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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INSPECTOR OF TRANSPORT SECURITY BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and Regional Services,
the Honourable Mark Vaile, MP)

INSPECTOR OF TRANSPORT SECURITY BILL 2006

OUTLINE

The Inspector of Transport Security Bill 2006 is a part of the Government's commitment to ensuring a safe and secure transport system.

The object of this Bill is to provide a framework for independent inquiry and recommendations in relation to transport security matters and offshore security matters, to contribute to the improvement of transport security and the security of offshore facilities.

The Government announced the intention to create the role of the Inspector of Transport Security (the Inspector) in December 2003.

The Government decided to establish a legislative basis for inquiries by the Inspector to:

- conduct independent inquiries into transport security and offshore security matters;
- protect information gathered or generated in the course of an inquiry; and
- ensure there is legal backing for the "no-blame" nature of the inquiries.

In broad terms, the Inspector's role is to undertake an inquiry, when required by the Minister for Transport and Regional Services (the Minister), into a major transport security incident, a major offshore facility security incident, or a pattern or series of incidents that point to a systemic failure or possible weakness of the security regulatory systems for aviation or maritime transport or offshore facilities.

The Bill also provides for the Inspector to undertake inquiries into major surface transport security incidents when required by the Minister if the relevant State or Territory Minister has agreed.

In practice, a direction given by the Minister to conduct an inquiry may follow a request from the Prime Minister, another Australian Government Minister, a Minister of a State or Territory Government or another person.

The Inspector's inquiries will be conducted on a "no-blame" basis, that is, the information generated or gathered in the course of inquiries cannot be used as evidence in civil or criminal proceedings except in very limited circumstances set out in the Bill. This approach is consistent with Australia's international obligations with respect to the collection and use of information arising from safety incidents involving transport.

The Bill ensures that the Inspector has the capacity to conduct inquiries in relation to the activities of Australian Government agencies where these agencies have a role in transport security.

Final reports into a transport security matter will be given to the Minister in the first instance. The Inspector will generally not have the capacity or requirement to publish or otherwise distribute the outcomes of inquiries.

Where the report contains a particular conclusion or recommendation that affects an area of responsibility of another Commonwealth Minister or a Minister in a State or Territory Government, the Minister will be required to pass the final report, or the parts of the report that are permitted under the Bill, to the relevant Minister.

The Bill has nine parts:

Part 1 – Preliminary: This Part includes information on when the Bill will commence, the definitions used in the Bill and its application both within and outside Australia.

Part 2 – Objects and overview of this Act: This Part sets out the objects of the Bill, and contains a general overview to assist the reader in navigating the Bill.

Part 3 – Inquiries: This Part allows the Minister to commence an inquiry. It also establishes the limits as to what an inquiry can investigate.

Part 4 – Inspector of Transport Security: This Part creates the statutory office of Inspector of Transport Security.

Part 5 – Gathering information: This Part sets out the Inspector's powers to request information and documents from persons and government agencies, including requesting on-board recording (OBR) information and restricted information from the Executive Director of the Australian Transport Safety Bureau) and other sources, and creates an immunity for those who provide information and documents to the Inspector. It also provides the Inspector with certain powers to enter (with consent) premises and vehicles and to search such premises provided consent has been granted.

Part 6 – Reports: This Part provides for the types of reports that may be generated by the Inspector and sets out arrangements for distribution and use, and creates penalties for unlawful uses.

Part 7 – Protected information: This Part sets out the arrangements applying to the disclosure of information gathered by the Inspector during the course of an inquiry. This part also sets out the limited circumstances under which protected information may be disclosed.

Part 8 – OBR information, CVR information, and restricted information given to the Inspector by the Executive Director: This part specifies the manner in which the Inspector may use OBR, Cockpit Voice Recording (CVR) and restricted information given to the Inspector by the Executive Director.

Part 9 – Miscellaneous: Amongst other things, this Part deals with:

- the power to delegate powers and functions conferred by the Bill on the Inspector and the Executive Director;
- the circumstances when a person involved in an inquiry can provide information to coronial inquiries;
- the confirmation that information-gathering powers of the Commonwealth Parliament and Royal Commissions are not affected by the Bill;
- the requirements for the Commonwealth to pay compensation in some circumstances where an acquisition of property has occurred; and
- the power to make regulations.

Financial impact statement

The Bill has no financial impact.

INSPECTOR OF TRANSPORT SECURITY BILL 2005

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1: Short Title

This clause is a formal provision specifying the title of the proposed Act. The Bill once enacted will be known as the *Inspector of Transport Security Act 2006*.

Clause 2: Commencement

This clause provides that the main operating provisions of the Bill commence on the date of proclamation or the expiration of six months after Royal Assent, whichever is earlier.

This period allows sufficient time for the completion of the drafting of the regulations, which will need to commence at the same time as the Bill.

Clause 3: Definitions

This clause defines certain terms in the Bill. In particular:

CVR information has the same meaning as in Part IIIB of the *Civil Aviation Act 1988*. CVR stands for ‘cockpit voice recording’. The concept of CVR information captures certain voice recordings not falling within the definition of OBR information in section 48 of the *Transport Safety Investigation Act 2003* (discussed below).

OBR information means the same as it does in section 48 of the *Transport Safety Investigation Act 2003*. OBR stands for on-board recording. Examples may include cockpit voice recordings in respect of aircraft, and the voice component of voyage data recordings in respect of ships that is being used by the Australian Transport Safety Bureau in the investigation of an immediately reportable matter under the *Transport Safety Investigation Act 2003*.

Protected information is defined in detail under clause 66. Protected information is information that is obtained or generated by any person during the course of performing functions or exercising powers under the Bill. The definition excludes documents that are derived from a public source or information otherwise in the public domain. Where restricted information is given to the Inspector by a person other than the Executive Director of the Australian Transport Safety Bureau it will be treated as protected information in the Bill.

Rail vehicle and *road vehicle* are defined broadly, so that when combined, the two definitions cover the field of vehicles that are used on land.

Restricted information means the same as it does in the *Transport Safety Investigation Act 2003*. In broad terms, restricted information refers to certain types of information obtained or generated in connection with an investigation under the *Transport Safety Investigation Act 2003*. This Bill permits such information to be provided to the Inspector for the purposes of an inquiry under the Bill notwithstanding the prohibitions under the *Transport Safety Investigation Act 2003*.

Security regulated offshore facility has the same meaning as in the *Maritime Transport and Offshore Facilities Security Act 2003*. In brief, this term refers to offshore facilities nominated in a notice made by the Secretary of the Department of Transport and Regional Services (DOTARS) under that Act.

Clause 4: Act binds the Crown

This clause provides that the Crown in right of the Commonwealth and all the States and Territories is subject to the Bill, but the Crown cannot be prosecuted for an offence under the Bill.

Clause 5: Application to external territories

This clause provides that the Bill applies in all external territories.

Clause 6: Application outside Australia

This clause clarifies that the Bill applies outside Australia. It is intended that the powers of the Inspector may be exercised in respect of security incidents that may have occurred outside Australia.

Clause 7: Relationships with other laws

This clause makes it clear that the Bill is not intended to “cover the field” in relation to inquiries into transport security.

The Bill does not prevent a State or a Territory from conducting its own inquiries into transport security matters under the laws of that jurisdiction so long as the law of the State or Territory is not directly inconsistent with this Bill.

Clause 8: Geographical jurisdiction

In accordance with section 15.2 of the *Criminal Code*, this clause extends liability for criminal offences established by this Bill to offences committed outside Australia.

