



THIRTY-EIGHTH PARLIAMENT

REPORT 52

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***LIQUOR CONTROL AMENDMENT REGULATIONS
(No. 10) 2011***

Presented by Hon Sally Talbot MLC (Deputy Chair)

and

Mr Paul Miles MLA (Member)

August 2012

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause -
- “**adverse effect**” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “**instrument**” means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “**subsidiary legislation**” has the meaning given to it by section 5 of the *Interpretation Act 1984*.

Members as at the time of this inquiry:

Mr Joe Francis MLA (Chairman)
Hon Sally Talbot MLC (Deputy Chair)
Hon Alyssa Hayden MLC
Ms Janine Freeman MLA

Hon Jim Chown MLC
Mr Paul Miles MLA
Hon Helen Bullock MLC
Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Irina Lobeto-Ortega, Advisory Officer (Legal)

Rachel Wells, Committee Clerk (until 7 May 2012)
Talweez Senghera, Committee Clerk (from 9 March 2012)

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
LIQUOR CONTROL AMENDMENT REGULATIONS (No. 10) 2011

EXECUTIVE SUMMARY

- 1 The Committee has identified significant concerns with the legislative scheme dealing with the confiscation of passports in the *Liquor Control Act 1988* and its associated regulations. The Committee has formed the view that sections in the Act and the regulations are inconsistent with two Commonwealth statutes which deal with passports: the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005*.
- 2 Although outside the scope of the Committee's inquiry into this instrument of delegated legislation, the Committee takes this opportunity to bring this issue to the attention of the House and recommend action.
- 3 This report recommends that the Legislative Council selectively disallow clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011*. The Committee also recommends that the Minister for Racing and Gaming amend the original wording of the regulation which will be revived by disallowance as it raises the same concerns identified by the Committee.
- 4 The Committee further recommends that the Minister for Racing and Gaming amend section 126 of the *Liquor Control Act 1988* due to the potential for the section to be declared invalid for inconsistency with section 109 of the *Australian Constitution*.

RECOMMENDATIONS

- 5 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011* be disallowed.

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Recommendation 2: The Committee recommends that the Minister for Racing and Gaming amend the previous wording of regulation 18G, once it is revived by the disallowance of clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011*, in line with any amendments to section 126(2b) of the *Liquor Control Act 1988*.

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Recommendation 3: The Committee recommends that the Minister for Racing and Gaming amend section 126 of the *Liquor Control Act 1988* to:

- (i) provide that only members of the Western Australian Police may confiscate a document which is, or purports to be a passport, whether issued by an Australian or foreign authority; or
- (ii) exclude passports, whether issued by an Australian or foreign authority, as a document that may be confiscated under that section.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

LIQUOR CONTROL AMENDMENT REGULATIONS (NO. 10) 2011

1 COMMITTEE SCRUTINY

- 1.1 The *Liquor Control Amendment Regulations (No. 10) 2011* (**Amendment Regulations**) were published in the *Western Australian Government Gazette* on 6 January 2012 and came into effect on 7 January 2012.
- 1.2 The Joint Standing Committee on Delegated Legislation (**Committee**) identified a problematic clause in the Amendment Regulations and wrote to the Minister for Racing and Gaming in the first half of 2012 to express its preliminary view that a clause in the Amendment Regulations offended its Terms of Reference. The Committee also received legal advice from the State Solicitor's Office through the Department of Racing, Gaming and Liquor.
- 1.3 The correspondence from the Minister for Racing and Gaming and the Committee's responses are all available for download on the Committee's website at www.parliament.wa.gov.au/del.
- 1.4 The Amendment Regulations deal with several changes to the *Liquor Control Regulations 1989* (**the Principal Regulations**), but the Committee's concerns relate to clause 6 only, which amends regulation 18G of the Principal Regulations.
- 1.5 The Committee has also scrutinised the wording of the Principal Regulations and the *Liquor Control Act 1988* (**Act**) in order to fully appreciate the consequences of the Amendment Regulations on persons affected by the legislation.

