

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

LEGISLATION AMENDMENT BILL 1999

EXPLANATORY MEMORANDUM

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

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION AMENDMENT BILL 1999

GENERAL OUTLINE

This Bill amends the *Australian Security Intelligence Organization Act 1979* (the ASIO Act), the *Financial Transaction Reports Act 1988* (the FTR Act), the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act), the *Taxation Administration Act 1953* (the TAA Act) and makes minor consequential amendments to other Acts arising from the change in spelling of 'Organization' in the title of ASIO. The amendments are intended to enable ASIO to utilise available technology and to access important sources of information in performing its statutory functions.

The amendments made by the Bill to the ASIO Act may be summarised as:

- (i) allowing the Minister to issue warrants which may authorise ASIO to:
 - remotely access data that is relevant to security and is stored in a computer specified in the warrant;
 - use a tracking device to assist the Organisation in collecting intelligence relevant to security; or
 - examine an article being delivered by a delivery service provider.
- (ii) providing ASIO with authority to enter premises for the purpose of removing a listening device or a tracking device which has been installed under warrant;
- (iii) amending provisions dealing with search warrants to:
 - simplify the description of the matters about which the Minister must be satisfied before issuing a warrant;
 - clarify ASIO's authority to use a computer found on the premises being searched;
 - extend the maximum period a warrant may remain in force from 7 to 28 days; and
 - permit the Minister to defer the commencement of a warrant for up to 28 days;
- (iv) amending provisions dealing with the collection of foreign intelligence in Australia by making provision for the new categories of warrant introduced in the Bill and allowing the Minister to authorise ASIO to collect such intelligence by means that do not require the authority of a warrant, such as human sources;
- (v) extending the authority of the Director-General of Security to issue certain warrants in an emergency;
- (vi) allowing the Director-General of Security to charge fees to recover the cost of providing advice or services to persons at their request;

- (vii) permitting ASIO to communicate security assessments in relation to the 2000 Olympics or Paralympics directly to State authorities;
- (viii) simplifying the communication of criminal intelligence given to ASIO by overseas partner agencies to Australian law enforcement agencies;
- (ix) providing for the making of regulations which will permit review bodies to consider decisions affecting former staff as well as current employees and allow immunity from civil proceedings to be conferred on review bodies;
- (x) revising the penalty provisions in the ASIO Act so that pecuniary penalties may be calculated according to the relevant formula in the *Crimes Act 1914*; and
- (xi) changing the spelling of 'Organization' in the title of ASIO to 'Organisation'.

The amendments to the FTR Act contained in Schedule 4 will give ASIO access to FTR information held by the Australian Transaction Reports and Analysis Centre (AUSTRAC). The Bill allows the Director of AUSTRAC to authorise ASIO to have access to FTR information for the purpose of performing ASIO's functions. The authorisation is to state the FTR information or class of FTR information to which ASIO has access. Provision is also made for the responsibilities of the Inspector-General of Intelligence and Security in relation to ASIO.

The amendments to the IGIS Act contained in Schedule 5 will:

- make the monitoring role of the Inspector-General of Intelligence and Security (the Inspector-General) explicit;
- allow the Inspector-General to remove taxation and identifying financial transaction reports information from his reports to Ministers;
- streamline clearance procedures when providing a written response to a complainant; and
- permit disclosure of information by the Inspector-General if the safety of a person may be at risk.

This Bill will amend the TAA Act (Schedule 6) to allow the Commissioner of Taxation to disclose tax information, with safeguards, to the Director-General of Security or persons employed under paragraphs 84(1)(a) or (b) of the *Australian Security Intelligence Organisation Act 1979* (ASIO officers) provided the Commissioner is satisfied that the information is relevant to the performance of ASIO's functions under subsection 17(1) of that Act.

The amendments will give ASIO officers similar access to taxation information as law enforcement agencies now have under the Act. The amendments will allow ASIO officers to record and divulge or communicate the information in specified circumstances to law enforcement agencies and the Inspector-General of Intelligence and Security or one of his officers in specified circumstances.

Financial Impact

It is not expected that the Bill will have a direct financial impact.

NOTES ON CLAUSES

Clause 1: Short Title

Clause 1 is a formal item which provides for the short title of the Bill.

Clause 2: Commencement

The Bill commences on the day that it receives Royal Assent except as provided for in subsections (2) to (6) which take into account the commencement of other legislation.

Clause 3: Schedules

This item explains that, subject to section 2, each Act specified in a Schedule is amended or repealed as set out in the Schedule concerned.

Schedule 1 - Warrant provisions etc.

