

PROOF VERSION ONLY

LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne – 21 February 2002

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Necessary corrections to be notified to executive officer of committee

The CHAIRMAN — Welcome. You will receive a copy of the transcript which is being recorded at the moment. I invite you to make any necessary corrections to that record and return it to our staff.

There are a number of questions that we have that as a follow— up to your written submission. I suggest we may start out just by asking those questions of you first, and then we can use that as a background to identify other issues which you may wish to raise with us.

Mr FIELD — Sure.

Mr BOWDEN — It has been put to us on occasions, and particularly a representative of the Director of the Office of Public Transport said about the hearing, that part of the difficulty with the Victoria Police is that they are mostly not available when they are required to assist in the detention process for fare evasion and other things like that. Sometimes there is some doubt as to the power to detain, and so when a police officer is not there that's a difficulty. I guess the question is: How does the centre respond to the argument that the police are often unavailable and that without the power of arrest, this presents a difficulty and there is no other way to enforce the legislation? Would an alternative to removing the power to arrest in the legislation be more coordinated and effective training for authorised officers in power of arrest and detention coupled with a more effective complaints mechanism?

Mr FIELD — I think that is a completely reasonable question. I am not absolutely convinced that police aren't readily available to be involved in those sorts of procedures. I think it depends on whether it is an ad hoc, a one— off arrest and detention or attempt at that, or alternatively part of a blitz action. Certainly my experience at the Centre and the feedback we have from our clients is that where there are organised blitz, police are generally involved in those and on hand. I personally witnessed one, as it so happened, just by complete coincidence when I was going to work. There were around 20 or so officers and there were police off to the side there basically waiting for that arrest and detention powers to be used. So I think it does depend on whether it is an organised blitz or whether it is a one off. I think the one-off cases it is unlikely that the police would be there just as sometimes police are not there when you want them to be in your own circumstance. As you know, they can't of course be everywhere, they are not sufficiently resourced to be so.

The CHAIRMAN — Are you suggesting in those one-off circumstances there should be no power of arrest?

Mr FIELD — No. What we are saying is that the power of arrest and detention is a fundamentally important power for officers, public officers, to hold. It is all the more important I think when we look at the transport officers being effectively privatised public officers. I have referred to them previously as a privatised police force, but whichever way you look at it they are a privatised formerly public position. If you were to hold detention arrest powers — and there are no more important powers for officers to hold in the community, they are an absolutely fundamental incursion upon what we consider to be our civil liberties — if people are to hold those sorts of powers this must be properly monitored and scrutinised subject to scrutiny and complaint mechanisms. When the former government privatised the public transport system unlike when it privatised utilities and appointed an ombudsman who has become the Essential Services Ombudsman. there was no mechanism established in public transport. There was also a lack of an independent regulator, once again as there was with utilities. That lack of scrutiny and that lack of a complaints mechanism means that the public can't have confidence that these very important powers, these powers that are significant powers for individuals to hold, are subject to that proper scrutiny.

Ms LOWE — Just to firstly endorse all of that, there are certainly a number of cases that we have in a case work capacity at our centre where the police both as part of an organised blitz and in individual circumstances have been called and have attended and have dealt with the matter, so we certainly are aware of a number of occasions where the police have been available to provide that back up in relation to the power, but we certainly also agree that more so than any of the other powers that the transport officials possess, the detention and arrest clearly deprives people at that point in time of their liberty, and we are aware of a number of instances where we consider that those powers have been improperly exercised, and that often is compounded with an improper exercise of previous power, whether that be to require verification, whether that be to require information from people that we take the view the officials are not entitled to request, and just noting the commentary I heard earlier from Yarra Trams, that they appear to be seeking an extension of the act especially to deal with matters such as date of birth, verification and so forth. We can certainly assure you that those things are being requested now, and that is an unlawful exercise of power in our view. It is quite often the case that when a consumer resists what they see to be an improper exercise of power, it is at that point that they are then detained, often physically removed

from a transport vehicle, and possibly subsequently arrested.