Part 2 – Objects and overview of Act

Division 1 – Objects

Clause 9: Objects of this Act

Subclause 9(1) sets out the main object of the Bill, which is to improve the security of transport and security related offshore facilities by providing a framework for independent inquiry and recommendations in relation to transport and offshore security matters.

Subclause 9(2) makes it clear that it is an object of the Bill that the Inspector does not interfere with the investigation of another agency even if the Minister directs an inquiry be conducted as a result of a particular incident that might be the subject of investigation by another agency.

That means:

- the Office of Transport Security will continue to investigate compliance/breaches of legislation administered by the Minister;
- police agencies will continue to investigate criminal matters;
- the ATSB will continue to undertake transport safety investigations; and
- the investigative role of coroners is not affected.

It is intended that the Inspector’s inquiries will be “a step behind” police and coroner investigations, and will not interfere with the processes of other investigations, including evidence gathering.

Subclause 9(3) explains that the Bill cannot be used to facilitate the apportionment of blame or the allocation of liability.

The Bill is based on the same “no-blame” principle as the *Transport Safety Investigation Act 2003*.

Except in specifically identified circumstances, information collected or generated under this Bill cannot be used to determine liability or to assist in court proceedings.

No adverse inference should be drawn from a person being the subject of an inquiry conducted by the Inspector.

Division 2 – Overview

Clause 10: General overview of Act

This Division provides an overview of the Bill.

Part 3 - Inquiries

Clause 11: Minister may initiate inquiry

Subclauses 11(1), (2) and (3) provide that the Inspector is to commence an inquiry into a transport security matter or an offshore security matter (terms defined in clause 12) when directed to do so by the Minister.

A direction by the Minister must be in writing and may include a reporting date. The Minister may vary the terms of a direction, as set out in section 33 of the *Acts Interpretation Act 1901*, in order to revoke a direction or prioritise an inquiry (for example, by bringing forward the reporting date).

Subclause 11(4) clarifies that a direction from the Minister to the Inspector is not legislative in character so does not fall within the definition of a legislative instrument under section 5 of the *Legislative Instruments Act 2003*.

Subclause 11(5) provides that the Inspector is not bound by a direction from the Minister in relation to the inquiry or reports other than a direction in writing given under subclause 11(2).

Subclause 11(6) provides the Inspector is not bound by a direction of the Secretary of Transport and Regional Services in regard to the conduct, or findings of an inquiry.

Subclauses 11(5) and 11(6) go to ensuring the independence of the Inspector.

Clause 12: What is a *transport security matter*?

This clause sets out the matters that constitute a transport security matter and therefore matters into which the Minister may require the Inspector to inquire.

Subclause 12(a) provides that an incident occurring in the course of transport or involving a transport vehicle that the Minister believes on reasonable grounds to be a major incident and does (or may) demonstrate a problem with the security of transport can be the subject of an inquiry.

The term ‘in the course of transport’ is intended to include an incident that may occur at a transport facility regardless of whether a transport vehicle was involved in the incident.

Subclause 12(b) provides that a situation or set of circumstances that suggests a systemic failure or weakness in the regulation of transport security can also be the subject of an inquiry.

An example of such a weakness may be a pattern of unauthorised incursions into secure areas of security regulated airports or ports.

Subclause 12(c) confers a general power to allow for the inquiry to be conducted where the Minister believes the matter to be significant and may have implications for the security of transport.

An example would be where a major incident occurs outside Australia that the Minister believes may provide useful lessons for Australian transport security. Note, however, that there are limits on the extent to which the Inspector may inquire into an incident that occurs outside Australia – see notes on clause 23.

Clause 13: What is an *offshore security matter*?

This clause sets out matters that constitute an offshore security matter and therefore matters into which the Minister may require the Inspector to inquire.

Subclause 13(a) provides that an incident occurring on, around or in relation to a security regulated offshore facility (a defined term discussed in the clause note to clause 3) that the Minister believes on reasonable grounds to be a major incident and does (or may) demonstrate a problem with the security of transport can be the subject of an inquiry.

Subclause 13(b) provides that a situation or set of circumstances that suggests a systemic failure or weakness in the regulation of security regulated offshore facilities can be the subject of an inquiry.

An example of such a weakness may be the occurrence of a pattern of unauthorised access at a security regulated offshore facility.

Subclause 13(c) confers a general power to allow for an inquiry to be conducted where the Minister believes the matter to be significant and may have implications for the security of security regulated offshore facilities.

An example is a major incident that occurs outside Australia that the Minister believes may provide useful lessons for the security of Australian offshore facilities. Note, however, that there are limits on the extent to which the Inspector may inquire into an incident that occurred outside Australia – see notes on clause 23.

Clause 14: Constitutional limitations – air transport

This clause prescribes the limits within which the Inspector may inquire into a matter in relation to air transport.

This clause is consistent with the Commonwealth's constitutional power to legislate in respect of external affairs, trade and commerce with other countries and among the States, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, matters referred to the Commonwealth by any State or States, power to legislate in respect of Territories and respect of Commonwealth places, and in respect of any other matter to which the Commonwealth has the power to make laws.

The Commonwealth's wide constitutional power to make laws relating to air navigation has been confirmed by court decisions such as *Airlines of New South Wales Pty Ltd v New South Wales* (Airlines No.2 (1965) 113 CLR 54).

Clause 15: Constitutional limitations – maritime transport

This clause prescribes the limits within which the Inspector may inquire into a matter in relation to maritime transport.

This clause is consistent with the Commonwealth's constitutional power to legislate in respect of external affairs, trade and commerce with other countries and among the States, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, matters referred to the Commonwealth by any State or States, power to legislate in respect of Territories and respect of Commonwealth places and in respect of any other matter to which the Commonwealth has the power to make laws.

Clause 16: Constitutional limitations – rail transport

This clause prescribes the limits within which the Inspector may inquire into a matter in relation to rail transport.

This clause is consistent with the Commonwealth's constitutional power to legislate in respect of external affairs, trade and commerce with other countries and among the States, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, matters referred to the Commonwealth by any State or States, power to legislate in respect of Territories and respect of Commonwealth places and in respect of any other matter to which the Commonwealth has the power to make laws.

Clause 17: Constitutional limitations – road transport

This clause prescribes the limits within which the Inspector may inquire into a matter in relation to road transport.

This clause is consistent with the Commonwealth's constitutional power to legislate in respect of external affairs, trade and commerce with other countries and among the States, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, matters referred to the Commonwealth by any State or States, power to legislate in respect of Territories and respect of Commonwealth places and in respect of any other matter to which the Commonwealth has the power to make laws.

Clause 18: Constitutional limitations – security-regulated offshore facilities

This clause prescribes the limits within which the Inspector may inquire into a matter in relation to a security regulated offshore facility.

This clause is consistent with the Commonwealth's constitutional power to legislate in respect of external affairs, trade and commerce with other countries and among the States, foreign corporations and trading and financial corporations formed within the limits of the Commonwealth, matters referred to the Commonwealth by any State or States, power to legislate in respect of Territories and respect of Commonwealth places and in respect of any other matter to which the Commonwealth has the power to make laws.

Clause 19: Meaning of *outside Australia* in sections 14 to 18

In clauses 14 to 18, outside Australia means outside the baseline from which the breadth of the territorial sea is measured. The territorial sea is considered outside Australia for purposes of clauses 14 to 18.

This definition has been adopted to ensure that the Commonwealth's external affairs power can be invoked to the maximum extent possible for the purposes of the Bill.

However, any references to 'Australia' in other provisions of the Bill, have the ordinary meaning in accordance with Section 15B of the *Act Interpretation Act 1901* which includes the coastal sea (including the territorial sea) of Australia. In other words, the territorial sea would be considered within Australia for purposes of all provisions of the Bill – other than clauses 14-18.

