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Amendments to the *National Security Information (Criminal Proceedings) Act 2004*

The *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005* seeks to clarify ambiguities arising from section 6 of the NSI Act. The amendments broaden the application of the Act to include federal criminal proceedings commenced before the commencement of the Act (11 January 2005). Furthermore, the section is clarified to ensure that where a prosecutor gives notice that the case falls within the provisions of the legislation, notice need only be given once, rather than separately at each part of the proceedings.

National Security Information (Criminal Proceedings) Act 2004 (the NSI Act)

The NSI Act seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's defence, security, international relations, law enforcement interests or national interest; specifically, where the disclosure of information would be likely to prejudice Australia's national security. The Act applies to any criminal proceeding in any court exercising federal jurisdiction in relation to Commonwealth offences, and covers all stages of the criminal process through to an appeal of a decision.

The legislation provides the court with a device to admit documents and information in an edited form which protects national security but preserves the essence of the information. The legislation facilitates the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial.

The Act requires that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect national security. This information includes information that may be introduced through a document or a witness's answer to a question, as well as information disclosed by the mere presence of a witness.

Upon notification, the Attorney-General may review the relevant information to decide whether the information can be disclosed. If the information is *likely to prejudice national security*, the Attorney-General may issue a certificate which prevents the disclosure of the information or allows the information to be introduced in an edited or summarised form. Before a trial commences, any certificates that have been issued must be considered at a closed hearing of the trial court.

Part 3 of the Act considers the management of information including pre-trial conferences and the arrangements regarding disclosure of material. Section 23 provides that regulations may be made to prescribe the way in which information is disclosed and stored. Accordingly, the purpose of the *National Security Information (Criminal Proceedings) Regulations 2005* is to specify how and where information that requires protection under the Act must be

accessed, prepared and otherwise handled. The Regulations commenced on 11 January 2005, the day of their registration.

The Act also considers the issue of security clearances. If an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security, the defendant's legal representative may apply to the Secretary for a security clearance by the department at the level considered appropriate by the Secretary in relation to the information.

Part 5 deals with offences under the Act, which include the disclosure of information contrary to, or prior to the issue of an Attorney-General non-disclosure certificate, and the contravention of the requirement to notify the Attorney-General.

NSI (Criminal Proceedings) Amendment (Application) Act 2005

The *NSI (Criminal Proceedings) Amendment (Application) Act 2005* commenced on 21 March 2005. The amendments to the NSI Act are set out in schedule 1 which provides for the repeal of section 6 and substitution of the following:

6 Application of the Act

- a. Subject to subsection (2), this Act applies to a federal criminal proceeding, whether begun before on or after the day on which this section commences, if the prosecutor gives notice in writing to the defendant and the court that this Act applies to the proceeding.
- b. If the prosecutor gives the notice after the proceeding begins, this Act only applies to the parts of the proceeding that take place after the notice is given.

The amendments to the Act have the effect of broadening its application to include proceedings that *began prior* to the commencement of the main provisions of the Act. Accordingly, section six provides that the Act now applies to federal criminal proceedings if the proceeding began before, on or after 11 January 2005.

In order to trigger the operation of the Act, the prosecutor must notify the court and the parties that a particular case falls within the provisions of the legislation. Such notice can be given at any time during the proceedings, however if the prosecutor gives notice after the proceeding begins, the Act only applies to the part of the proceedings that takes place after notice is given (Section 6(2)).

Section 6 amends the NSI Act to confirm that the prosecutor is only required to give the requisite notice of intention to the court and the defendant on the one occasion and that the provisions of the Act will thereafter apply to all stages of the proceedings in terms of the utilisation of that material. The amendment avoids a possible misinterpretation of the Act requiring the prosecutor to give further notices under the Act for each subsequent part of the proceedings (e.g. at a committal and then at the trial) and, the consequent possibility of triggering the various appeal mechanisms that are provided for in the Act once the notice is given.

Implications

Five terrorism related proceedings were underway at the time of the amendments to the NSI Act in which security sensitive information may have disclosed. Without the amendments provided in the Amendment Act, there was a risk that an attempt to apply the primary Act to future stages of these proceedings could be found to be incompetent (because the proceedings were commenced before the commencement of the Act). The amendments thereby allow security sensitive information to be protected in these proceedings by the NSI Act without the need to issue fresh charges.

Text of the Act (as amended) is available at:

[www.comlaw.gov.au - NSI \(Criminal Proceedings\) Act 2004.pdf](http://www.comlaw.gov.au - NSI (Criminal Proceedings) Act 2004.pdf)

This is to be read in conjunction with the National Security Information (Criminal Proceedings) Regulations 2005 available at:

[www.comlaw.gov.au - NSI \(Criminal Proceedings\) Regulations 2005.pdf](http://www.comlaw.gov.au - NSI (Criminal Proceedings) Regulations 2005.pdf)

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