All of this has to be viewed in the context that if the consumer wishes to take issue with any of that and they are unable to have discretion exercised in their favour either at the transport company or the department, they face criminal conviction if they wish to challenge those fines or those arrests, those allegations that have been made against them, and understandably, many people find that to be an unacceptable risk to take in order to challenge what they see otherwise as being completely unfair and unreasonable behaviour.

Mr FIELD — I don't want to make the answer to this question inordinately long, but it would be a shock to most members of the Victorian public if the Police Ombudsman, who is part of the overall Victorian Ombudsman, was removed tomorrow because I think people think at the end of the day the sorts of powers that the Victorian police hold ought to be subject to independent scrutiny. Now at the end of the day what we are talking about with these transport officers is having a power exactly the same as the police, the power to arrest and detain. I am almost amused to hear the submissions of the transport companies that the legislation should be extended beyond name and address because it is absolutely clear at the moment they are asking for more than that on what seems to be not just a systemic basis but on every single occasion. We have not had one report to our centre of a client who has been either detained or arrested who has not been asked for details more than name and address. We know that the legislation only allows name and address to be taken, but licence details are taken, phone numbers of parents and others are taken to confirm name and address. I think in that sense the minister has not been properly apprised of these matters from public statements I have heard him make and I find it once again astonishing that the department that authorises these officers — at the end of the day that is where this power comes from — has not done something to address what is the systemic breach of those powers at this stage. No wonder they are asking for these powers to be extended. Perhaps they don't understand that it will not be retrospective.

Mr STENSHOLT — In the evidence given us by Yarra Trams they said of 12 000 instances 500 people were detained and 43 arrested. Some of that was because they were asking for verification. They based the claim for verification on the fact that people shouldn't give false addresses, and that was in the act, although the act is silent about verification. They sought extension of the act to apply specifically to verification but also for date of birth. Do you have any comment on those particular extensions and how you see them from the Consumer Law Centre's point of view?

Mr FIELD — It would be unthinkable to extend the powers at this stage the transport officers hold unless there were appropriate safeguards put in place. There is far too great a chance that those powers will be abused — indeed the current powers are being abused. There is no doubt that is the case. I would not be confident and I don't believe the public could be confident that the powers would not be abused unless indeed there was appropriate scrutiny and safeguards in place, like for example improved training mechanisms of an ombudsman's system.

We ought not lose sight of the fact of two things: First of all there is no substantive evidence that has ever been presented that I have seen about the actual number of fare evaders. There is talk of hard-core and non-hard-core fare evaders. The recent blitz reported most prominently in the *Age* late last year indicated 1 per cent of the travelling public had their names and addresses taken in relation to fare evasion. That is a far cry from the 20 per cent that the companies suggest and indeed the department suggests is the reason why these blitzes of arrest and detention need to occur. I think we need to be clear and questions ought to be asked about what evidence, what numbers are there about real fare evasion? Let's not just quote figures without support and back up for that.

In any event, even if there were 20 per cent of fare evaders there are two other things I want to say. How many of those people are not evading fares but rather have been unable to purchase a ticket in the system because the system, as we all I think would agree, has anywhere between some shortcomings to really being a significant failure. There are many clients who contact our centre; some of them of course, one looks at the story carefully and others it is absolutely abundantly clear that they were simply honest, law-abiding citizens who wanted to pay their fare but couldn't because of the shortcomings of the system. I myself last week couldn't validate my ticket at the station. That would have technically meant I would have been detained and arrested if I hadn't provided the additional details when I was stopped at Flinders Street. Fortunately I was let through. These are the sorts of failings in the system that I think mean that we should be very careful about how punitive we are being to the public in terms of incursions upon their civil liberties. We shouldn't be punitive on the public because of failure in a privatised system. I think that is a very important point.