Part 1 - Amendment of the Australian Security Intelligence Organisation Act 1979

Item 1 section 4 (subparagraph (a)(iv) of the definition of *permanent resident*)

This item amends the definition of 'permanent resident' by substituting the term 'unlawful non-citizen' for 'illegal entrant' to be consistent with the *Migration Act 1958*.

Item 2 section 14

Item 2 amends section 14 to permit the Minister to appoint an acting Director-General.

Item 3 after paragraph 17(1)(c)

This item amends ASIO's functions by adding the new function of furnishing security assessments to a State or an authority of a State in connection with year 2000 Games matters and is a consequence of item 41.

Item 4 paragraph 17(1)(e)

This item amends paragraph 17(1)(e) as a consequence of item 33 which will permit ASIO to collect foreign intelligence pursuant to the new section 27B.

Item 5 after section 17

Item 5 adds section 17AA which will permit ASIO to recover part or all of its costs incurred in providing advice or services to other persons at their request, for example protective security advice given under paragraph 17(1)(d). The purpose is to establish ASIO's authority to recover costs from non Commonwealth agencies. Costs can already be recovered from Commonwealth agencies under administrative arrangements.

Subsection 17AA(1) allows the Director-General to determine in writing that a fee is payable by persons for advice or the provision of services by ASIO to the persons at their request.

Subsection 17AA(2) provides that where a fee is not paid the amount concerned becomes a debt due to the Commonwealth which may be recovered by the Commonwealth.

Subsection 17AA(3) prohibits the Director-General from determining a fee at an amount that is greater than the reasonable costs to ASIO of giving the advice or providing the service.

Subsection 17AA(4) allows the Director-General to waive a fee in full or in part.

Item 6 paragraph 18(3)(c)

This item repeals paragraph 18(3)(c) and substitutes a new paragraph 18(3)(b) which will permit ASIO to communicate information to an Australian police force or the National Crime Authority where that information is given to ASIO overseas.

The effect is to simplify the communication of intelligence about international criminal activity to Australian law enforcement agencies where ASIO receives such information through its liaison arrangements with the intelligence authorities of other countries some of whom collect intelligence about serious crime as well as security matters.

Item 7 section 22

This item defines 'carrier' for the purposes of the ASIO Act.

Item 8 section 22

This item defines 'computer' for the purposes of the ASIO Act.

Item 9 section 22

This item defines 'data' for the purposes of the ASIO Act.

Item 10 section 22

This item defines 'telecommunications facility' for the purposes of the ASIO Act.

Item 11 subsection 24(1)

Item 11 enables the Director-General or an authorising officer to authorise persons to exercise the authority conferred by a relevant device recovery provision.

This amendment is a consequence of the items in the Bill which permit ASIO to enter premises for the purpose of recovering a listening or tracking device which has been installed under a warrant.

Item 12 subsection 24(2)

Item 12 allows a person who has been approved in accordance with subsection 24(1) to do the things authorised by a relevant device recovery provision.

Item 13 subsection 24(3)

This item defines 'relevant device recovery provision' as meaning subsection 26(6A), 26B(7), 26C(7), 27A(3A) or (3B).

Item 14 subsection 24(3) (definition of *relevant warrant*)

Item 14 amends the definition of 'relevant warrant' to include the additional warrant provisions included in the ASIO Act by this Bill.

Item 15 subsection 24(3) (paragraph (b) of the definition of *senior officer of the Organization*)

This item amends the definition of 'senior officer of the Organization' to reflect changes to the classification of staff within ASIO.

Item 16 section 25

Section 25 is repealed and replaced by a new section 25 dealing with search warrants. The main changes effected in the new section 25 are outlined below.

Subsection 25(2) simplifies the description of the matters about which the Minister must be satisfied before he or she issues a warrant.

Subsection 25(5) enables the Minister to authorise the use of a computer or other electronic equipment found on the premises being searched to access data relevant to security.

The express authority to access computer data is intended to remove any doubt about the ability of the Minister to authorise ASIO to use computer or other electronic equipment on premises being searched for the purpose of examining and copying data which appears to be relevant to ASIO's statutory function of collecting intelligence where that data is either stored on the premises being searched or is accessible by a computer or equipment on those premises. This is similar to the authority already given under section 3L of the *Crimes Act 1914* to a police officer executing a search warrant issued by a Magistrate or other issuing officer.

Subsection 25(8) allows the Minister to delay the commencement of a warrant for up to 28 days after the day on which the warrant is issued.

Subsection 25(10) extends the maximum period a warrant may remain in force from 7 days to 28 days.

The change to the maximum duration of a warrant is intended to give greater flexibility to ASIO. Unlike law enforcement agencies, most search warrants issued to ASIO need to be executed covertly and it may take time for a suitable opportunity to arise.