Clause 20: Consultation with other Ministers before direction made

This clause obliges the Minister to consult with all Commonwealth Ministers that may be affected by an inquiry before an inquiry is initiated.

This consultation may lead to a decision not to initiate an inquiry or a decision to modify the scope of an inquiry.

Clause 21: Defence aspects of a matter

This clause prevents the Minister from directing the Inspector to inquire into a defence aspect of a transport or offshore security matter if the Defence Minister objects to the inquiry.

A defence aspect of a transport security matter is defined in subclause 21(2) and includes a range of circumstances where the Australian Defence Force or information in possession the Australian Defence Force is involved.

Clause 22: Surface transport aspects of a transport security matter

This clause obliges the Minister to gain the agreement of the relevant State or Territory Transport Minister on the proposed scope of an inquiry into a surface transport aspect before an inquiry into that aspect may be initiated.

A surface transport aspect is defined in subclause 22(2) as including:

- rail vehicles operating within a particular State or Territory, other than rail vehicles owned or operated by a Commonwealth agency;
- road vehicles operating within a particular State or Territory, other than road vehicles owned or operated by a Commonwealth agency; or
- ships operating within the State or Territory waters of a particular State or Territory, other than security regulated ships or ships owned or operated by a Commonwealth agency.

Agreement from the States or Territory will be needed in this situation as the inquiry will deal with matters within the responsibility of the State or Territory. The relevant Transport Minister would be expected to consult with the appropriate State Government Ministers about the inquiry and provide a whole of State or Territory Government response to the request for agreement from the Minister.

Clause 23: Geographical reach of inquiry

This clause explains the limitations and conditions in which an inquiry may be conducted either in Australia or overseas. Generally, an inquiry should only be conducted where a security event occurs in Australia or involves Australian citizens or assets owned by an Australian government or registered in Australia.

However, the Minister can institute an inquiry into an incident that occurs overseas where the Minister reasonably believes a matter has or may have implications for the management of security in Australia, or where the matter relates to security arrangements in place in a foreign country from which transport vehicles depart that may pose security risks when they enter Australia.

Clause 24: Preservation of certain privileges and immunities

This clause ensures existing privileges and immunities conferred by Australian law are not affected by the Bill.

Under international law, representatives of foreign governments, such as diplomats, consular officials and heads of State, are immune from many Australian laws.

For example, an embassy's diplomatic bag may not be opened or detained by the government which is hosting the diplomatic mission.

These immunities have been recognised in several existing Commonwealth Acts that are listed in this clause.

Part 4 – Inspector of Transport Security

Division 1 – Appointment

Clauses 25: Inspector of Transport Security

This clause creates the statutory office of the Inspector of Transport Security and recognises the “on-call” nature of the duties by specifically allowing for the appointment to be made on a part-time basis.

Clause 26: Conduct of Inspector

This clause sets out the minimum standard for the conduct of the Inspector. The standard required of the Inspector is similar to that required of APS employees as set out in the Code of Conduct under the *Public Service Act 1999*.

Clause 27: Terms and conditions of employment

This clause sets out that the Minister can set terms and conditions for the employment for the Inspector that are not otherwise dealt with in the Bill.

Clause 28: Remuneration

This clause sets out that the Inspector's remuneration will be determined by the Remuneration Tribunal. In the event that no determination is in operation the Minister for Transport and Regional Services will set the remuneration.

Clause 29: Acting appointments

This clause allows an Inspector to be appointed during a vacancy in the office of the Inspector, or when the Inspector is unable to perform the duties of the office.

Subclause 29(2) ensures that an acting appointment is not invalidated by an irregularity in the way the acting appointment is made.

Clause 30: Resignation

This clause allows the Inspector to resign by notifying the Minister in writing.

Clause 31: Termination

The Minister may terminate the appointment of the Inspector for a range of circumstances that would cause the Inspector to be considered unsuitable to continue to hold the office.

Division 2 – Functions

Clause 32: Functions of the Inspector

This clause sets out the Inspector's functions as:

- conducting inquiries into transport security matters and offshore security matters in accordance with a direction from the Minister; and
- preparing reports in relation to those inquiries.

Division 3 – Powers

Clause 33: Powers of Inspector to be used for inquiries

This is a clause of limitation, designed to make it clear that the Inspector can only use the position's statutory powers exclusively for the purposes of conducting an inquiry and preparing reports and for no other reason.

Part 5 – Gathering Information

Division 1 – Powers relating to information and documents

Clause 34: Simplified outline

This clause is a simplified outline of this Division, which relates to the information-gathering powers of the Inspector.

Clause 35: Power to request information from persons generally

This clause permits the Inspector to request documents (other than OBR information or restricted information a person has been given under section 62 of the *Transport Safety Investigation Act 2003*) that the Inspector believes to be relevant to an inquiry.

The Inspector cannot ask for OBR information or restricted information a person has been given access to under section 62 of the *Transport Safety Investigation Act 2003*. OBR information and restricted information may only be requested of the Executive Director of the Australian Transport Safety Bureau and provided under clause 37.

Under subclause 35(4), a person may comply with the request, notwithstanding the terms of any other law, including the *Privacy Act 1988*. “Any other law” for the purposes of subclause 35(4) includes any law enacted after the commencement of this Bill (unless that law expressly overrides subclause 35(4) of this Bill).

Subclauses 35(5) and (6) allow the Inspector or a person assisting in the exercise of Inspector’s powers or functions under the Bill to copy, make a record of or disclose information given in response to a request under cl. 35.

Subclause 35(7) is an offence provision applying to the copying, use or disclosure in certain circumstances of information obtained under subclauses 36(5) or (6).

This subclause applies to information that is gathered either by the Inspector or by a person assisting another person in the exercise of the Inspector’s powers. If, in the course of the inquiry, the information is passed to another person who is not exercising powers or performing functions under the Bill then that person commits an offence if they copy, use or disclose the information. This offence includes disclosure to a court, a tribunal or a coroner.

Subclause 35(8) provides that the offence provision in subclause 35(7) does not apply to any conduct necessary for the purpose of assisting with an inquiry.

Clause 36: Power to request information from government agencies

This clause allows the Inspector to seek similar information that may be sought under clause 35 from government agencies.

The clause operates similarly to clause 35 with an additional element. Subclause 36(6) prohibits disclosure by the Inspector or an assistant, of information provided by a government agency without its consent, where the Inspector is of the opinion that disclosure may either compromise an investigation being conducted by the agency or may have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

This is in keeping with subclause 9(2), which provides that it is an object of the Bill that the Inspector not interfere with the investigations of other agencies.

Clause 37: Requesting OBR information and restricted information from the Executive Director

This clause deals with occasions when the Executive Director of Transport Safety Investigation (an office established under the *Transport Safety Investigation Act 2003*, currently occupied by the Executive Director of the ATSB) may provide OBR or restricted information to the Inspector.

Subclause 37(1) allows the Inspector to ask the Executive Director for such information that the Inspector believes may be relevant to the inquiry.

Subclause 37(2) only allows the Executive Director to provide the information after considering whether the adverse effect on current or future investigations under the *Transport Safety Investigation Act 2003* is outweighed by the public interest served by providing the information.

Subclauses 37(3) and (4) have the effect of removing the possibility of commencing criminal proceedings against a person for disclosing information to the Inspector, notwithstanding the prohibitions contained in the *Transport Safety Investigation Act 2003* that would otherwise apply.

