



## **Express law** *fast track information for clients*

19 July 2005

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

The ***National Security Information Legislation Amendment Act 2005*** ('the Amendment Act') will amend the ***National Security Information (Criminal Proceedings) Act 2004*** ('the NSI Act') by extending the operation of the Act to include civil proceedings. The NSI Act applies to federal criminal proceedings to protect information that relates to, or whose disclosure may affect, national security, by facilitating the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial. The proposed amendments also seek to allow sensitive security information to be protected in civil proceedings.

#### ***National Security Information (Criminal Proceedings) Act 2004***

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The NSI Act currently applies to any criminal proceeding in any court exercising federal jurisdiction in relation to Commonwealth offences, and covers all stages of the criminal process. It allows a court to admit documents and information in an edited form so as to protect national security but preserve the essence of the information.

#### ***National Security Information Legislation Amendment Act***

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The Amendment Act passed through Parliament on 20 June 2005, receiving Royal Assent on 6 July. It will enter into force on 3 August 2005. The Amendment Act broadly adopts the procedures set out in the NSI Act, with some necessary departures to account for the particular nature of civil proceedings. It applies to all stages of civil proceedings, including discovery, ex parte applications, interlocutory proceedings and appeal proceedings in any Australian court (Commonwealth, State or Territory).

A key difference with the regime set out in the NSI Act, as it currently stands, is that the Attorney-General or an appointed minister gives written notice to the parties and court, rather than the prosecutor, that the Act applies to a civil proceeding. Such a notice can be given at any time during the proceeding. However, as with criminal proceedings, if notice is given after the proceeding begins, the Act would only apply to the part of the proceedings that take place after the notice is given.

#### ***Operation of the Amendment Act***

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##### **Attorney-General's Certificates**

The Amendment Act seeks to introduce a Part 3A into the NSI Act which deals with the protection of information in civil proceedings as outlined below.

A party must notify the Attorney-General, at any stage of civil proceedings, where that party expects to introduce information that relates to or may affect national security. National

security information may arise in the form of a document, in the context of evidence given orally by a witness or by the mere presence of a witness. Where proceedings have already begun, the court must adjourn to allow the Attorney-General to consider the information and determine whether disclosure is likely to prejudice national security. If so, the Attorney-General may issue a certificate which either prevents the disclosure of the information or recommends how the information should be dealt with (a non-disclosure certificate).

The proposed Part 3A would allow the parties to confer prior to a substantive hearing, to consider issues in relation to disclosure of information that relates to, or may affect, national security and consider the best mechanism for handling that information with the assistance of the court. The court may then make an order giving effect to any agreement reached by the parties.

### **Disclosure of information in 'permitted circumstances'**

The Amendment Act introduces a number of situations in which disclosure of national security information will be permitted in civil proceedings. This includes where a Minister or employee of the Commonwealth, who is a party to the proceedings, discloses information in the course of their duties and where a legal representative discloses information to their client in carrying out duties in relation to the proceeding.

### **Closed hearings**

Any non-disclosure certificate must be considered at a closed hearing of the court to assess the validity of the Attorney-General's certificate, having regard to whether the making of the order for the exclusion of information or a witness would have a substantial adverse effect<sup>1</sup> on the fairness of the hearing. This will not necessarily be significant departure from the principles to be applied in determining a claim of public interest immunity.<sup>2</sup> Only parties and their legal representatives who possess security clearances to an appropriate level may attend these closed hearings.

The Amendment Act provides that a court must give reasons to the parties and their legal representatives for a decision to make an order to admit, exclude or redact information, or to exclude a witness.

### **Offences**

The proposed Part 5 outlines offences in relation to civil proceedings. The offences include disclosure of information prior to the issue of a non-disclosure certificate from the Attorney-General and contravening the requirement to notify the Attorney-General of expected disclosure.

### **Conclusion**

The amendments proposed in this Amendment Act will strengthen the protections for security sensitive information in civil proceedings whilst still protecting the rights of the parties. Perhaps the most significant change introduced by the NSI legislation is that summarisation of national security information is now permitted in civil and criminal proceedings.

**Text of the Amendment Act is available at:**

[parlinfoweb.aph.gov.au - NSI Legislation Amendment Act 2005.pdf](http://parlinfoweb.aph.gov.au - NSI Legislation Amendment Act 2005.pdf)

**Text of the Act (un-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 which are available at:

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

### **Further Information**

*For further information please contact:*

Andrew Berger  
Senior Executive Lawyer  
T 02 6253 7405 F 02 6253 7383  
[andrew.berger@ags.gov.au](mailto:andrew.berger@ags.gov.au)

### **Notes**

- <sup>1</sup> The definition of 'substantial adverse effect' means that any effect which is not insubstantial, insignificant or trivial is a 'substantial adverse effect'.
- <sup>2</sup> In determining a claim for public interest immunity a court is required to balance the prejudice to the interests of justice if information was withheld against the prejudice to public interests (such as national security) if information was disclosed. A claim for public interest immunity can be refused even if withholding certain information may not have 'a substantial adverse effect on the fairness of a hearing' whereas a non-disclosure certificate could not be overturned unless such a substantial adverse effect could be shown. However, it would be very rare for a public interest immunity claim on national security grounds to be rejected in a civil case, particularly where exclusion of the information would not have a substantial adverse effect on the fairness of a hearing.

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