H. The requirement in proposed new subsection 298H(4) is that the Electoral Commission is unable to delegate the power to deal with an application for the reconsideration of the decision refusing a final claim.

An application under new section 298G must be made in writing to the Electoral Commission. Proposed new subsection 298H(1) requires that the Electoral Commission itself is to reconsider all applications for reconsideration. While it may be arguable that an application for a reconsideration that is made outside the 28 day period is not an application that is required to be considered by the Electoral Commission under proposed new subsection 298H(1), it is clearly the intent of the Bill that all such applications, including those for an extension of time under proposed new subsection 298G(3) would be also considered by the Electoral Commission itself. This intent is also reflected at paragraph 92 of the Explanatory Memorandum to the Bill which states that it would be the Electoral Commission that is to consider applications for extension of the 28 day time period for lodging a written application.

Further support for the above approach can be found in an examination of the approach taken by the Courts and other administrative review bodies in considering applications for an extension of time. Due to the nature of the principles contained in the case of *Hunter Valley Developments v Cohen* (particularly the final principle) it is often necessary for an application for an extension of time to be considered together with the substantive application itself. As the Electoral Commission is required to be the decision-maker on the substantive application for a reconsideration of a decision refusing a claim for public funding under proposed new section 298H, the related application for an extension of time would also need to be considered by the Electoral Commission as it is unable to delegate this decision-making power.

In conclusion, the above schema, principles and process for determining decisions on all applications for extension of time under proposed new subsection 298G(3) would appear to have the necessary degree of certainty and accountability to ensure that the rights of claimants are fully protected.

The extension of time concept is not new and is contained in numerous other laws in a range of jurisdictions. This concept is well-known. The ability of claimants to seek judicial review by the Courts and lodging complaints with the Commonwealth Ombudsman will ensure that the clearly defined principles espoused by the Courts will be applied to decisions relating to applications for extension of time in such a manner to address the Committee's concerns.

I appreciate the Committee's input on this matter and I trust that this information is of assistance to you.

Yours sincerely

JOHN FAULKNER

07 April 2009

The Hon Anthony Albanese MP
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House

RECEIVED
5 MAY 2009
Senate Standing C'ttee
for the Scrutiny of Bills

Reference: 02152-2009

05 MAY 2009

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Coonan~~ Helen,

Thank you for your letter dated 12 March 2009 from the Senate Standing Committee for the Scrutiny of Bills about the Transport Safety Investigation Amendment Bill 2009. The Committee's *Alert Digest No.3 of 2009* (11 March 2009) raises questions about schedule 1, items 62, 84 and 89. As royal assent has been provided, I will make reference to the provisions of the *Transport Safety Investigation Amendment Act 2009* (TSIA Act) in answering the Committee's questions.

Schedule 1, item 62, new section 63E – *Transport Safety Investigation Act 2003*

The Committee has asked whether a separate document tabled in both Houses of the Parliament annually – containing details of all relevant activities of special investigators – might be considered appropriate in order to promote transparency and openness in this area. In response, I note that section 63E will only replace the existing section 14 power to appoint special investigators when the TSIA Act comes into effect on 1 July 2009. Presently, there is no requirement to report on the use of special investigators.

However, in the interests of transparency, these details could be included in the annual report which must be prepared in accordance with section 63A. The Committee has drawn attention to the fact that under paragraph 63A(2)(a), particulars may be prescribed in relation to the transport safety matters investigated by the ATSB during the financial year. I will undertake to ensure that regulations are made to prescribe a requirement to report on the use of special investigators in those investigations.

As a matter of practice, the ATSB Annual Review is already made publicly available. Similarly, the annual report produced in accordance with section 63A will be made publicly available. Based on information provided in the annual report, a sufficient level of parliamentary scrutiny would come from the opportunity during Senate Estimates to ask questions of the ATSB relating to the use of special investigators.

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Schedule 1, items 84 and 89, new subsections 52(5) and 64(5) – *Inspector of Transport Security Act 2006*

The Committee questioned the *Inspector of Transport Security Act 2006* (ITS Act) limitation on the Minister's discretion to table interim and final reports in parliament and provide interim reports to any person or government agency. The limitation is with respect to those reports that contain restricted information given to the Inspector of Transport Security by the ATSB. In these circumstances, before tabling a report or providing it to any person or government agency, the ATSB Chief Commissioner's agreement is required where the disclosure of the restricted information may compromise an investigation being conducted by the ATSB; or have a substantial adverse affect on the proper and efficient conduct of the ATSB's operations.

These provisions do not contain an unnecessary fetter on the Minister and I do not propose that 'advice' or 'recommendations' from the Chief Commissioner would be a suitable alternative to seeking his or her agreement in the relevant circumstances. As the original Explanatory Memorandum to the Inspector of Transport Security Bill 2006 advised for sections 52 and 64, the limitations are in keeping with subsection 9(2). Subsection 9(2) of the ITS Act provides that it is an object of the Act that the Inspector's investigations are not to interfere with the investigations of other agencies.

Preservation of control over restricted information by the ATSB is also consistent with schedule 1, item 24, new section 12AB of the TSIA Act, which states that the ATSB is not subject to direction from anyone in relation to the performance of its functions or exercise of its powers. This includes directions from the Minister other than a direction under section 21 of the TSI Act to commence an investigation. The independence required for the ATSB to carry out its functions includes limiting any external direction affecting the ATSB's ability to protect restricted information. If the ATSB's capacity to protect restricted information is compromised, sensitive safety information may not be forthcoming in the future.

I trust this has clarified the matters the Committee has raised. I acknowledge that the Committee is giving careful consideration to the Transport Safety Investigation Amendment Bill 2009 and I look forward to hearing the outcome.

Yours sincerely

ANTHONY ALBANESE