Subclause 37(5) permits the Executive Director to choose to comply with the request, notwithstanding the terms of any other law, including the *Privacy Act 1988*. It is intended that “any other law” for the purposes of subclause 37(5) includes any law enacted after the commencement of this Bill (unless that law expressly overrides subclause 37(5) of this Bill).

Subclauses 37(6) and (7) allow the Inspector to copy, use and disclose OBR and restricted information in the course of an inquiry. This would permit discussion and sharing of the information amongst persons (eg. investigators engaged by the Inspector) participating in the inquiry. OBR or restricted information may also need to be disclosed to other persons, such as witnesses, in the course of obtaining information from these persons. However, where the Inspector is of the opinion that disclosure of the OBR or restricted information may compromise an investigation being conducted by the Executive Director or may otherwise have a substantial adverse effect on the proper and efficient conduct of the operations of the Executive Director, the information may be disclosed only with the Executive Director's prior agreement.

The balancing exercise established by this clause reflects Australia's obligations to keep these types of information strictly confidential in the light of Annex 13 of the Convention on International Civil Aviation (the Chicago Convention) and section 10.1 of the International Maritime Organization's Code for Investigation of Marine Casualties. Both instruments anticipate that the objective of investigating incidents is to prevent such incidents occurring in future rather than to attribute blame. Accordingly, information should not normally be available for use other than for preparing the report into a particular incident by the entity conducting the investigation, unless:

- the interests of justice requires it; and
- release will not adversely affect the provision of relevant information to investigation agencies in the future.

Subclause 37(8) is a general offence provision applying to the copying, use or disclosure of information obtained under subclauses 37(6) or (7).

This subclause applies to information that is gathered either by the Inspector or by a person assisting another person in the exercise of the Inspector's powers. If, in the course of the inquiry, the information is passed to another person who is not exercising powers or performing functions under the Bill then that person commits an offence if they copy, use or disclose the information. This offence includes disclosure to a court, a tribunal or a coroner.

Subclause 37(9) provides that the offence provision in subclause 37(8) does not apply to conduct necessary for the purpose of assisting with an inquiry.

Clause 38: Protection from liability

This clause provides immunity for those who provide information or documents in the honest and reasonable belief that they are permitted by the terms of this Bill to do so, from being the subject of either legal proceedings or disciplinary action as a result of providing the information or documents to the Inspector.

This is designed to encourage people to assist the Inspector in the conduct of inquiries.

Division 2 – Search powers

Clause 39: Simplified outline

This clause provides a simplified outline of this Division.

Clause 40: Identity cards

This clause deals with the use and control of identity cards.

Subclause 40(1) imposes an obligation on the Inspector to ensure that identity cards are issued to people entitled to exercise powers conferred by this Division.

Subclause 40(2) requires that the identity card must contain a photograph of the holder and allows for regulations to be made prescribing the form of the identity card.

Subclauses 40(3) and (4) create a strict liability offence with a maximum penalty of five penalty units if a person issued with an identity card does not return the card to the Inspector when the person ceases to be entitled to hold a card.

This is to prevent, for example, a person continuing to exert the powers associated with the card to gain access to premises or transport vehicles even though that person no longer has the authority to exert those powers.

Subclause 40(5) creates a defence to the strict liability offence if the card is lost or destroyed.

Subclause 40(6) requires the card holder to carry the card when exercising entry and search powers.

This is to ensure that those permitted to exercise the powers of the Inspector in regard to entry and search powers can be identified.

Clause 41: Obligations before entering premises or boarding transport vehicle

This clause explains the duties of persons delegated powers of the Inspector when entering premises or boarding a transport vehicle.

The person must take reasonable steps to identify himself or herself to the controller of the premises or transport vehicle, and show his/her identity card to the controller.

The person must also take reasonable steps to inform the controller of the reason for the request to enter.

If the person fails to take these reasonable steps, the person cannot exercise powers under this subdivision in relation to entering premises or boarding a transport vehicle.

Clause 42: Security regulated offshore facilities – occupational health and safety requirements

To ensure that high standards of occupational health and safety are maintained, this clause requires that the person (who has been delegated the relevant powers of the Inspector) follows Australian occupational health and safety legislation when exercising powers within the boundaries of a security regulated offshore facility.

Clause 43: Power to enter any premises with consent

Subclause 43(1) permits the Inspector to enter premises where a person gives voluntary consent to the entry. This subclause does not apply to a private living area within a security regulated offshore facility.

Under subclauses 43(2) and 43(3) the Inspector can only enter the private living areas of security regulated offshore facilities or a security regulated ship with the consent of the facility operator or the ship's master and those occupying the private area. While in this area the Inspector must be accompanied by a facility operator or a person nominated by the facility operator.

Under subclauses 43(4) and (5) the Inspector must explain to the person that consent can be refused or withdrawn. If consent is refused the Inspector must leave the premises. Involuntary consent is not consent for the purposes of this Bill.

Subclause 43(6) makes clear that no offence is committed if a person refuses the Inspector to enter, or remain on the premises or vehicles.

Clause 44: Power to board any transport vehicle with consent

This clause allows the Inspector to board a transport vehicle with the consent of the controller of the vehicle.

This clause operates in a similar way to clause 43.

Clause 45: Powers that may be exercised in relation to premises

This clause states the powers the Inspector may exercise when he/she enters premises with consent. This gives the Inspector wide ranging powers to collect information and documents sufficient for the conduct of the inquiry and completion of the reports.

Clause 46: Powers that may be exercised in relation to a transport vehicle

This clause states the powers the Inspector may exercise when he enters a transport vehicle with consent. This gives the Inspector wide ranging powers to collect information and documents sufficient for the conduct of the inquiry and completion of the reports.

Clause 47: Compensation for damage to electronic equipment

This clause sets out the compensation rights available for damage to electronic equipment when such equipment has been operated and damaged by the Inspector or by a person operating the equipment.

Division 3 – Where information or documents are volunteered

Clause 48: Protection from liability

This clause provides immunity for those who honestly and reasonably believe that providing information (even without being requested by the Inspector to do so) would assist an inquiry, from being the subject of either legal proceedings or disciplinary action as a result of providing the information to the Inspector.

However, the immunity under this clause does not apply to a person who volunteers OBR or restricted information or CVR information in breach of the *Transport Safety Investigation Act 2003* or Part IIIB of the *Civil Aviation Act 1988*.

Division 4 – Information generated in the course of conducting an inquiry

Clause 49: Copying, making a record of or using or disclosing information generated in the course of an inquiry

Subclause 49(1) allows the Inspector or a delegate or a person assisting the Inspector to make records, copies, use or disclose information for the purposes of carrying out their functions under the Bill.

Subclause 49(2) is a general offence provision applying to the copying, use or disclosure of information obtained under subclause 49(1). This subclause applies to information that is gathered either by the Inspector or by a person assisting another person in the exercise of the Inspector's powers. If, in the course of the inquiry, the information is passed to another person who is not exercising powers or performing functions under the Bill then that person commits an offence if they copy, use or disclose the information. This offence includes disclosure to a court, a tribunal or a coroner.

Subclause 49(3) provides that the offence provision in subclause 49(2) does not apply to any conduct necessary for the purpose of assisting with the inquiry.

Part 6 – Reports

Clause 50: Simplified outline

This clause provides a simplified outline of this Part.

Division 2 – Interim Reports

Clause 51: Interim report - no security issue found

This clause allows for the rapid termination of an inquiry where the Inspector considers that a transport security matter or an offshore security matter demonstrates no significant problem in, and has no significant implications for, the security of transport or security regulated offshore facilities.

In this circumstance, the Minister must terminate the inquiry.

Clause 52: Disclosure of interim reports

This clause deals with how interim reports may be circulated and includes specific restrictions on the distribution of interim reports that contain protected information, OBR, CVR or restricted information.

