Quintus-Bosz, Donna (REPS)

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Parliamentary Joint Committee on ASIO ASIS and DSD

Margaret Swieringa
Secretary
Parliament Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT
BY EMAIL

Dear Margaret

John Fairfax Holdings Limited (Fairfax) is pleased to forward this submission in response to the PJC's review of ASIO's questioning and detention powers.

On December 3 2003, as amendments were pending in Parliament, Fairfax joined other major media organisations in opposing key provisions of the ASIO Legislation Amendment Bill 2003 [No 2].

That correspondence is attached.

No substantive amendments in response to our concerns were made to the Bill as the legislation was finalised.

Our views have not changed since this legislation was enacted. The precedents set in this legislation under Section 34VAA on secrecy with respect to "operational information" and the length of time such secrecy is imposed are unwarranted and deserve reconsideration.

The underlying legislation -- the ASIO Terrorism Bill 2002 -- also contains provisions that permit the detention and questioning of journalists. Fairfax made a submission to the Senate Legal and Constitutional Committee on this issue, and suggested a balancing test should the detention and questioning of journalists be sought. In addition, there are criminal sanctions where the lawyer or parent of a detainee communicates to unauthorised persons – including journalists – information relating to the questioning and detention of the detainee. These are extremely restrictive provisions that undermine the operation of a free press.

Clearly, there are fundamental values and principles at stake in these debates. In a democracy, it is imperative to reconcile the interests of the protection of national security and the exercise of the rights of freedom of the press -- and we have a responsibility, jointly, to try to do so.

In our judgment, for all the reasons outlined in the materials below, the ASIO legislation enacted so far has failed to satisfactorily reconcile these issues. This failure is matter of utmost concern to Fairfax.

We hope there is genuine interest by the Joint Committee in revisiting these provisions and developing proposed amendments to address these issues. Fairfax pledges to work earnestly and in good faith with interested Members to help reach a consensus on these matters.

Sincerely,

Bruce Wolpe
Corporate Affairs
Fairfax

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JOHN FAIRFAX HOLDINGS LIMITED
NEWS LIMITED
SPECIAL BROADCASTING SERVICE
COMMERCIAL RADIO AUSTRALIA LIMITED
AUSTRALIAN PRESS COUNCIL
AUSTRALIAN BROADCASTING CORPORATION

December 3 2003

Dear Attorney General Ruddock

The undersigned media organisations have reviewed the ASIO Legislation Amendment Bill 2003 [No. 2] ("**the Bill**"), which is being considered by the Senate today.

We are gravely concerned with several provisions of the Bill. We respectfully urge that the Senate take a more deliberative process to resolve the issues outlined below.

The Bill should not be enacted until these matters have been constructively addressed in a more deliberative process.

As the Senate prepares to consider the Bill, we wish to make the following comments:

Introduction

1. Recent amendments to the *Australian Security and Intelligence Organisation Act 1979* have bestowed upon ASIO extensive investigative powers that go further than those enacted in other Western democracies, including the United States.
2. ASIO's warrant regime pursuant to this section is broader than that of any Australian police force.
3. Under the proposed amendments, individuals could face 5 - year jail terms for reporting the details of warrants issued for the investigation of terrorism. This could potentially put a stop to any media coverage of ASIO investigations of terrorism in Australia.

Section 34VAA(1)(c)(ii) - Prohibiting disclosure of "operational information"

4. The Bill currently defines "operational information" as:

"(a) information that the Organisation has or had;

(b) a source of information (other than the person specified in the warrant mentioned in subsection (1) or (2)) that the Organisation has or had; or

(c) an operational capability, method or plan of the Organisation."

