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STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Monday, 21 October 2002

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

Senators in attendance: Senators Crossin, Johnston, McLucas and Murray

Terms of reference for the inquiry:

Transport Safety Investigation Bill 2002

WITNESSES

- BILLS, Mr Kym Maynard, Executive Director, Australian Transport Safety Bureau,
Department of Transport and Regional Services.....1**
- FILOR, Captain Christopher William, Deputy Director, Surface Safety and Inspector of Marine
Accidents, Australian Transport Safety Bureau, Department of Transport and Regional Services.....1**
- LAM, Miss Wancy, Senior Lawyer, Australian Transport and Safety Bureau, Department of
Transport and Regional Services.....1**
- MACAULAY, Miss Kerryn Maree, Team Leader, Transport Safety Investigation, Australian
Transport Safety Bureau, Department of Transport and Regional Services1**

Committee met at 11.03 a.m.

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

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

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

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

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

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

CHAIR—Please do so.

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

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

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

A briefing by departmental officers was sought on these aspects.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

... directly relevant to the investigation concerned and the Executive Director believes, on reasonable grounds, that it is necessary to seize the material in order to prevent it being interfered with or to prevent its concealment, loss, deterioration or destruction.

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

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

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

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

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

and:

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

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

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

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

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

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

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

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

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

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

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

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

Capt. Filor—No.

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator MURRAY—But it says 'may'.

Mr Bills—Yes.

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

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

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

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

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

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

Mr Bills—Yes.

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

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

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

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

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

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

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

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

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

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

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

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

Miss Macaulay—That is correct.

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

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

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

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

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

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

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

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

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

Mr Bills—I will dig that out for you.

Senator MURRAY—To clarify, are the regulations disallowable?

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

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

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

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

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

et cetera.

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

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

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

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

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

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

Mr Bills—Section 33 says:

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

So I guess there is a ‘reasonable’ nexus there.

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

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

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

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

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

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

The bill’s definition of ‘investigation’ is:

... an investigation under this Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr Bills—Yes.

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

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

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

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

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

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

Mr Bills—Yes, there is.

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

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

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

Mr Bills—Yes.

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

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

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

Mr Bills—They could, yes.

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

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

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

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

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

Mr Bills—No.

CHAIR—You do not want to keep going?

Mr Bills—No.

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

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

(a) an SES employee; or

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

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

(d) a special investigator.

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

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

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

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

Committee adjourned at 11.53 a.m.