Subclause 52(1) permits the Minister to provide all or part of a report to a person, government agency or the Parliament when the Minister considers that it is in the public interest to do so.

Subclause 52(2) ensures that the Minister discloses any part of an interim report that relates to a transport security aspect of a transport security matter to the relevant State or Territory Transport Minister.

Subclause 52(3) prevents the Minister from providing parts of an interim report containing protected information provided to the Inspector by a government agency without the relevant Minister's prior consent, if the disclosure may compromise an investigation being conducted by the agency or publication would have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

This is in keeping with subclause 9(2), which provides that it is an object of the Bill that the Inspector not interfere with the investigations of other agencies.

Subclause 52(4) prevents disclosure or tabling of any part of an interim report that contains OBR or CVR information, unless that information is already publicly available.

The provision in this clause is necessary to comply with Australia's obligations under various international instruments (such as Annex 13 to the Chicago Convention) that seek to limit the use of OBR and CVR.

Subclause 52(5) prevents disclosure of restricted information provided to the Inspector by the Executive Director, without the Executive Director's prior consent, if the disclosure may compromise an investigation being conducted by the Executive Director or have a substantial adverse effect on the proper and efficient conduct of the operations of the Executive Director.

This is in keeping with subclause 9(2), which provides that it is an object of the Bill that the Inspector not interfere with the investigations of other agencies.

Subclause 52(6) prevents disclosure or tabling of any part of an interim report that relates to a surface transport aspect of a transport security matter without the agreement of the State or Territory Minister of the relevant jurisdiction.

Clause 53: Admissibility of interim reports

This clause ensures that an interim report cannot be used in any *proceedings* – defined in clause 3 of the Bill to be civil proceedings (either in a court or tribunal), criminal proceedings, coronial inquiries and disciplinary proceedings or processes.

The clause reflects the policy intention that such information is to be used only for the purpose of inquiries into transport security matters and offshore security matters.

Division 3 – Draft Reports

Clause 54: Information that may be included in draft reports

This clause makes clear a draft report can contain protected information, OBR information, CVR information, and restricted information given to the Inspector by the Executive Director.

Clause 55: Disclosure of the draft reports

This clause sets out when and how draft reports can be circulated.

Subclause 55(1) requires the Inspector to provide draft reports to anyone whose interests may be adversely affected by the release of the report, so as to allow them to make submissions or to give them advance notice of the likely form of the report. The Inspector may also, at his or her discretion, give draft reports to any other people or government agencies so as to allow them to make submissions or to give them advance notice of the likely form of the report. However, the obligation and power to provide draft reports are subject to the restrictions under subclauses (4) – (6) – see notes on these provisions below.

Subclause 55(2) requires a Minister to disclose any part of the draft report that relates to a security aspect of a surface transport matter which is the responsibility of a State or

Territory to the relevant Transport Minister. However, the obligation and power to provide draft reports are subject to the restrictions under subclauses (4) – (6) – see notes on these provisions below.

Section 55(3) allows the Inspector to give the draft report to any person or government agency to allow the person or agency the opportunity to respond or to give the person notice of the content of the final report.

The arrangement for the provision of draft reports in section 55 (1) – (3) is designed to improve the accuracy of the contents of the report by allowing interested parties to view and comment on the draft report. It would also provide those who may be adversely affected with procedural fairness, so they can make submissions as to the appropriate findings and recommendations that should be made by the Inspector in the final report.

The draft report is meant to be treated as an in-confidence document. Clause 56 sets out penalties for using the report inappropriately.

Subclause 55(4) prevents the Inspector from providing any part of a draft report that contains protected information provided by a government agency, without the prior agreement of the agency, where the disclosure could compromise an investigation conducted by the agency or have a substantial adverse effect on the conduct of the operations of the agency.

Subclause 55(5) allows the Inspector to give part of the draft report that contains OBR or CVR information to a person or agency who is being invited to comment on the draft report to understand the conclusions made. The provision in this clause is necessary to comply with Australia's obligations under various international instruments (such as Annex 13 to the Chicago Convention) that seek to limit the use of OBR and CVR information unless it the interests of justice require it.

Subclause 55(6) prevents the Inspector from providing any part of a draft report to a person who is being provided an advance notice of the likely form of the final report if it contains OBR or CVR information unless the information is publicly available. The provision in this clause is necessary to comply with Australia's obligations under various international instruments (such as Annex 13 to the Chicago Convention) that seek to limit the use of OBR and CVR.

Subclause 55(7) prevents the Inspector from providing any part of a draft report that contains restricted information given by the Executive Director, without the prior agreement of the Executive Director, where the disclosure could compromise an investigation conducted by the Executive Director or have a substantial adverse effect on the conduct of the operations of the Executive Director.

Subclause 55(8) prevents the Inspector from giving a draft report (or part thereof) that is associated with a surface transport aspect to any person, without the agreement of the relevant State or Territory Transport Minister.

Clause 56: Copying, disclosure and using the draft report

This clause reinforces the “in-confidence” nature of a draft report.

Subclause 56(1) makes it an offence for a person who receives a draft to then copy, disclose, or use any contents of the report. The maximum penalty is 2 years imprisonment.

This is to deter draft reports, which may contain information yet to be verified, from being, for example, taken out of context or misused.

Subclause 56(2) provides a defence to a prosecution where the relevant action was taken to either prepare a submission on the draft report or to take steps to remedy security deficiencies that are identified in the report.

Subclause 56(3) makes clear that the prohibition on publishing a draft report includes disclosing information to a court, tribunal or coroner.

This clause establishes the policy intention that such information is to be used only for the purpose of inquires into transport security matters and offshore security matters, and should not be used in the judicial system for the purpose of blame or liability.

Subclause 56(4) prohibits an employer disciplining an employee on the basis of the contents of the draft report. This forms part of the policy intention of the Bill to promote a “no blame” environment, so as to encourage the improvement of transport security.

Clause 57: Submissions on a draft report

This clause ensures that anyone who acts honestly and reasonably in making a submission on a draft report is not liable to criminal or civil proceedings, or disciplinary action, for the making of the submission.

Clause 58: Admissibility of draft reports

This clause ensures that a draft report cannot be used in any *proceedings* – defined in clause 3 of the Bill to be civil proceedings (either in a court or tribunal), criminal proceedings, coronial inquiries and disciplinary proceedings or processes.

This clause is designed to be broad, so as to reinforce the policy intention that such information is to be used only for the purpose of inquiries into transport security matters and offshore security matters, and should not be used in the judicial system for the purpose of blame or liability.

Division 4 – Final Reports

Clause 59: Final report

This clause deals with the preparation and provision of final reports.

Subclauses 59(1) – (3) require the Inspector to give the Minister the final report in writing, either as soon as practicable after an inquiry is completed or, if a time period is specified by the Minister, within that period. The final report must include the Inspector’s conclusions and recommendations.

Subclause 59(4) permits protected information, OBR information, CVR information, and restricted information given to the Inspector by the Executive Director, to be contained in the final report.

Subclause 59(5) requires the final report to take into consideration any submissions made on the draft report by persons given the draft report under clause 55.

Subclause 59(6) allows the Inspector to recommend to the Minister whether all or part of the final report should be given to any other person. For example, if the Inspector considers that the disclosure of a certain part of a final report would not be in the public interest, he or she may recommend that the Minister limit the disclosure of that part of the report.

Clause 60: Disclosure by the Minister to another person

This clause sets out to whom a Minister must, or may, give a final report.