5. The broad definition given to "operational information" poses a grave threat to Australian democracy, by gagging the media and its ability to report on national security issues involving ASIO and totally remove from public scrutiny, all discussion of ASIO's activities in relation to terrorism.
6. While disclosure would only be impermissible if the journalist had direct or indirect knowledge of the issue of the warrant, we submit that this limitation is insufficient. Journalists are often led to information about ASIO's terrorism investigations by direct or indirect knowledge of warrants.
7. Further, we agree that journalists should not be able to report on operational capabilities, methods or plans of ASIO if disclosure of such information would in any way threaten national security.
8. However, while section 34VAA(5)(c) seems necessary to ensure that ASIO can perform its duties, subsections (a) and (b) do not. Restricting the disclosure of all information that ASIO has or had is simply too broad. This has the potential to completely remove from public scrutiny all discussion of ASIO's activities in relation to terrorism.
9. Such a wide definition would serve to make liable to prosecution activities far beyond those envisaged or intended by the attorney general in the second reading speech. This would effectively mean anything involving ASIO cannot be reported on if it pertains to any information in ASIO's possess, or that was once in ASIO's possession.

Section 34VAA(2) - Extending the prohibition for two years after warrant expires

10. We submit that a blanket prohibition on disclosure of all "operational information" which is in the discloser's possession due to direct or indirect knowledge of a warrant is too wide.
11. This blanket prohibition on disclosure significantly undermines the media's ability to contemporaneously report the actions of statutory bodies. Because of the 2-year lag imposed by the Bill, the media will be unable to fulfil its important role of informing the public.
12. ASIO's activities, even if they involve an infringement of an innocent individual's rights, will not be known to the public until the information is obsolete. Memories will have faded, employees may have left, and abuses of power may go unnoticed by the Australian public until it is simply too late.
13. We advocate a more flexible system for extended prohibitions on disclosure. With the importance of publishing to the public interest in mind, each case should be dealt with on its unique facts. The rare and exceptional circumstances where information is so sensitive that disclosure must be limited for an extended period, will warrant a suppression order in the interests of national security. But such secrecy should be reserved for those cases only, rather than restricting the Australian public's access to other information which does not threaten national security - information which the public is entitled to receive.

Implied Freedom of Political Communication - Section 34VAA(12) exception

14. However, we do note and support the inclusion of sub-section 34VAA(12) which clarifies that the proposed section does not apply to the extent that it would infringe any Constitutional doctrine of implied freedom of political communication. We submit that this sub-section is crucial for media organisations and their journalists to enable the general public to receive information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. This protection of the implied freedom of political communication must not be a token inclusion in the Bill.
15. The importance of protecting the public interest in publication was emphasised by Mason J in *The Commonwealth v John Fairfax & Sons Ltd:*

    It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

16. In order to balance these competing concerns, we advocate a more flexible system, decided on a case by case basis. If disclosure of certain information could in any way hamper ASIO investigations into terrorism or undermine national security, then that particular information should be suppressed. All other information, however, should be available to the Australian public to ensure the integrity and openness of our democracy.
17. The High Court in the free speech cases has demonstrated the importance it places on ensuring the proper working of representative democracy. The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a

desirable political privilege, but inherent in the idea of representative democracy. It held that the Constitution contains an implied freedom of political speech and communication.

18. While we acknowledge that it is not possible to construct a formula for more narrowly defining the limits of what is and what is not the type of discussion which will attract the freedom which the Constitution protects, it is apparent from case law regarding freedom to communicate on political and government matters that the freedom although not absolute, cannot be given any narrow construction.
19. Effectively, what proposed sub-section 34VAA(12) creates for disclosers of information is a qualified privilege defence found in the law of defamation.
20. In the landmark case of *Lange v Australian Broadcasting Corporation* the High Court remarked that the common law rules of defamation concerning privileged communications failed to meet the requirements of the implied Constitutional freedom of discussion about political and government matters, and stated that the common law:

...ought to be developed to take into account the varied conditions to which McCue, J. referred [in Stephens v West Australia Newspapers Ltd]

21. Those 'varied conditions' were referred to by McHugh J in the following terms:

In the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public money. How, when, why and where those functions and powers are or are not to be exercised are matters of real and legitimate interest to every member of the community ... Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally. [emphasis added]

22. In extending the laws of qualified privilege to protect publication concerning governmental or political matters to mass audiences, the High Court in *Lange* imposed as a condition of the extended privilege that the publisher's conduct in publishing the matters be reasonable in the circumstances. Reasonableness of the publisher's conduct both defines and confines the scope of qualified privilege.
23. It is our submission that in relation to publications under this section, like the notion of the implied freedom of political communication itself, the element of reasonableness of conduct should be given a similar wide interpretation. In this case, as long as the journalist's conduct is responsible and conforms with the journalistic code of ethics, without compromising national security or undermining an ASIO investigation, publication should be allowed.