The second point I make is this, and it is not one that necessarily is particularly popular because it tends to have people labelled as apologists for fare evaders. I am concerned that the sort of arrest and detention powers that the private companies currently have and that the department authorises are based on a mentality that fare evasion is

stealing. Well it probably is, I can accept that, in fact you see signs all over Melbourne at the moment saying fare evasion is stealing but what is the theft — 80 cents, \$2? I must say I think there ought to be some sort of consideration in society as to whether people ought to be detained, arrested, physically pushed to the ground, assaulted as we have seen in some of the evidence that has been well publicised and has been brought to my centre for theft of \$1 or \$2. There is a disproportionality in terms of some of the responses we see for this problem, and that must be considered as well.

The CHAIRMAN — As a point of legal clarity, it is not really stealing as in theft but it is just a specific statutory offence for non-payment of a fare.

Mr FIELD — I am referring to the signs — perhaps Allan Fels ought to have a look at them as they may be misleading and deceptive, but the signs say fare evasion is stealing. Perhaps it is obtaining financial advantage by stealing and not actually theft, but what I am trying to get at is not so much the legality that it is stealing but the mind-set behind it that people are stealing from the system. Even if they are, excepting the ones who cannot actually buy a ticket because the system is not working, even those ones who are stealing what ought to be our response to people in the community who steal 80 cents or \$1. I know the police response if you are stealing a Mars Bar from the supermarket and it would not be the sort of thing reported in the *Age* and other places.

Mr KATSAMBANIS — Probably on a broader macro policy level, you represent consumers and we have seen consumer rights groups spring upright around the place to advocate all sorts of changes. Telstra is a classic example; people are not putting up with inefficiency. Telstra is not providing a good service, there are plenty of groups out there arguing against Telstra, pressuring Telstra to provide better customer service.

Mr FIELD — I am one of them.

Mr KATSAMBANIS — And there are other examples. The AFL's supposed members are rising up because they have no member rights they are simply subscribers, et cetera. We have the situation where the fact is if you travel on the public transport system without a ticket you are committing an offence. I put it to you that 99.9 per cent of the public of Victoria are or ought to be aware of that fact, so you are on public transport without a valid ticket you are committing an offence, be it stealing, a statutory offence, obtaining financial advantage by deception. Therefore, if, as you submit, a large part of the problem for the commission of that offence is the fact that the ticketing system is so bad that people systemically are unable to per tickets, why don't I see any consumer pressure on Yarra Trams or Swanston Trams or Hillside Trains or Bayside Trains or on ERG to fix the system up? Where is the consumer pressure? You are telling me that the system is making them criminals. People jump up about inconvenience, you know, they can't get a fax machine within 3 days, yet they are not jumping up and down that the fact the system is making a criminal.

Mr FIELD — Two things about that. Having done a fairly significant amount of talkback radio and other similar sorts of things on this I can say certainly there is an enormous amount of public disquiet about it. One would only have needed to read the pages of the *Age* and the *Herald Sun* over the days of the last blitz to see a significant amount of public disquiet about these matters. I am surprised that in fact there wouldn't be a general recognition that the public has expressed real concern about these matters. I don't think there is any argument, though — and I agree with you, 99.9 per cent of Victorians would think it is appropriate that there be an offence if you don't pay for public transport.

Mr KATSAMBANIS — Beyond that they are aware it is an offence.

Mr FIELD — That is not what the public is saying, though. What they are saying is that we are concerned that we oughtn't be punished when we can't purchase a ticket from the system. They are saying that. It is a defence basically. There are defences in the offence. There are three defences in the offence. The offence was quite properly and rightly set up to say for example that people have to have a reasonable opportunity and take reasonable steps but if they have done that and taken reasonable steps to purchase a ticket they haven't committed an offence. That is commonsense. Most people ring up as I recollect it on talkback radio and say the ticket machine was broken, it was raining, there wasn't another place to buy a ticket, 'I took reasonable steps, I didn't have a reasonable opportunity but I have been charged and that does not seem right,' and maybe it is not. That is what people are saying and I think that is fair.

One other thing in relation to the use of the system, people can't vote with their feet here, they can't go and choose another bank; these are monopolies. If your train line is Connex you don't have another option to get another train. You have to stay with them. People can't vote with their feet and say this company is bad and I will go somewhere

else. They are monopoly providers of a service.