Subclause 60(1) requires the Minister to provide a Commonwealth Minister or a Minister of a State or Territory that part of a final report that contains a conclusion or recommendation that affects the area of responsibility of that other Minister. This is essential in facilitating any action that is necessary to correct any security deficiencies identified in the report.

The obligation to provide a final report under subclause 59(1) is subject to the restrictions under clauses 61 to 64.

Subclause 60(2) ensures the Minister discloses any part of the final report that relates to a state or territory surface transport aspect of a transport security issue to the relevant State or Territory Minister.

Subclause 60(3) permits the Minister to give a person or government agency all or part of the report if it is in the public interest.

Subclause 60(4) permits the Minister to impose conditions on the copying, making a record of, or disclosure of a final report provided under subclause 60(3).

Subclause 60(5) establishes a criminal offence if a person breaches a condition imposed under subclause 60(4). The maximum penalty is 2 years imprisonment.

Clause 61: Final reports containing protected information

This clause prevents the Minister from disclosing any part of a final report that contains protected information provided to the Inspector by a government agency, without the agreement of the Minister with administrative responsibility for that agency, if the disclosure could compromise an investigation being conducted by that agency or may have a substantial adverse effect on the proper and efficient conduct in the operations of the agency.

Clause 62: Final reports relating to surface transport aspects of a matter

This clause prevents the Minister from providing part of a final report relating to a surface transport aspect of a transport security matter without the agreement of the relevant State or Territory Transport Minister.

Clause 63: Final reports containing OBR information, CVR information, and restricted information given to the Inspector by the Executive Director

This clause restricts distribution of reports containing OBR or CVR information, or restricted information provided to the Inspector by the Executive Director. These constraints apply to restricted information only where the information was given to the Inspector by the Executive Director and the constraints apply to OBR or CVR information irrespective of its source. Restricted information from sources other than the Executive Director is treated as protected information and is dealt with in accordance with clause 60.

Subclause 63(1) precludes the provision of a report containing OBR and CVR information unless the information is already publicly available, or the person receiving the report is a Commonwealth, State or Territory Minister with responsibility for the relevant area and would not be able to implement the recommendations without being given the report.

Subclause 63(2) precludes the provision of part of a report containing restricted information provided by the Executive Director unless the information is already publicly available, or the person receiving the report is a Commonwealth, State or Territory Minister with responsibility for the relevant area and would not be able to implement the recommendations without being given that part of the report.

Subclause 63(3) provides that a Minister receiving a report (or part of a report) containing OBR, CVR or restricted information under this clause can only disclose the contents of the report for the purposes of implementing the recommendations. The provision in this clause is necessary to comply with Australia's obligations under various international instruments (such as Annex 13 to the Chicago Convention) that seek to limit the use of OBR and CVR information unless it prevents an incident from occurring again.

Subclauses 63(4) – (6) mean that anyone who copies uses or discloses the contents of a final report that contains OBR or CVR information, or restricted information given by the Executive Director (including disclosing a report to a court, tribunal or a coroner) for a purpose other than implementing the recommendations commits an offence. The maximum penalty is 2 years imprisonment.

Clause 64: Tabling the report in the Parliament etc

This clause gives the Minister discretion to table all or part of a final report in Parliament, other than any part of a report containing OBR or CVR information that is not publicly available, or any part of a final report that deals with a surface transport aspect of a transport security matter without the agreement of the relevant State or Territory Transport Minister.

However, prior to tabling the report, given the “no blame” nature of the scheme put in place in the Bill, the Minister must consider that publication is, on balance, in the public interest.

Clause 65: Admissibility of reports

This clause provides that a final report is not admissible in any proceedings other than coronial inquiries.

This clause reflects the policy intention that information obtained during an inquiry by the Inspector may not be used to apportion blame or liability or in disciplinary proceedings.

Part 7 – Protected information

Clause 66: What is *protected information*?

This clause defines what is regarded to be *protected information*.

In general terms, information generated or obtained in the course of an inquiry is considered *protected information* unless it is publicly available or in the open access period prescribed in the *Archives Act 1983* (i.e. where the record is more than 30 years old and not otherwise exempt).

'Protected information' also excludes OBR information and CVR information, which are protected under the *Transport Safety Investigation Act 2003* and the *Civil Aviation Act 1988* respectively. The exclusion of such information from the definition of protected information is intended to remove the overlap between the confidentiality regimes under the aforementioned legislation and the new regime created by Part 7 of this Bill. While the confidentiality requirements under the *Transport Safety Investigation Act*, the *Civil Aviation Act* and this Bill are quite similar, they differ in a number of ways. To avoid confusion, it is considered desirable to ensure that persons who have OBR information or CVR information, and who have been called upon to participate in an inquiry under this legislation, are subject only to one set of confidentiality restrictions - that is, the restrictions under either the *Transport Safety Investigation Act* or the *Civil Aviation Act* (as the case may be), but not the restrictions under Part 7 of this Bill.

Restricted information given to the Inspector by the Executive Director of the Australian Transport Safety Bureau is also excluded from the definition of 'protected information'. Such information is subject to separate (but substantially similar) protections under clause 73.

Note that restricted information given by a person other than the Executive Director of the Australian Transport Safety Bureau is treated as 'protected information' under Part 7 of this Bill.

Clause 67: Offence – copying, disclosing or using protected information

This clause governs when protected information can be copied, used or disclosed.

Subclause 67(1) prohibits a person who has obtained or generated protected information in the course of an inquiry under this Bill from copying or using that information, or disclosing the information to another person or a court, tribunal or coroner.

Non-compliance constitutes a criminal offence with a maximum penalty of 2 years imprisonment.

Restrictions on the use and disclosure of *protected information* reinforce the notion that information gathered or generated in the course of an inquiry under this Bill should not be used for other purposes such as judicial proceedings (particularly criminal proceedings).

Subclause 67(2) provides exceptions to this prohibition, where:

- the Bill, by express words or necessary implication, permits the copying, use or disclosure;
- the information is required for the purposes of prosecuting offences under this Bill. An example would be prosecution of an offence under this clause itself for unauthorised disclosure of protected information;

- the information is required for the purposes of prosecuting certain specific offences under the *Criminal Code*, which might include the provision of false or misleading information or documents to the Inspector, or deliberate obstruction of the Inspector in conducting an inquiry;
- the information is required for civil proceedings or coronial inquiries, where the Minister has provided a certificate, and a court has ordered the information be disclosed (this is discussed in subclause 67(5)); or
- the information is required for a criminal proceeding, where a number of safeguards have been met. See discussion in subclause 67(4).

Subclauses 67(3) – (6) set out when protected information can be used in the court process.

Subclause 67(3) permits the Minister to issue a certificate indicating that disclosure of the information in a civil proceeding or coronial inquiry is not likely to interfere with an inquiry under this Bill. For the information to be disclosed to a court or coroner subclause 67(5) must also be satisfied.

Subclause 67(4) permits disclosure of information in a criminal proceeding where the Minister has issued a certificate stating that the disclosure is not likely to interfere with an inquiry. The Minister may only issue a certificate if the criminal proceeding is for a serious offence and the disclosure is necessary to establish a chain of evidence. In addition subclause 67(5) must be satisfied.

Subclause 67(5) permits a court or coroner to order disclosure when the court or coroner considers the adverse impact of disclosing the information is outweighed by the public interest in the administration of justice.

Subclause 67(6) permits a court or coroner to place conditions on the publication or communication of protected information that is to be disclosed as ordered under subclause (5), including any information that may be obtained from such information.

Subclause 67(7) confirms that a person who is prohibited by this clause from disclosing protected information cannot be required by a court or a coroner to disclose the information, and ensures that, if there is disclosure in contravention of this clause, the disclosed information cannot be used in any proceedings (other than proceedings against the person under subclause 67(1)).