Conclusion

24. While we recognise the intention of the 'operational information' prohibition - to protect ASIO from disclosures that would compromise its operation - the width of scope of the definition is far too wide. Such a measure to address threats of terrorism is capable of being used by the Government against Australian citizens while providing little tangible benefit, save for a complete media black-out of those matters that are so important in this political climate.
25. Further, the implied right of political communication exception must not be a token inclusion. We are concerned that section 34VAA(12) is deficient. A balance has to be clarified between the two public policy concerns: national security and freedom of political communication.
26. It is our submission that in order for section 34VAA(12) to operate effectively, a wide interpretation must be attributed to the Constitutional doctrine of implied freedom of political communication. Similarly, reasonableness of conduct cannot be given any narrow construction. Clearly, each reported matter will have to be assessed on a case by case basis.
27. The High Court has stated that it will accept limits on freedom of political communication only if such limits are reasonably adapted to pursuing a legitimate objective. We submit that in cases where it is deemed that the implied freedom of political communication does not apply, the Bill is still cause for concern. It is questionable whether the operational knowledge offence will survive Constitutional scrutiny. By defining operational knowledge so broadly and imposing the two year prohibition, the section is potentially grossly disproportionate to the goal of protecting national security.

We respectfully urge the Senate not to rush into law these very flawed provisions in the Bill. We wish to work with all interested Senators in developing amendments to address the concerns we have raised.

Sincerely,

Bruce Wolpe. Manager, Corporate Affairs, John Fairfax Holdings Limited

Warren Beeby, General Editorial Manager, News Limited

Julie Eisenberg, Head of Policy, SBS

Joan Warner, CEO, Commercial Radio Australia Limited

Prof Ken McKinnon, Chairman, Australian Press Council

Stephen Collins, Corporate Counsel, Australian Broadcasting Corporation

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Fairfax **John Fairfax Holdings Limited**

Level 19, 201 Sussex Street, Sydney, 2000 ABN 15 008 663 161

November 22 2002

STATEMENT OF MICHAEL GAWENDA

ASSOCIATE PUBLISHER AND EDITOR, *THE AGE*

SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION AMENDMENT (TERRORISM) BILL 2002

Mr Chairman and Members of the Committee:

Thank you for the opportunity to appear before the Committee today.

My remarks are on behalf of John Fairfax Holdings Limited and all its publications, including *The Age*, *The Sydney Morning Herald, The Australian Financial Review*, *BRW* and our other newspapers, magazines and websites.

At the outset, we wish to state clearly that we support the broad consensus for a strengthening of the legal framework to deal with the war against terrorism. The world changed after September 11, 2001. New legislation is required to respond to the threat and to protect Australia. The media does have a role to play in this effort, and we cannot shirk our responsibilities in this regard.

We are not of the view that privilege for journalists is absolute. I do not believe we are obliged to protect sources when lives are at risk, or when we learn of serious crimes that are about to be committed. But the remedy must not be new law that is so sweeping that it compromises our ability to do what we do in a free society and in furtherance of the public interest.

While we accept the premise behind this legislation, it does, regrettably, in many instances go too far. A better balance can, and should, be struck.

We have rejected the easy argument to simply oppose this legislation – to simply urge repeal of the provisions affecting journalism and media reporting in Australia.

In an effort to help you and your colleagues enact the most responsible legislation, we have instead endeavoured to suggest improvements to the Bill that advance its objectives and protect the ability of the media to do its job in a free society.

It is in this spirit that I come before you today. There are two broad issues of concern to us.