Item 16 also inserts a new section 25A which provides for a computer access warrant which enables the Minister to authorise ASIO to gain remote access to data held in a computer specified in the warrant where access will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.

The provisions dealing with access to computer data are intended to strengthen ASIO's capability to obtain security intelligence where relevant information is held on

computers. The effect is to provide the Minister with the power to authorise ASIO to access and copy computer data where unauthorised access is otherwise prohibited by Commonwealth or State or Territory law.

The computer provisions permit the Minister to authorise ASIO to add, delete or alter data for the purpose of gaining access to data in a target computer and to do things that are reasonably necessary to conceal that any thing has been done under the warrant. This would include modifying access control and encryption systems. However, ASIO is not permitted to obstruct the lawful use of a computer or do anything that causes loss or damage to a person lawfully using the computer or other electronic equipment.

The search warrant provisions are also intended to permit ASIO to tamper with a computer which forms part of an electronic security system controlling access to premises to be searched under warrant.

Item 17 subsection 26(3)

This is a minor amendment to adopt plain English drafting.

Item 18 subsection 26(3)

This item amends subsection 26(3) as a consequence of other items which insert device recovery provisions in the ASIO Act. The effect is that the authority to do acts for the purpose of recovering a listening device will be conferred by a relevant device recovery provision rather than a warrant.

Item 19 subsection 26(4)

This is a minor amendment to adopt plain English drafting.

Item 20 subsection 26(4)

This is a parallel amendment to item 18.

Item 21 subsection 26(5)

This item replaces subsection 26(5) to adopt plain English drafting.

Item 22 after subsection 26(6)

Item 22 inserts subsection 26(6A) which provides a statutory authority for ASIO to enter premises for the purpose of recovering a listening device installed under a warrant. ASIO will be able to recover a device while the relevant warrant is in force or within 28 days after it ceases to be in force. If the listening device is not recovered while the warrant is in force or during the following 28 day period, ASIO is permitted to recover the device at the earliest practicable opportunity.

This amendment is intended to enable ASIO to recover a listening device where it is impracticable to gain access to the device before the relevant warrant expires or is revoked without the risk of detection which would impair the collection of intelligence in accordance with the ASIO Act.

The amendment indicates that ASIO is expected to recover a device while the relevant warrant is in force or within the next 28 days. Provision is made for an extension of

time to the earliest practicable opportunity where a device cannot be recovered in that period but this does not imply an authority to retrieve a device at any convenient time after a warrant ceases to be in force.

This item does not authorise ASIO to use a listening device after the warrant has lapsed or is revoked.

A parallel authority to recover tracking devices is included in item 23.

Item 23 after section 26

This item inserts sections 26A, 26B and 26C which enable the Minister to issue warrants permitting ASIO to use a tracking device for the purpose of tracking a person or an object. The intention is to regulate the use of tracking devices by ASIO as well as to provide the Minister with a power to authorise ASIO to do things that are necessary to use a tracking device such as entering premises or interfering with property. These new warrant provisions are similar to section 26 which deals with the use of listening devices by ASIO.

Section 26A prohibits ASIO from using a tracking device except with the consent of the person using the object being tracked or in accordance with a warrant issued under section 26B or 26C.

Section 26B enables the Minister to issue a warrant in relation to a person specified in the warrant. A warrant issued under this section may authorise ASIO to apply a tracking device to an object used or worn, or likely to be used or worn, by the subject of the warrant. In addition a warrant issued under section 26B may authorise ASIO to enter any premises in which a target object may be found, and to enter or alter a target object for the purpose of applying, using or maintaining a tracking device.

Section 26C provides for the issue of a warrant in relation to an object specified in the warrant. Such a warrant may permit ASIO to apply a tracking device to that object, as well as entering premises specified in the warrant and entering or altering the object for the purpose of applying, using or maintaining the tracking device.

Item 24 after section 27

This item adds section 27AA which enables the Minister to issue a warrant permitting ASIO to access an article that is being delivered by a delivery service provider.

The new section 27AA is similar to section 27 which provides for ASIO to inspect postal articles under warrant. This amendment will partially restore ASIO's ability to collect intelligence by examining articles in the course of delivery which has been affected by the use of private delivery services.

Subsection 27AA(3) permits the Minister to issue a warrant in relation to a specified person if the Minister is satisfied, among other things, that that person may be engaged in activities prejudicial to security. A warrant issued under this section may permit ASIO to inspect and copy articles being delivered by a service provider and which are being sent by or on behalf of the person specified in the warrant or are intended to be received by that person. This is a parallel provision to subsection 27(2).

Subsection 27AA(6) permits the Minister to issue a warrant in relation to a specified address. This is a parallel provision to subsection section 27(3).