This procedure again reinforces the policy intention that except in extraordinary circumstances, information collected for the purposes of an inquiry under this Bill should only be used for that purpose.

Clause 68: Disclosing information where serious offence imminent

This clause allows the Inspector to disclose protected information to a government agency to prevent the commission of an imminent offence where the offence is punishable by more than 2 years imprisonment. The receiving body can only deal with the information for the purpose of preventing such an offence.

It is not the purpose of this clause to permit disclosure of protected information for the purposes of criminal investigations when an offence appears to have already been committed. Nor could such information be used in any subsequent prosecution unless the Minister issues a subclause 67(4) certificate and the court makes an order under subclause 67(5).

Clause 69: Disclosing information where not directly relevant to an inquiry

The Inspector may disclose protected information to a government agency if the information was voluntarily disclosed and is not directly relevant to the Inspector's inquiry, where he/she believes that the information may be relevant to the prevention or prosecution of a Commonwealth, state or territory offence. Under this clause the information cannot be used for any reason that is not related to the prevention or prosecution of such an offence.

Clause 70: Disclosing information to the Executive Director

This clause permits the Inspector to provide the Executive Director with protected information where requested to do so and the information is relevant to an investigation being conducted by the Executive Director, but only if the adverse effect the disclosure may have on current and future inquiries of the Inspector is outweighed by the public interest in disclosing the information to the Executive Director.

Clause 71: Immunity where copying, recording, using or disclosing protected information permitted under this Act

This clause protects a person who has disclosed protected information for the purposes of this Bill from liability in legal or disciplinary proceedings commenced because of the disclosure. This would protect, for example, persons engaged by the Inspector to participate in an inquiry, who need to discuss protected information amongst themselves in analysing the information. It also expressly authorises any person, who is permitted by this Bill to use and disclose protected information, to do so notwithstanding the terms of any other law, such as the *Privacy Act 1988*. It is intended that "any other law" for the purposes of subclause 71(2) includes any law enacted after the commencement of this Bill (unless that law expressly overrides subclause 71(2) of this Bill).

Part 8 – OBR information, CVR information, and restricted information given to the Inspector by the Executive Director

Clause 72: Simplified outline

This clause provides a simplified outline of the Part.

Clause 73: Application of other laws to copying, recording, use and disclosure of OBR information

This clause provides that where the Bill permits the copying or disclosure of OBR information, the provisions contained in the *Transport Safety Investigation Act 2003* that make copying and disclosing such information a criminal offence do not apply.

In addition, section 55 of the *Transport Safety Investigation Act*, which (with some exceptions) makes OBR information inadmissible in criminal proceedings, does not preclude admission of OBR information for prosecution of an offence against this Bill (eg. an offence under clause 56 of this Bill for unauthorised disclosure of a draft report given by the Inspector, including a draft report that contains OBR information).

Clause 74: Application of other laws to copying, recording, use and disclosure of CVR information

This clause provides that where this Bill permits the copying or disclosure of CVR information, the provisions contained in the *Civil Aviation Act 1988* that make copying and disclosing such information a criminal offence do not apply.

In addition, section 32AP of the *Civil Aviation Act 1988*, which (with some exceptions) makes CVR information inadmissible in criminal proceedings, does not preclude admission of CVR information for prosecution of an offence against this Bill (eg. an offence for unauthorised disclosure of a draft report given by the Inspector, including a draft report that contains CVR information).

Clause 75: Application of other laws to copying, recording, use and disclosure of restricted information given to the Inspector by the Executive Director

Subclause 75(1) provides that where this Bill permits the recording or disclosure of restricted information given to the Inspector by the Executive Director, the provisions contained in the *Transport Safety Investigation Act 2003* that make the act of recording or disclosing of such information a criminal offence do not apply.

Subclause 75(2) creates a criminal offence if restricted information given by the Executive Director is copied, used or disclosed unlawfully. The maximum penalty is 2 years imprisonment.

Subclause 75(3) provides exceptions to this prohibition, where:

- the Bill, by express words or necessary implication, permits the copying, use or disclosure;
- the information is required for the purposes of prosecuting offences under this Bill. An example would be prosecution of an offence under this clause itself for unauthorised disclosure of restricted information;
- the information is required for the purposes of prosecuting certain specific offences under the *Criminal Code*, which might include the provision of false or misleading information or documents to the Inspector, or deliberate obstruction of the Inspector in conducting an inquiry;
- the information is disclosed to a court in civil proceedings or coronial inquiries where the Minister has issued a certificate, and a court has ordered the information be disclosed; or
- The information is disclosed to a court in a criminal proceeding where the Minister has issued a certificate and a court has ordered the information be disclosed.

Subclause 75(4) permits the Minister to issue a certificate indicating that disclosure of the restricted information given to the Inspector by the Executive Director in a civil proceeding or coronial inquiry is not likely to interfere with an inquiry under this Bill. For the information to be disclosed to a court or coroner subclause 75(6) must also be satisfied.

Subclause 75(5) permits the disclosure of restricted information given to the Inspector by the Executive Director in a criminal proceeding where the Minister has issued a certificate stating that the disclosure is not likely to interfere with an inquiry. The Minister may only issue a certificate if the criminal proceeding is for a serious offence and the disclosure is necessary to establish a chain of evidence. In addition subclause 75(6) must be satisfied.

Subclause 75(6) permits the court or coroner to order disclosure when the court or coroner considers the adverse impact of disclosing the information is outweighed by the public interest in the administration of justice.

Subclause 75(7) permits a court to restrict the publication or communication of restricted information provided to the Inspector by the Executive Director that is to be disclosed as ordered under subclause 67 (6) including any information that may be obtained from such information

Subclause 75(8) confirms that a person who is prohibited by this clause from disclosing restricted information provided to the Inspector by the Executive Director cannot be required by a court or a coroner to disclose the information, and ensures that, if there is disclosure in contravention of this clause, that the disclosed information cannot be used in any proceedings (other than for proceedings under clause 75(1)).

Clause 76: Immunity where copying, recording, using or disclosing OBR information, CVR information, or restricted information given by the Executive Director, permitted under this Act

This clause provides immunity from legal or disciplinary proceedings for someone who deals with OBR or CVR information, or restricted information that has been given to the Inspector by the Executive Director, for the purposes of this Bill. This would protect, for example, people assisting the Inspector in an inquiry.

It also expressly authorises any person, who is permitted by this Bill to use and disclose OBR, CVR or restricted information provided to the Inspector by the Executive Director to do so notwithstanding the terms of any other law, such as the *Privacy Act 1988*. It is intended that “any other law” for the purposes of subclause 74(2) includes any law enacted after the commencement of this Bill (unless that law expressly overrides subclause 76(2) of this Bill).

Clause 77: Disclosing OBR information, CVR information, and restricted information given by the Executive Director, where serious offence imminent

This clause allows the Inspector to disclose OBR or CVR information, or restricted information given by the Executive Director, to a government agency to prevent the commission of an imminent offence where the offence is punishable by more than 2 years imprisonment.

It is not the purpose of this clause to permit disclosure of OBR, CVR or restricted information for the purposes of criminal investigations when an offence appears to have already been committed.

Disclosure under this clause may occur only if it is authorised by an eligible Judge or a nominated member of the Administrative Appeals Tribunal (AAT). The requirement for this authorisation is necessary to comply with Australia’s obligations under various international instruments (such as Annex 13 to the Chicago Convention) that seek to limit the use of OBR, CVR and restricted information except with the specific authorisation of a court.