2 CLAUSE 6 OF THE AMENDMENT REGULATIONS

The wording of clause 6

- 2.1 Clause 6 of the Amendment Regulations updates the procedure which an authorised person¹ must follow when an identity document is confiscated from a suspected

¹ "Authorised person" is defined in section 3(1) of the Act as being the licensee or occupier of the premises; the manager of the premises; an employee or agent of the licensee, occupier or manager; or a member of WA Police. Section 3(7) of the Act further confirms that "employee" extends to all employees at licensed premises: including bar staff, security guards or crowd controllers (bouncers), door staff and wait staff, whether employed on a fulltime, casual or contractual basis.

juvenile under section 126(2a) of the Act. Clause 6 derives its authority from section 126(2b) of the Act and reads as follows:

<p>6. Regulation 18G amended</p> <p>In regulation 18G:</p> <p>(a) in paragraph (a) delete “deliver the document” and insert:</p> <p style="padding-left: 40px;">if the document does not purport to be a passport, deliver it</p> <p>(b) delete paragraph (b) and insert:</p> <p>(b) if the document purports to be a passport, whether Australian or foreign —</p> <p style="padding-left: 40px;">(i) if the authorised person no longer suspects on reasonable grounds that it is forged, false or counterfeit — return it to the person from whom it was confiscated; or</p> <p style="padding-left: 40px;">(ii) otherwise — deliver it to an office of the department of the Commonwealth public service principally assisting the Minister in the administration of the <i>Australian Passports Act 2005</i> (Commonwealth).</p>

2.2 The difference that clause 6 has made to the Principal Regulations is to create a new procedure where a document confiscated by an authorised person is, or purports to be, a passport. A passport confiscated from a person suspected of being under 18 years under section 126(2a) of the Act must now be forwarded to the Commonwealth Department of Foreign Affairs and Trade,² while all other types of identity documents which are confiscated are to be delivered to a police station.

2.3 The Committee’s view is that this confiscation procedure in clause 6 conflicts with Commonwealth legislation and therefore offends the Committee’s Terms of Reference.

Practical concerns with the operation of clause 6

2.4 When the Committee first wrote to the Minister for Racing and Gaming in March 2012, it also pointed out its concerns with how clause 6 would operate in a practical manner. The Committee raised the following queries with the Minister with regard to clause 6 of the Amendment Regulations:

² The Department of Foreign Affairs and Trade (**DFAT**) is the Commonwealth public service department principally assisting the Minister in the administration of the *Australian Passports Act 2005* (Cth) according to clause 6. The Passports Office is the relevant branch of DFAT which deals with Australian passports.

- What sort of training in forensic document examination is provided to all authorised persons under section 126 of the Act?
- What document examination equipment is provided/installed at all licensed premises (such as document examination units or magnification units) to enable the analysis of security features on passports or other travel documents?
- What training is given to authorised persons to enable them to form a suspicion on reasonable grounds that a document is false, forged or counterfeit?
- What safeguards are in place to ensure that authorised persons deliver the Australian or foreign passport to the relevant office, following the confiscation under section 126(2a) of the Act?
- What information is given to a person suspected of being a juvenile who is the owner of the confiscated document to enable them to claim their document from the relevant office? Is there provision for the person suspected of being a juvenile to be given a receipt for the confiscated property?
- Are there arrangements in place to station officers from DFAT in regional centres around WA to inspect suspected false, forged or counterfeit travel documents which are confiscated? Alternatively, are there arrangements to transport the documents to Perth for the assessment of the document?
- Who is liable for the costs of stationing the DFAT employee(s) in regional areas or for the transportation of the suspected false, forged or counterfeit travel document(s) to Perth?³

2.5 The Minister advised that **no training** would be provided to authorised persons and **no forensic document examination equipment** would be installed at any licensed premises. The Minister's response also advised that there are **no delivery arrangements** in place for confiscated passports to be sent to DFAT and **no information nor receipt** is given to a suspected juvenile following the confiscation of their passport. **No safeguards** exist to ensure that confiscated passports are delivered to the DFAT office in Perth.⁴

2.6 The Committee notes that there is a very real possibility of an authorised person confiscating a genuine passport from a suspected juvenile under clause 6 because he

³ Letters from Mr Joe Francis MLA, Chairman, Joint Standing Committee on Delegated Legislation, 27 March 2012, pp3-4 and 1 May 2012, pp1-2.