The definition of 'article' at subsection 27AA(12) is intended to cover the same range of items that could be carried by the post and is not limited to items small enough to fit in a post box.

Item 25 paragraph 27A(1)(a)

This item amends paragraph 27A(1)(a) to reflect other amendments which provide for the issue of warrants in relation to a specified computer or thing.

Item 26 paragraph 27A(1)(a)

Item 26 amends paragraph 27A(1)(a) to refer to the new kinds of warrant added to the ASIO Act by other amendments. It maintains the connection between section 27A and other warrant provisions in the ASIO Act whereby the Minister may authorise ASIO, for the purpose of obtaining foreign intelligence in Australia, to do acts or things which the Minister can authorise in other warrants under that Act.

The effect is that the Minister is able to issue warrants permitting ASIO to obtain foreign intelligence in accordance with the functions of the Organization by accessing computer data, using a tracking device or inspecting delivery service articles.

Item 27 subsection 27A(1)

Item 27 is another consequential amendment arising from other items which permit the issue of warrants in relation to a specified computer or thing.

Item 28 subsection 27A(2)

This item substitutes a new subsection 27A(2) to adopt plain English drafting. It provides for the small number of ASIO warrants that are executed overtly.

Item 29 paragraph 27A(3)(a)

This item is connected to the new subsection 25(10) in item 16 which extends the maximum duration of a search warrant issued under section 25 from 7 days to 28 days. The effect is that a search warrant issued under section 27A for the purpose of foreign intelligence collection may also remain in force for up to 28 days.

This retains the present situation wherein a warrant issued under section 27A has the same maximum duration as a warrant which may be issued under another provision of the ASIO Act permitting the doing of similar acts or things.

Item 30 paragraph 27A(3)(b)

This item amends paragraph 27A(3)(b) to take into account the new computer access warrant and the tracking device warrants inserted into the ASIO Act at items 16 and 23 respectively.

Item 31 paragraph 27A(3)(c)

This item amends paragraph 27A(3)(c) to take into account item 24 which introduces warrants to inspect delivery service articles.

Item 32 after subsection 27A(3)

This item inserts subsections 27A(3A) and (3B) which authorise ASIO to enter premises for the purpose of recovering a listening device or tracking device that has been installed in accordance with a warrant issued under section 27A. The purpose is to provide a similar authority to recover these devices as conferred in items 22 and 23.

Item 33 after section 27A

This item inserts section 27B which gives the Minister the power to issue a written notice authorising ASIO to obtain foreign intelligence in relation to a matter specified in that notice.

One of ASIO's functions is to obtain within Australia foreign intelligence - but only by means that are authorised pursuant to a relevant warrant. This item permits ASIO also to collect foreign intelligence by other means that are lawfully available to ASIO without need for the authority of a warrant, such as by utilising a human agent. This will allow Ministers to utilise ASIO's existing resources to supplement foreign intelligence collection by other agencies.

Before authorising the collection of foreign intelligence under this provision, the Minister must be satisfied, on advice received from the Minister for Defence or the Minister for Foreign Affairs, that the collection of that intelligence is important to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

Item 34 paragraph 29(1)(a)

The effect of this item is to give the Director-General a greater authority to issue warrants in an emergency. The Director-General is currently permitted to issue a listening device warrant if the specified conditions are met, including that security will be, or is likely to be, seriously prejudiced if the action authorised by the warrant is not commenced before a warrant can be issued by the Minister.

This item will permit the Director-General, subject to the same conditions as presently apply, to issue warrants of the same kind as the Minister is able to issue under the ASIO Act, excepting a warrant under section 27A to collect foreign intelligence which will continue to be issued only by the Minister. The intention is to allow the Director-General to be able to respond more effectively in an emergency.

An emergency warrant issued by the Director-General under section 29 may remain in force for a period of up to 48 hours but may be revoked earlier by the Minister.

The Director-General must provide a copy of the warrant to the Minister as well as a statement of the grounds on which the Director-General was satisfied that it was necessary for him or her to issue the warrant.

Item 35 subsection 29(1)

This is a minor amendment to adopt plain English drafting.

Item 36 section 30

This item amends section 30 as a consequence of item 23 which provides for the use of tracking devices under warrant.

Item 37 section 35

This item defines 'year 2000 Games matters' for the purposes of the ASIO Act. This definition includes sporting and other activities held outside Sydney in connection with the year 2000 Games.

Item 38 paragraph 36(1)(b)

This item amends paragraph 36(1)(b) to correct an error in the cross-reference to the *Migration Act 1958* arising from an earlier amendment to that Act.