Ms McCALL — Can I go back to some of the issues you have raised. You and I may agree to differ on some of these issues, we are into semantics, I think it is stealing, that is a personal opinion. If you come and stand at Frankston railway station people jump the barriers and they know exactly what they are doing and why. I am interested in your comment about the authorised officers and the department itself and the issue of training. The distribution of accreditation, if you like are you suggesting that it is what, not sufficient training given to the people giving out the accreditation? Are they giving it at a consistent level? Do you think the officers who are then accredited are not trained or their skills are not updated or is there inconsistency between companies? I would like to pursue the issue of training to the extent that do the officers themselves then not understand the limits or expense of that plan?

Mr FIELD — Sure. Can I make a point of clarification, and that is that the centre doesn't condone, nor does any reputable consumer advocate, fare evasion, and I am not suggesting you are saying we were. Second, we know that people do deliberately avoid fares, and they been doing that forever, and presumably will continue to do so; but of course people also break all sorts of other laws every other day of the week and the police are there to deal with that and the police have appropriate regulation and scrutiny in relation to their behaviour. Ultimately what we are saying is that people who hold these sorts of powers should be accountable for them, and at this stage this is what is lacking.

To get to your point about training: I am not deeply or intimately familiar with the sort of training that these sorts of officers have. All I can say is that the results of the training don't seem to be adequate to me, so what I see at the moment is the systemic lack of following in the actual legislation itself. I see a lack of preparedness to act in a way that diffuses the situation as opposed to exacerbates it, and I suspect indeed what the training needs to be.

The other important thing to say about training and it applies wherever, it must also be audited, there must be compliance mechanisms put into place, it has to be tested, people have to be out in the field and trained. I can say in relation to the incident I witnessed that I thought the behaviour of the officers on the whole was such that it indicated a lack of appropriate training. I can also say on that particular day that I witnessed the police act and the police acted in a way that can only be described as significantly more responsible and they behaved in a way that was substantially different to the transport officers and one suspect its that has much to do with the levels of training differences between the two.

Mr KATSAMBANIS — Cultural, too.

Ms LOWE — One other point in relation to the training that is important to make is that either because the training is not being understood or because it is being given in an inconsistent way or perhaps the messages that are being sent are inconsistent, the behaviour of the authorised officers is inconsistent. I have a particular client at the moment who has been travelling on the same train line before, during and after the blitz we had late last year, and prior to the blitz his behaviour had been on the very often occasions where the ticket machine at his station had been out of order, was to travel to his end point at the journey, to advise the ticket inspector at the other end of the journey that that is what he had done and to then go and purchase a ticket at the ticket window. He had been undertaking that behaviour for some months leading up to the blitz. During the blitz he was given a fine for exactly that behaviour that he had been undertaking with the full knowledge and authorisation of the officers prior to. Since the blitz he has had to go back to doing exactly the same thing and again it is acceptable behaviour, so whilst I think yes, broadly we can say the public would agree that fare evading is wrong and there should be penalties that attach to it, I think the public would have a vastly different view about what is reasonable behaviour.

Ms McCALL — I think as a member of the travelling public, if you like, although I have to say I have the privilege of a gold pass but I watch what goes on: Is it because the public to a certain extent do not understand the powers that the authorised officers may or may not have and that in fact inevitably they will exercise what they believe to be their rights as a member of the public, not understanding in fact the demarcation, if you like, or what it is the authorised officer should be able to do or to ask of them? For example, I have some sympathy that if an authorised officer appropriately asks someone for their name and address, given that there is a level of cynicism out there in the community, they will say, 'Well, my name is Abraham Lincoln, and I live at whatever'; they say, 'Well look, can you prove that?' in a reasonable tone. Then the public says, 'You have no right to ask me that; I am not going to tell you' and become obstructive.

What I am trying to get to is that there is a level of concern that not only do the authorised officers not only have the right level of training, but the public doesn't understand its rights and responsibilities towards travelling on

public transport. We have a credibility gap somewhere; do you have any suggestions as to how we get round it?