⁴ Letters from Hon Terry Waldron MLA, Minister for Sport and Recreation; Racing and Gaming, 23 April 2012, p2 and 15 May 2012, pp1-2.

or she suspects that it is false, forged or counterfeit. The Committee is concerned that the following issues arise from this scenario:

- without the technical training and equipment required to assess the genuineness of a passport, an authorised person is required to make a decision based on subjective factors, rather than on a 'reasonable suspicion' in the circumstances; and
- the suspected juvenile may be left with no identification which, if the juvenile is not an Australian citizen, can result in officers from the Department of Immigration and Citizenship or WA Police requiring the juvenile to identify themselves (with the possibility of detention if there is reasonable suspicion that the suspected juvenile cannot do so).

2.7 The Committee is also concerned that an authorised person does not have the authority to confiscate a passport (whether Australian or foreign) under the Act or Principal Regulations due to the issue of constitutional invalidity⁵. The Committee will explore this issue further at paragraph 4.14.

3 REGULATION 18G OF THE PRINCIPAL REGULATIONS

3.1 The Committee has considered the wording of regulation 18G which would be revived upon the selective disallowance of clause 6 of the Amendment Regulations.

3.2 Prior to the current amendments, regulation 18G read as follows:

<p>18G. Dealing with confiscated documents (Act s. 126(2b))</p> <p>For the purposes of section 126(2b), within 72 hours after a document is confiscated by an authorised person under section 126(2a), the authorised person is to —</p> <p>(a) deliver the document to a police station; or</p> <p>(b) return the document to the person from whom it was confiscated.</p> <p><i>[Regulation 18G inserted in Gazette 1 May 2007 p. 1884.]</i></p>

3.3 The previous wording of regulation 18G is similar in intent and effect to clause 6, but did not prescribe a different procedure for dealing with a confiscated document that purported to be a passport. Prior to these amendments, regulation 18G provided that all confiscated documents were to be delivered to a police station. The Minister for Racing and Gaming advised the Committee that:

⁵ This raises the possibility of the confiscation being classified as theft, which is acknowledged by the State Solicitor's Office in its legal advice.

*The handling of confiscated passports, mainly relating to the Burswood Entertainment Complex, has been of on-going concern to the Western Australian Police Service. In response to the Police request that confiscated passports not be delivered to the Police but to the relevant authority, I agreed to amend the Regulations to provide for the handling of confiscated passports.*⁶

- 3.4 The Committee notes that the Minister's decision to update this process is therefore driven by policy, which is outside the scope of the Committee's Terms of Reference. The Committee does note, however, that the concerns that it has with the confiscation of passports in clause 6 extend to the previous wording of regulation 18G.
- 3.5 The Committee cannot properly discharge its scrutiny role in relation to subsidiary legislation without also drawing the attention of the House to the situation which would arise if the problematic clause in the Amendment Regulations were disallowed. As a result of its concerns with the original wording of regulation 18G, the Committee is strongly of the view that the regulation should be amended to exclude passports from the confiscation procedure.

4 SECTION 126 OF THE ACT

The wording of section 126

- 4.1 Section 126 of the Act outlines the steps which an authorised person must take if they suspect that a person on licensed or regulated premises is a juvenile. Section 126 provides the head of power under which regulation 18G and clause 6 are made⁷.
- 4.2 Subsection 126(2b) leaves the detail as to how the confiscation will occur to the Principal Regulations (including changes effected by clause 6 of the Amendment Regulations).

Commonwealth legislation dealing with the same purpose as section 126

- 4.3 Passports (either Australian or issued by foreign governments) are the responsibility of the Commonwealth government as a result of section 51(xix) of the *Australian*

⁶ Letter from Hon Terry Waldron MLA, Minister for Sport and Recreation; Racing and Gaming, 23 April 2012, p1.

⁷ Section 126 was amended in 2006 by inserting the powers in subsections (2a) and (2b) to confiscate a document. The Explanatory Memorandum to the Liquor and Gaming Legislation Amendment Bill 2006 did not contain any specific explanation for the amendment, nor was there debate on the change in either House during the passage of the Bill: Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 2006, pp8415-8438 and Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 October 2006, pp7388-7403.

*Constitution*⁸. The power to issue, cancel or otherwise deal with Australian passports lies with the Commonwealth as a result of this power in the Constitution.