Item 39 subsection 38(1)

This item amends subsection 38(1) as a consequence of item 40 which permits ASIO to communicate security assessments for State purposes directly to a State or State authority in certain circumstances.

The intention is to ensure that the notification and review rights of a person who is the subject of an adverse or qualified security assessment in those circumstances are not reduced. Should ASIO communicate an adverse or qualified security assessment directly to a State or the authority of a State, that State or authority must notify the person in accordance with subsection 38(1).

Item 40 subsection 38(2)

This is a minor amendment to adopt plain English drafting.

Item 41 subsection 40(1)

At present ASIO is permitted to provide security assessments for State purposes but is prohibited from communicating such assessment directly to a State authority. This item substitutes a new subsection 40(1) which permits ASIO to communicate a security assessment which is for State purposes and connected to a year 2000 Games matter directly to a relevant State or a State authority instead of transmitting it through an intermediary Commonwealth agency. The intention is to simplify administrative processes in the expectation that State authorities responsible for security arrangements for the Sydney 2000 Olympics and Paralympics are likely to request large numbers of security assessments.

The amendment retains the current communications arrangements for security assessments provided for State purposes other than year 2000 Games matters. In addition, ASIO will still be able to communicate a security assessment in relation to a year 2000 Games matter through an intermediary Commonwealth agency if this is appropriate.

The amendment retains the requirement that the prescribed administrative action by the State in relation to year 2000 Games matters must affect security in connection with matters within the functions of a Commonwealth agency before ASIO is

permitted to provide a security assessment to either that Commonwealth agency or to a State or State authority.

The new communication arrangement will apply only to security assessments sought before 31 December 2000.

Item 42 paragraph 40(2)(a)

Item 42 amends paragraph 40(2)(a) as a consequence of the new subsection 40(1) inserted at item 41. This amendment removes the present prohibition on ASIO communicating a security assessment directly to a State or an authority of a State where the relevant prescribed administrative action by a State would affect security in connection with year 2000 Games matters.

Item 43 after subsection 90(2)

This item adds subsection 90(2A) which provides that regulations may make provision for the establishment of a body or for a person to review actions by ASIO affecting current or former officers, or temporary or casual employees. The regulations may also make provision to protect such bodies or persons from civil proceedings arising from their review of such actions.

The intention is to enable regulations to be made which will authorise review bodies, established under section 86 of the ASIO Act in relation to officers and employees, also to deal with complaints made by former officers or employees. The statutory functions of the Inspector-General of Intelligence and Security in relation to complaints by former staff are not changed. It is intended that, as for current staff, complaints by former staff should be examined by available review bodies before being inquired into by the Inspector-General of Intelligence and Security.

Part 2 - Application and transitional provisions

Item 44

This item provides that the amendments relating to warrants in this schedule apply to warrants where the relevant request by the Director-General and the issue of the warrant both occur after the commencement of this item. The effect is to preserve the authority of other warrants.

Item 45

This item preserves the relevant instrument of appointment should a person be acting as Director-General when this item commences.

Schedule 2 - Penalty provisions

Item 1 subsection 18(2) (penalty)

This item amends the penalty for the offence at subsection 18(2) by providing only for a maximum term of imprisonment. The intention is to allow a court to impose a pecuniary penalty, instead of, or in addition to, a period of imprisonment in accordance with section 4B of the *Crimes Act 1914*.

The effect is that the pecuniary penalty for this offence will change as the value of a penalty unit in the meaning of the Crimes Act is amended thereby ensuring that this penalty remains consistent with similar penalties in other Commonwealth legislation.

Item 2 section 33 (penalty)

This item changes the penalty for an offence under section 33 to a period of imprisonment for 6 months. It is intended that a court should be able to impose a pecuniary penalty, instead of, or in addition to, a period of imprisonment in accordance with section 4B of the *Crimes Act 1914*.

This item is also intended to retain the relativity between the penalty for this offence and the penalties for other offences in the ASIO Act which would be lost if the former pecuniary penalty for an offence under section 33 were to be merely converted into penalty units.

Items 3 to 13

These items are similar to item 1 in amending the penalty for the relevant offences to provide only for a maximum term of imprisonment and to permit a court to impose a pecuniary penalty, instead of, or in addition to, a period of imprisonment in accordance with section 4B of the *Crimes Act 1914*.

Item 14

The item provides that the amendments made by this schedule apply to offences committed after the commencement of the schedule.

Schedule 3 - The spelling of 'Organization'

This schedule amends the spelling of 'Organization' in the title of the Australian Security Intelligence Organization to 'Organisation' to adopt common practice.

Item 21 changes the spelling in the whole of the ASIO Act.

The remaining items make consequential amendments in other legislation.