First, the Bill would permit the detention and questioning of journalists. As you know, the Bill empowers ASIO to seek a warrant which allows the detention and questioning of persons who have information that may assist in preventing terrorist attacks or in prosecuting those who have committed a terrorism offence.

The Bill permits journalists to be detained and interrogated on information they may have in their possession, in the course of their reporting, regarding terrorists and terrorist activity.

The Bill also permits journalists to be held incommunicado. We cannot conceive of any reasonable circumstances where this is desirable or warranted. Our lawyers should have access to any of our journalists who are being detained. Our lawyers should also have the authority to fully advise the company on all relevant issues.

> Compelling journalists to divulge information goes to the heart of our profession,
>
> and how we serve the public interest. The protection of sources is fundamental to

how we do our job. If we cannot give assurances of confidentiality to sources, we cannot report. If there is a suspicion that information journalists receive will be divulged to the authorities, journalists will be specifically targeted by terrorists as well.

Stated plainly, this Bill in its current form places all journalists in the invidious position of breaking their professional bond and code of ethics or defying legal authority and risking severe penalties for doing so.

At the same time, we recognise that our ability to protect our sources is not absolute. If it is to be overridden, however, it should only be in the most compelling circumstances.

The Australian Journalists' Association Code of Ethics Guidance Clause states that:

Only substantial advancement of the public interest or risk of substantial

harm to people allows any standard to be overriden.

These are the competing interests we sought to balance in developing our proposal that a qualified – and, I stress, not absolute – privilege be given to journalists under the terms of this Bill.

We urge the Committee to recommend a clear test to provide predictability to journalists, editors and sources. Specifically, we propose that for any journalist subject to a warrant under Section 34D of the Bill, the legal authority would have to be satisfied that:

1. There are reasonable grounds for believing that the warrant is *absolutely* essential to collection of intelligence that is important in relation to a terrorism offence;
2. The intelligence *cannot be collected by any other means*; and
3. It would *not be contrary to the public interest* to do so.

We also believe it is essential that you reverse the evidentiary burden in the Bill that a journalist prove that he or she does not have the information or record requested. We are in danger here of descending into an Alice in Wonderland world where you have to prove a negative in order to avoid going to jail.

Our proposal for a qualified privilege for journalists is adopted from what we suggested – in conjunction with over 30 leading international media organisations, including The New York Times, Dow Jones, the BBC, Time, AP, CNN, Fox News, and others – to the International Criminal Tribunal for the former Yugoslavia with respect to the compulsion of testimony from journalists in the trial of Slobodan Milosevic. (A ruling on our petition is pending.)

As with the war on terrorism, bringing war criminals to justice is a compelling objective. Where the direct evidence of journalists might have a bearing on these matters, there should be a presumption against being compelled to testify about their news gathering activities, unless their testimony is absolutely essential to the determination of the case and the information cannot be obtained by any other means.

We respectfully urge the Committee to endorse such a standard in this Bill.

Second, the Bill contains severe restrictions on communications with persons who are detained. Detainees essentially become incommunicado.

With respect to journalists, the Bill specifically provides for a penalty of 2 years' jail where the lawyer or parent of the detainee communicates to unauthorised persons – including journalists – information relating to the questioning and detention of the detainee.

Quite frankly, these provisions are more reminiscent of the former East Germany than

the democracy that is Australia.

If these provisions were law, the representations by the family regarding the condition of the Australian Taliban in Cuba – which has been of immense interest to Australians – would be criminalised.

If these provisions were law, the accounts and phone calls to journalists of friends and family of certain detainees in Woomera would be a criminal act.

To our knowledge, not even in the United States, which is leading the war against terrorism, has new law been enacted which is so punitive towards journalists, or to the lawyers or family members of suspected terrorists.

The Bill should therefore be amended to ensure that lawyers and friends of detainees are able to speak to the media.

We have suggested specific language on each of our recommendations in our submission to the Committee. Again, they are offered to help strike a balance between the need for affirmative response to the war against terrorism and our ability to do our job consistent with the values of a democratic society.

Thank you Mr Chairman.