- 4.4 It is the Committee's view that the State legislation and relevant Commonwealth Acts share a common purpose: the use of passports as identity documents. A person (whether a juvenile or not) attempting to enter licensed premises holding a passport is using the document for the same purpose as a person who produces a passport at an international airport: to establish identity.
- 4.5 The State Solicitor's Office advised the Committee that the purpose of the confiscation in the State Act is to remove false, forged or counterfeit documents from circulation. In the Committee's view, this incorrectly narrows the application of section 126 of the Act and misinterprets the intent of the section.⁹
- 4.6 The Committee has examined the relevant Commonwealth Acts dealing with passports and has formed the view that there is a serious inconsistency between the power to confiscate passports in the Commonwealth legislation and the powers given to authorised persons in section 126 of the Act (and by extension, any regulations made under that section).

Demanding or confiscating an Australian or foreign passport

- 4.7 The *Australian Passports Act 2005* (Cth) (**APA**) is the statute which sets out the law relating to Australian passports: who can be issued one, how they are issued, the powers of officers and passport offences. The *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) (**FPA**) is the equivalent statute which deals with offences relating to foreign passports in Australia.
- 4.8 For the purposes of this inquiry, the Committee notes that the APA specifically lists the persons who may demand, confiscate or otherwise deal with an Australian passport once it has been issued to an Australian citizen¹⁰. Similarly, the FPA provides

⁸ Section 51(xix) of the *Commonwealth of Australia Constitution Act* provides that: "*The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to naturalization and aliens*".

⁹ The State Solicitor's legal advice received by the Committee acknowledges that the Committee raises a valid concern with the possibility of an inconsistency existing between the State and Commonwealth legislation. The legal advice does not conclusively find that there is no inconsistency and in fact provides advice on amendments that could be made to the legislation if the Committee's view is preferred.

¹⁰ The only people who may demand that a person surrender a suspicious Australian travel document are "*officers*" as defined in the APA. These officers are: APS employees working for the Department of Foreign Affairs and Trade, diplomatic staff working at an Australian mission, consular officers working at an Australian consulate, customs officers, AFP members, State or Territory police officers or someone approved in writing by the Minister under the Act (any approvals by the Minister are not made public: section 52 APA).

a definition of the class of persons who may demand the surrender of a foreign travel document¹¹.

- 4.9 Section 17 FPA provides that an “*enforcement officer*” may demand that a person surrender a foreign travel document only in situations related to the FPA: for example, where the enforcement officer has intelligence that suggests that the document is forged/counterfeit (sections 18 or 20) or where a person uses a cancelled foreign travel document for travel or identity (section 21).
- 4.10 The Committee notes that the wording of the section does not refer to an offence against ‘this or any other Act’, which therefore limits the power to demand a foreign passport to only those circumstances listed in the FPA.

Review of the decision to confiscate a passport

- 4.11 The Committee has the power to inquire whether an instrument:

*ousts or modifies the rules of fairness [or] ... deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review*¹².

- 4.12 The Committee takes this opportunity to note that both Commonwealth Acts above provide for a person to appeal against the decision to confiscate their passport:
- section 23(1) of the FPA contains a mechanism for the administrative review of a decision to order the surrender of a foreign travel document; and
 - section 48 of the APA provides for merits review of the decision to demand the surrender of a passport.
- 4.13 There are no appeals against the confiscation of a passport from a suspected juvenile under the *Liquor Control Act 1988* or the *Liquor Control Regulations 1989*.

Section 109 of the Australian Constitution

- 4.14 Section 109 of the Constitution provides that a State law that is inconsistent with a Commonwealth law is invalid to the extent of that inconsistency. This includes not only an Act, but any subsidiary legislation made under that statute.

¹¹ “*Enforcement officer*” is defined in section 5 of the FPA as: Customs officers, AFP members, State or Territory police officers or someone approved in writing by the Minister to exercise the powers and perform the functions of an enforcement officer. As with the definitions in the APA, the class of people who have been given the power to demand foreign travel documents is that of law enforcement officers (specifically those trained in border security or forensic document examination).

¹² Committee’s Terms of Reference 3.6(c) and (d).