Schedule 4 - Amendment of the Financial Transaction Reports Act 1988 (the FTR Act)

Item 1 at the end of Part IV

This item adds section 27AA which provides for ASIO to access FTR information.

Subsections 27AA(1) to (3) allow the Director of AUSTRAC to authorise ASIO to have access to FTR information for the purpose of performing ASIO's functions. The authorisation is to state the FTR information or class of FTR information to which ASIO has access. An authorisation under s27AA(1) will permit ASIO officers

authorised by the Director-General of Security to access that information in accordance with the authorisation.

Subsection 27AA(4) prohibits an ASIO officer who obtains FTR information from divulging or communicating it other than to the following persons, for the purposes of or in connection with the performance of those persons' duties:

- a police officer;
- an IGIS officer; and
- another ASIO officer.

When the person is no longer an ASIO officer, the person is prohibited from making a record of the information or divulging or communicating it in any circumstances.

Subsection 27AA(5) prohibits an IGIS officer who obtains FTR information from divulging or communicating it except to:

- another IGIS officer for the purposes of or in connection with the performance of that officer's duties in relation to ASIO or its employees;
- to the Director-General in a draft report under section 21 of the IGIS Act in relation to ASIO or its employees;
- to Ministers or a complainant in a report under sections 22 or 23 of the IGIS Act in relation to ASIO or its employees, but only in a manner that does not identify and is not reasonably capable of being used to identify a person to whom the information relates; or
- to Ministers or the Director-General in a report under section 25A of the IGIS Act.

When the person is no longer an IGIS officer the person is prohibited from making a record of the information or divulging or communicating it in any circumstances.

Subsection 27AA(6) proscribes requiring an ASIO or IGIS officer to produce in a court any document containing FTR information or divulge or communicate FTR information to any court.

Subsection 27AA(7) makes it an offence for an ASIO or IGIS officer or former officer to make a record of, divulge or communicate information in breach of section 27AA, subject to a penalty of two years imprisonment.

Subsections 27(6) to (13) deal with the use by a police officer of FTR information obtained from ASIO.

Subsection 27AA(8) defines "ASIO", "ASIO Officer" "IGIS officer" and "police officer" for the purposes of section 27AA.

Schedule 5 - Amendment of the Inspector-General of Intelligence and Security Act 1986 (the IGIS Act)

Item 1 inspection functions of the Inspector-General

While sections 8 and 9 of the IGIS Act enable the Inspector-General to conduct inquiries of security and intelligence agencies in relation to specific events or matters, there is no explicit provision for the Inspector-General to inspect those agencies on a

regular basis. New section 9A will make explicit provision for regular inspection of those agencies.

Items 2 and 3 amendments to section 22

Section 22 requires that, following an inquiry conducted at the request of the responsible Minister, of the Inspector-General's own motion, or in response to a complaint, the Inspector-General shall provide a report to the responsible Minister, the head of the relevant agency and, if the inquiry was initiated by the Prime Minister, to the Prime Minister. As presently drafted, section 22 requires identical reports to be provided to these parties. Schedule 6 of this Bill provides for the Director-General of Security to have access to certain taxation information, and for the Inspector-General to have access to the same information subject to restrictions on the further disclosure of that information. The proposed amendments to section 22 would provide that the Inspector-General could refer to this information in a report provided to the Director-General of Security (where the report relates to an inquiry rather than a monitoring activity conducted under the proposed new section 25A (Item 6)), but that the report supplied to the relevant Minister would have taxation information removed.

Items 4 and 5 - amendments to section 23

At present, subsection 23(1) requires the Inspector-General to supply complainants with a written response following any inquiry he has conducted into their complaint. Before a response can be supplied to a complainant, subsection 23(2) requires that it be cleared on national security grounds by the responsible Minister. As a practical matter, the responsible Minister will rely on the advice of the relevant agency head. The purpose of this amendment is to streamline the clearance procedure by amending subsection 23(2) (Item 4) so that the national security clearance of the response can be given by the relevant agency head instead of the responsible Minister. To maintain information flows, a new subsection 23(3) (Item 5) would be added to require the Inspector-General to supply the responsible Minister with a copy of the response supplied to the complainant.

Items 6 new section 25A

New section 25A would give the Inspector-General a discretion to make specific reports on regular inspections conducted under the new section 9A to the responsible Minister and/or the head of the relevant agency. However, such reports are subject to the requirements of the *Taxation Administration Act 1953* and the *Financial Transaction Reports Act 1988*. The effect of this is that a report supplied to the responsible Minister would have taxation information or identifying financial transaction reports information removed.