Ms LOWE — I certainly would say that public misunderstanding of the powers of the authorised officer would be an element of the problem. I do think it is a small element, because I think in large part the confusion has been caused by the very fact that the officers themselves don't behave in a consistent fashion and they don't behave in a fashion that members of the general public would consider to be reasonable. I have lost track of the number of members of the public that I have spoken to on the phone who simply express sheer disbelief that they cannot challenge an infringement notice they have been given without going to the Magistrates Court and risking a conviction against their name to do so.

Ms McCALL — **Many** actually come to their local Member of Parliament more often.

Ms LOWE — But the issue unfortunately rolls on regardless of the letters and people are therefore faced with the requirement to either pay their fine, which they don't believe they should have got in the first place, or contesting the matter in court.

Mr FIELD — Can I make a quick point coming out of that. At the end of the day all these things of course are expenditures from the public purse of which are entirely matters very much close to your collective hearts. I would say to adequately inform the general members of the public — remember it wouldn't just be well-educated members of the public but people from non-English-speaking backgrounds, rural and regional people — it would be a expensive campaign. Money is well spent targeting effective training and scrutiny of the transport officers themselves. At the end of the day you could run the same argument that we could educate the public about every possible power the police might exercise in relation to any sort of particular act. I think that would not be cost efficient. What you have to say is we have to have a proper police force that has proper scrutiny and training so I think I would rather see the money spent there rather than on a public campaign.

Ms HADDEN — I know you've answered the question about complaints to your centre and people being asked about names and addresses, but what about third-party verification where a person has been asked to verify a name and address and give a mobile number, a name and a third-party whether it be a third-party, a parent, guardian, aunt, uncle or a employer; do you have people expressing those concerns to your centre?

Ms LOWE — Absolutely. We have got a couple at the moment who have had phone calls made to friends — not even members of the family — at 11 o'clock on a Sunday night in order to verify a person's address when in the view of the authorised officer proof hadn't been provided. Some had already been provided and yet a phone call was made so we certainly do have concerns. There are also privacy concerns, both for the individual who is giving out the information and the individual whose information is being given out and then there is also the very real question of what the obligations that rest on that third— party may be at the time they receive that phone call.

Mr LANGUILLER — I represented 3 underage persons last year who consistently lied in relation to their home address when asked. The three of them said to me, 'Well, I didn't want to provide that to them because I didn't want my parents to find out'. I think it is consistent throughout the case throughout a whole range of areas, not just fare evasion, that minors or children and teenagers do not wish their parents to find out that they got themselves into trouble. I think it is quite common, except parliamentarians of course, but most normal people under age would have done in their other lives. I wonder if you have any comments to make in the way we are dealing with, I am particularly concerned about young people in this area.

Mr FIELD — Lawyers never commit offences either, I can assure you of that! There is no doubt there is a range of consumer advocates nationally who have been concerned about the most recent blitzes in transport in relation to its impact upon particular segments of the community, and that has certainly been the case also, particularly in Victoria. The sort of segments the committee should consider are not just young people, although they are an important component of it, but people from a non-English-speaking background, rural and regional people who don't necessarily use Met transport on a regular basis who might not be as familiar with the system, and of course, somewhat sadly for our image from time to time, our overseas visitors who are also not familiar with the system.

We have had particular complaints as have other complaints agencies and other youth advocacy organisations about the treatment of young people. There are often good reasons why young people are reluctant to give further details out, it might not be because they don't want their parents to know, they might be concerned about how that sort of information might be used, they may not be particularly confident that they may be good advocates to their cause either at that minute or at any further proceedings that might be taken. Once again, the police have been

trained to deal with segments of the community in a sensitive way and transport officers need that sort of training. Where it goes wrong there must be the opportunity for appropriate scrutiny, there must be the opportunity for those mistakes to be corrected and appropriate measures brought to bear.

The CHAIRMAN — On behalf of the committee, I would like to thank you very much for coming in this afternoon to give us your insights and expertise based on the case studies we have experienced.

The witnesses withdrew.