- 4.15 According to recent judicial authority considered by the Committee, the test to determine whether there is a conflict between State and Commonwealth legislation requires an exercise in statutory interpretation to establish if:

*even in the absence of an express indication to that effect, the detailed character of the federal law may evince a legislative "intention" ... to deal completely and thus exclusively with the law governing a particular subject matter. The question then is whether the State law is upon the same subject matter as the federal law and, if so, whether the State law is inconsistent with it because it detracts from or impairs that negative implication. But the first question ... always is one of statutory interpretation to discern legislative "intent" or "intention".*¹³

- 4.16 The Committee notes that judicial authority on the question of section 109 inconsistency has acknowledged that this exploration of intent also includes the general question of whether a State law, if valid, would “alter, impair or detract” from the Commonwealth law¹⁴.
- 4.17 In the case of section 126 in the State Act and the sections referred to in paragraphs 4.7 to 4.10 above of the Commonwealth Acts, the Committee has formed the view that the operation of the former unequivocally alters (let alone ‘impairs’ or ‘detracts’ from) the validity of the latter.

5 CONCLUSIONS

- 5.1 The Amendment Regulations (specifically clause 6) have presented the Committee with a unique opportunity to correct a potentially serious constitutional conflict that it has identified in the *Liquor Control Act 1988*. Even though clause 6 is authorised by the empowering section in the Act, the Committee has concluded that there is a real possibility that section 126 of the Act is inconsistent with Commonwealth legislation and therefore invokes section 109 of the Australian Constitution.
- 5.2 According to section 109 of the Constitution, the effect of this inconsistency is that section 126 of the Act is invalid to the extent of the inconsistency. This means that a Court would likely conclude that the portion of section 126(2a) which refers to the confiscation of Australian or foreign passports is invalid and ceases to operate.
- 5.3 The State Solicitor’s Office is of the view that it may be appropriate to wait until such a challenge occurs in the Courts. This Committee disagrees with this course of action

¹³ Gummow J in *Momcilovic v The Queen* (2011) 85 ALJR 957 at [261].

¹⁴ *Dickson v Queen* (2010) 241 CLR 49 at 502, referring to *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 (citing *Victoria v Commonwealth* (1937) 58 CLR 618 at 630).

and notes that it cannot properly discharge its scrutiny role without bringing Parliament's attention to this issue and recommending action.

5.4 The Committee has formed the view that clause 6 of the Amendment Regulations offends the following Terms of Reference:

- it is not authorised or contemplated by the empowering enactment on the grounds of inconsistency with the *Australian Passports Act 2005* (Cth) and the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth): **Term of Reference 3.6(a)**;
- it has an adverse effect on existing rights, interests or legitimate expectations beyond giving effect to a purpose authorised by the empowering enactment: **Term of Reference 3.6(b)**;
- it ousts or modifies the rules of fairness: **Term of Reference 3.6(c)**;
- it deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review: **Term of Reference 3.6(d)**;
and
- it contains provisions that, for any reason, would be more appropriately contained in an Act: **Term of Reference 3.6(f)**.

5.5 The Committee has also formed the view that the wording of regulation 18G, revived by the disallowance of clause 6, would also offend the same Terms of Reference above, were it referred to the Committee as an instrument of delegated legislation.

6 RECOMMENDATIONS

6.1 The Committee recommends that clause 6 of the Amendment Regulations be selectively disallowed.

Recommendation 1: The Committee recommends that clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011* be disallowed.

6.2 The disallowance of the Amendment Regulations revives the previous wording of regulation 18G which, while outside the scope of the Committee's Terms of Reference, is also problematic and also offends the Committee's Terms of Reference as outlined above.

6.3 It does not sit comfortably with this Committee to permit an instrument of delegated legislation to remain on the public record when there are serious problems with its validity.

Recommendation 2: The Committee recommends that the Minister for Racing and Gaming amend the previous wording of regulation 18G, once it is revived by the disallowance of clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011*, in line with any amendments to section 126(2b) of the *Liquor Control Act 1988*.

6.4 The Committee further recommends that the inconsistency between Commonwealth and State legislation, as identified in this report, can only be fully corrected through the amendment of section 126 of the empowering legislation.

Recommendation 3: The Committee recommends that the Minister for Racing and Gaming amend section 126 of the *Liquor Control Act 1988* to:

- (i) provide that only members of the Western Australian Police may confiscate a document which is, or purports to be a passport, whether issued by an Australian or foreign authority; or
- (ii) exclude passports, whether issued by an Australian or foreign authority, as a document that may be confiscated under that section.



Hon Sally Talbot MLC

Deputy Chair

16 August 2012