Items 7 and 8 - disclosure of information

Subsection 34(1) of the IGIS Act makes it an offence for the Inspector-General or any staff member of his office to disclose information received in the course of his or her duties except in the performance of those duties, the available penalties being \$5000 or 2 years imprisonment or both. On occasion, the Inspector-General has received information indicating that a person may be at physical risk from a complainant. So that the Inspector-General may seek expert professional guidance or refer such information to police, a new subsection 34(1A) is proposed (Item 7) to provide that the offence created by subsection (1) does not extend to situations where the Inspector-General believes on reasonable grounds that the well-being or safety of a person may

be at risk. Subsection 34(1) would be amended (Item 8) to note the existence of the exception created by the new subsection (1A).

Item 9 - new subsection 35(2A)

New subsection 35(2A) would require the Inspector-General to report on regular inspections conducted under the new section 9A in his annual report.

Schedule 6 – Amendment of the Taxation Administration Act 1953 (the TAA Act)

Items 1 to 5 amend section 2

These items add definitions to section 2. Added definitions are “ASIO”, “ASIO officer”, “authorised ASIO officer”, “Director-General of Security” and “IGIS officer”. The definitions are inserted to provide a framework in the TAA Act for the provision of tax information to ASIO.

Item 6 amends section 3B

This item amends subsection (1AA) of section 3B to provide for annual reporting of the number of requests received by the Commissioner of Taxation from ASIO to provide tax information and the number of times that information was disclosed under new section 3EA.

Items 7 to 9 amend section 3E

Subsection 3E(2) is amended by omitting “authorised law enforcement agency officer, or to an authorised Royal Commission officer, under subsection (1)” and substituting “officer under subsection (1) of this section or paragraph 3EA(3)(e)”.

Subsection 3E(3) is amended by inserting “of this section or paragraph 3EA(3)(e)” after “subsection (1) or (2)”.

Subsection 3E(4) is amended by omitting “authorised law enforcement agency officer, or to an authorised Royal Commission officer, under subsection (1)” and substituting “officer under subsection (1) of this section or paragraph 3EA(3)(e)”.

These amendments to subsections 3E(2), (3) and (4) will provide that the prohibition against recording, divulging or communicating tax information obtained, and the exceptions to those prohibitions, contained in section 3E will also apply to a law enforcement agency officer who obtains tax information from an ASIO officer under new paragraph 3EA(3)(e).

Item 10 inserts new sections 3EA, 3EB and 3EC.

Outline

New Section 3EA will allow the Commissioner of Taxation to disclose tax information to an ASIO officer provided the Commissioner is satisfied that the information is relevant to the performance of ASIO’s functions under subsection 17(1) of the *Australian Security Intelligence Organisation Act 1979* (ASIO’s 17(1) functions). Subject to exceptions, Section 3EA will also prohibit an ASIO officer, or a former ASIO officer, to whom the information is, or has been, disclosed from

recording, divulging or communicating the information to another person and provides a penalty for breach of that obligation.

New Section 3EB will impose an obligation on barristers and solicitors not to record, divulge or disclose tax information where that information has been disclosed by an ASIO officer under an exception in new section 3EA. It will also impose that obligation on a person to whom the barrister or solicitor has divulged or disclosed the information under the exception to disclosure.

Section 3EC will impose obligations on the Inspector-General of Intelligence and Security holding office under *Inspector-General of Intelligence and Security Act 1986* or a member of staff appointed to assist the Inspector-General (IGIS officer) in cases where tax information is disclosed to an IGIS officer by an ASIO officer under one of the exceptions in new section 3EA.

Section 3EA

Subsection 3EA(1) overrides any taxation secrecy provisions and allows the Commissioner of Taxation to disclose tax information to an ASIO officer provided the Commissioner is satisfied that the information is relevant to the performance of ASIO's 17(1) functions.

'Tax information' means information acquired by the Commissioner under the provisions of a tax law as defined in subsection 3EA(6).

Information has its normal meaning and disclosure of information includes the production of a document or the granting of access to a document.

Subsection 3EA(2) imposes a general secrecy obligation prohibiting an ASIO officer or a former ASIO officer from recording, divulging or disclosing any tax information obtained under subsection 3EA(1) from the Commissioner of Taxation, under subsection 3EA(3) from another ASIO officer or under subsection 3EC(2) from an IGIS officer. A penalty for breach of that secrecy obligation is provided for.

Subsection 3EA(3) provides 5 exceptions to the prohibition contained in subsection (2). The exceptions apply to an ASIO officer (but not a former ASIO officer).