Subclauses 77(1) - (3) provide that an application to disclose OBR or CVR information, or restricted information given by the Executive Director, may be made to an eligible Judge or nominated AAT member and must be accompanied by a statement from the Inspector (or delegate) indicating the grounds of suspicion of the serious imminent offence, why the information may be relevant to the prevention of the offence, and a statement by the Executive Director (or delegate) that the effect the disclosure may have on investigations under the *Transport Safety Investigation Act 2003* is outweighed by the public interest served by disclosing the information. The proposed terms of the order must also accompany the application. Urgent applications may be made by telephone.

Subclause 77(4) provides that the accompanying statements and proposed orders must be in writing if the application is made in writing.

Subclause 77(5) provides that if the application is made by telephone, the accompanying statement may be given by telephone, as can the proposed terms of the orders sought. However, the person making the statement must provide the Judge or AAT member on the next business day an affidavit containing a copy of the telephone statement made to the Judge or AAT member and a statement of the effect that the copy of the telephone statement is a true record. The Inspector must inform the Judge or AAT member of the urgent circumstances which formed the basis of the Inspector's belief that a telephone application was necessary.

Subclause 77(6) permits the Judge or AAT member to issue a disclosure order, where he or she is satisfied that the relevant offence is imminent and that the information may be relevant to the prevention of the offence, and that it is appropriate to make the order, having regard to the:

- extent to which the privacy of any person may be affected by the disclosure;
- seriousness of the offence;
- likelihood that the disclosure of the information would assist the agency in the prevention of the offence;
- likelihood that the offence would be prevented without the disclosure of the information to the agency; and
- effect that the disclosure may have on current or future investigations under the *Transport Safety Investigation Act 2003*.

Subclause 77(7) permits the Judge or AAT member to set conditions or restrictions on the disclosure of the information.

Subclause 77(8) states that if an application is made by telephone the Judge or AAT member making the order must inform the Inspector of the terms of the orders and details of when they were made. A copy of the order must be given to the Inspector.

Subclause 77(9) states that the receiving body can only deal with the information for the purpose of preventing a serious offence.

Subclauses 77(10) – (11) allow the Judge or AAT member or a person assisting them while exercising their powers under this section to copy, make record or use the information.

Clause 78: Eligible Judge

This clause allows a Judge of a court created by the Parliament, who consents to nomination, to be declared by the Attorney-General as an eligible Judge for the purposes of this Bill (most relevantly, clause 77).

Subclause 78(5) makes it clear that the Judge, in performing functions under clause 77, is acting in a personal capacity and not as a member of the court of which they are a member.

Clause 79: Nominated AAT member

This clause permits the Attorney-General to nominate the President or a Deputy President or a senior member of the AAT to make orders under clause 77. A senior member of the AAT may only be nominated for this purpose, if he or she has been enrolled as a legal practitioner in Australia for more than 5 years

Part 9 – Miscellaneous

Clause 80: Inspector to minimise disruption to transport

This clause requires that the Inspector must be cognisant of the commercial implications caused by the disruption to transport services. This is to ensure, to the extent practicable, that the inquiry process itself does not result in delays to transport services and operations of security regulated offshore facilities.

It is anticipated that the Inspector would adopt procedures that enable him/her to conduct inquiries efficiently while also minimising disruption to transport or operations or offshore facilities.

Clause 81: Inspector to act consistently with Australia’s international obligations

This clause requires the Inspector to exercise his/her powers in a manner consistent with Australia’s obligations under relevant international agreements that are identified in the regulations.

Clause 82: Delegation

Subclause 82(1) permits the Inspector to delegate all or any of his/her powers under the Bill to an SES employee, or an APS employee at Executive Level 1 or 2 or a person (including a non-APS employee) in an equivalent position. (‘Equivalent position’ is intended to refer to a position equivalent to Executive Level 1 or 2 within an agency that has a classification structure different from the standard APS structure.)

The Inspector will also be able to delegate powers to individuals engaged by the Commonwealth (eg. under a contract) who satisfy specific criteria set out in the regulations.

Subclause 82(2) permits the Executive Director of the ATSB to delegate the powers conferred on that position by this Bill to SES or Executive Level 1 or 2 (or equivalent) employees.

Clause 83: States and Territories may confer powers and functions on Inspector

Clause 83 clarifies the Parliament's intention to allow the Inspector to exercise powers given to him/her by a State or Territory, to the maximum extent possible within the limits under the Constitution.

Clause 84: Immunity for actions under this Act

The clause does not apply to the copying, recording, use or disclosure of protected information, OBR information, CVR information or restricted information. Immunity for disclosure of such information is provided in clause 76.

This clause protects a person from legal and disciplinary actions in relation to things done by them either in exercising a power or performing a function set out in the Bill.

The immunity applies to anything done by a person expressly or implicitly permitted by this Bill. This immunity is also intended to protect persons who do not themselves exercise any power or perform any functions under the Bill, such as a person who performs routine administrative tasks for the Inspector or for other people engaged by the Inspector to participate in an inquiry.

Clause 85: Immunity for failure to act

This clause protects the Minister, the Inspector (or delegates) and other persons from legal (but not disciplinary) proceedings in the event of failure to take specific actions in exercising powers or performing functions contained in the Bill or in the course of doing anything permitted by this Bill.

This clause is also intended to protect persons who do not themselves exercise any power or perform any functions under the Bill, such as a person who performs routine administrative tasks for the Inspector or for other people engaged by the Inspector to participate in an inquiry.

Clause 86: Certification by Inspector of a person's involvement in an inquiry

This clause establishes arrangements that permit the Inspector to issue a certificate indicating that a specified person has exercised powers or performed functions as part of an inquiry. This clause is also applicable to staff assisting others in the exercise of powers or the performance of a function.

Clause 87: Compellability as a witness

This clause states that if a certificate has been issued under clause 86 the person cannot be compelled by a court (other than a coroner) or tribunal to be a witness in the court or tribunal or to provide information (eg. by producing documents) to the court or tribunal.

The non-compellability of a person under clause 87 overrides the provisions of any other law, including any law that requires compliance with subpoenas or similar court directions generally. It is intended that “any other law” for the purposes of subclause 87(3) includes any law enacted after the commencement of this Bill (unless that law expressly overrides subclause 87(3) of this Bill).

Clause 88: Fees for attendance at coronial inquiries

Where a person covered by the Inspector’s certificate is asked to give evidence as an expert witness in a coronial inquiry, the Commonwealth is entitled to receive a fee from the State or Territory concerned in respect of the person’s appearance at the inquiry.

Clause 89: Legal representation at coronial inquiry

This clause provides that a person covered by the Inspector’s certificate and who acts as an expert witness at a coronial inquiry is entitled to be represented by a lawyer in relation to their appearance at such an inquiry. This would apply even without leave of the coroner.

Clause 90: Operation of section 503A of the *Migration Act 1958* not affected

This clause preserves the effect of section 503A of the *Migration Act 1958*, which restricts disclosure of certain information that has been provided to the Immigration Department by certain Australian law enforcement or intelligence bodies or foreign law enforcement bodies. Consequently, a person who is prevented by section 503A of the *Migration Act 1958* from disclosing such information is precluded from disclosing the information to the Inspector under this Bill.

Clause 91: Powers of Parliament and Royal Commissions not affected

This clause makes clear that the prohibitions contained in this Bill do not affect the rights of Parliaments and Royal Commissions to collect information.

Clause 92: Compensation for acquisition of property

This clause provides for compensation for the acquisition of property where compensation is required for constitutional reasons.

Clause 93: Regulations

This clause allows regulations to be made where required or permitted by this Bill, or where necessary or convenient for the purposes of the Bill.