First, an ASIO officer may make a record of the tax information for the purposes of the performance of that officer's duties in carrying out ASIO's 17(1) functions. [New paragraph 3EA(3)(a)]

Secondly, an ASIO officer may divulge or communicate the information to another ASIO officer for the purposes of the performance of that ASIO officer's duties in carrying out ASIO's 17(1) functions. [New paragraph 3EA(3)(b)]

The ASIO officer to whom the tax information is disclosed by another ASIO officer is bound by the same secrecy obligation under subsection 3EA(2) as the ASIO officer to whom the Commissioner of Taxation disclosed the information.

Thirdly, an ASIO officer may divulge or communicate the information to a barrister or solicitor representing a person in:

- a prosecution of a person for a tax-related offence; or
- proceedings for the making of a proceeds of crime order; for the purposes of, or in connection with, the prosecution or proceedings. [New paragraph 3EA(3)(c)]

The barrister or solicitor may only use the tax information as provided for in new section 3EB.

Fourthly, an ASIO officer may divulge or communicate the tax information to an IGIS officer for the purposes of, or in connection with, the performance of that IGIS officer's duties in relation to ASIO or employees of ASIO. [New paragraph 3EA(3)(d)]

The IGIS officer may only use the tax information as provided for in new section 3EC.

Fifthly, an ASIO officer may divulge or communicate the information to a law enforcement agency officer for the purposes of, or in connection with:

- the investigation of a serious offence; or
- an investigation relating to the making, or proposed or possible making, of a proceeds of crime order; or
- the prosecution, or proposed or possible prosecution, of a person for a tax-related offence; or
- the proceedings, or proposed or possible proceedings, for the making of a proceeds of crime order. [New paragraph 3EA(3)(e)]

The law enforcement officer may only use the information as provided for in amended section 3E.

Subsection 3EA(4) provides that if an ASIO officer or former ASIO officer has obtained information under subsections 3EA(1) or (3) or subsection 3EC(2) the person must not:

- be required to divulge or communicate the tax information to a court; or
- voluntarily give the tax information in evidence in proceedings before a court except in the course of:
 - the prosecution of a person for a tax-related offence; or
 - the proceedings for the making of a proceeds of crime order.

Subsection 3EA(5) clarifies that the expressions "the possible making of a proceeds of crime order" or "the possible proceedings for the making of a proceeds of crime order" include a reference to the making of an order, or proceedings, that are only a possibility at the time in question because the person has not been convicted of an offence to which the order relates.

Subsection 3EA(6) defines "proceeds of crime order", "serious offence", "taxation secrecy provision", "tax information", "tax law", and "tax related offence" for the purposes of the section.

New section 3EB

Subsection 3EB(1) prohibits a person from recording, divulging or disclosing any tax information obtained under paragraph 3EA(3)(c) or subsection 3EB(2). A penalty for breach of the secrecy obligation is provided for.

Subsection 3EB(2) provides one exception in the case of a barrister or solicitor from the general secrecy obligation in subsection (1).

A barrister or solicitor will be allowed to divulge or communicate the information or make a record of the information for the purposes of or in connection with the proceedings mentioned in paragraph 3EA(3)(c).

The person to whom the barrister or solicitor divulges or communicates the tax information is also bound by the secrecy obligation in subsection 3EA(1).

Subsection 3EB(3) provides that a person who has received tax information under paragraph 3EA(3)(c) or under subsection 3EB(2) must not be required to divulge or communicate the information to a court.

Subsection 3EB(4) defines the term “tax information” for the purposes of section 3EB by reference to the definition in section 3EA.

New section 3EC

Subsection 3EC(1) imposes a general obligation on an IGIS officer or a former IGIS officer who has obtained tax information not to record the information or divulge or communicate the information to any other person. A penalty for breach of the secrecy obligation is also provided for.

Subsection 3EC(2) provides exceptions from the general secrecy obligation in subsection (1) and allows an IGIS officer (but not a former IGIS officer) to:

- make a record of the tax information for the purposes of the performance of the officer’s duties in relation to ASIO or its employees; [new paragraph 3EB(2)(a)]
- divulge or communicate the tax information to another IGIS officer for the purposes of or in connection with the performance of that officer’s duties in relation to ASIO or its employees; [new paragraph 3EC(2)(b)] and
- divulge or communicate the tax information to the Director-General of Security in:
 - a draft report under section 21 of the IGIS Act; [new subparagraph 3EC(2)(c)(i)] or
 - a report under section 22 or 25A of the IGIS Act; [new subparagraph 3EC(2)(c)(ii)]in relation to ASIO or its employees.

Subsection 3EC(3) clarifies that an IGIS officer (or former IGIS officer) must not be required to divulge or communicate the tax information received under section 3EA or subsection 3EC(2) to a court or to voluntarily give the information in evidence before a court.

Subsection 3EC(4) defines “tax information” for the purposes of section 3EC by reference to the definition in section 3EA.