



Australian Security Intelligence Organisation Amendment Bill 2004

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Australian Security Intelligence Organisation Amendment Bill 2004

Date Introduced: 17 November 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent

Purpose

To expand the circumstances in which ASIO can carry out security assessments.

Background

Ammonium nitrate

The immediate impetus for the Bill is to enable ASIO to carry out security assessments as part of a new regulatory regime for ammonium nitrate agreed to by the Council of Australian Governments (COAG) and being implemented by the States and Territories.

It is important to note that, by itself, ammonium nitrate is not an explosive. However, when combined with fuel oil (as ANFO¹) it is used as an explosive in mining and quarrying operations. Ammonium nitrate is also used by the agricultural sector as a fertiliser. It has been used to produce explosives in terrorist actions—for example, by the Oklahoma bomber, Timothy McVeigh.² The Attorney-General's second reading speech records that 'Jemaah Islamiyah had planned to use ammonium nitrate to bomb the United States and other Western targets in Singapore, including the Australian High Commission.'³ In addition, ammonium nitrate has been implicated in a number of major industrial explosions.⁴

According to the Queensland Department of Natural Resources and Mines:

Approximately 1,000,000 tonnes of ammonium nitrate and ammonium nitrate products is used in Australia each year. Queensland is the largest user with approximately 500,000 tonnes of explosives-grade ammonium nitrate being circulated and used around the State per year. Queensland manufactures approximately 490,000 tonnes and imports over 30,000 tonnes per year.⁵

Most ammonium nitrate in Australia is used to make explosives. In Queensland, for example, 98% of ammonium nitrate is consumed by the mining industry, with the

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remaining 2% being used by farmers, mainly horticulturalists.⁶ Apparently, ammonium nitrate 'is not preferred as a fertiliser in many parts of Australia for agronomic reasons.'⁷

The Council of Australian Governments (COAG) and counter-terrorism

One of the issues discussed by COAG at its meeting on 6 December 2002 was counter-terrorism, including measures enhancing and coordinating counter-terrorism initiatives. COAG noted 'deficiencies in the protection of some hazardous materials ... and agreed to a national review of the regulation, reporting and security around the storage, sale and handling of hazardous materials, including ammonium nitrate.'⁸

On 25 June 2004, COAG agreed that the States and Territories would introduce a licensing scheme for ammonium nitrate products with greater than 45% ammonium nitrate content.⁹ This is called 'SSAN' (security sensitive ammonium nitrate):

COAG agreed on a national approach to ban access to ammonium nitrate for other than specifically authorised users. The agreement will result in the establishment in each jurisdiction of a licensing regime for the use, manufacture, storage, transport, supply, import and export of ammonium nitrate. The licensing regime will ensure that ammonium nitrate is only accessible to persons who have a demonstrated legitimate need for the product, are not of security concern and will store and handle the product safely and securely. This arrangement will balance security considerations with the legitimate needs of industry and farmers. A national set of principles for regulating ammonium nitrate can be found at [Attachment D](#).

COAG agreed that the States and Territories would use their best endeavours to ensure the legislative arrangements for the licensing regime would be in place by 1 November 2004, with administrative arrangements to be finalised as soon as possible thereafter. COAG also noted that the Australian Government would continue to undertake investigations on the viability of completely banning ammonium nitrate fertilizers of security concern as a matter of priority, taking into account whether effective, non-detonable, alternatives can be developed, and provide information on any alternatives to the States and Territories.¹⁰

As indicated above, COAG agreed that an authority will be required for any importation, manufacture, storage, transportation, supply, export, use or disposal of SSAN. Anyone wishing to obtain an authority will have to demonstrate a legitimate need for access to SSAN, provide safe storage and handling procedures, report any loss or theft of SSAN, undergo background checks and provide proof of identity.¹¹

COAG's definition of 'legitimate use' indicates the range of users and uses of SSAN:

Legitimate need is likely to include use in commercial production processes, mining, quarrying, the manufacture of fertilizer and explosives, educational, research and laboratory use, commercial agricultural use by primary producers, and services for

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transportation, distribution and use of the product. Household and domestic use, and the fertilisation of recreational facilities will not be considered a legitimate need.¹²

In relation to criminal history and ASIO checks, COAG's *Principles for the Regulation of Ammonium Nitrate* state:

Background checking must include police and ASIO checks.

- a) As a minimum, background checks will be required for the person responsible for the security of SSAN at a workplace ('responsible person'), as well as for any person who has unsupervised access to SSAN.
- b) The owners and directors of companies which are not publicly listed will also undergo background checking.
- c) Police checking should be done regularly.
- d) ASIO checks need only be done once, provided ASIO is notified of the change of name of a person who is subject to security checking.¹³

State and Territory licensing regimes

The States and Territories have begun putting licensing regimes in place in accordance with the COAG agreement. For instance, SSAN has been declared an explosive in Queensland under the *Explosives Act 1999*¹⁴ and Victoria has passed the *Dangerous Goods Legislation (Amendment) Act 2004* which allows regulations to be made implementing a licensing regime for ammonium nitrate and other 'high consequence dangerous goods.'¹⁵

COAG's preferred start date for new State and Territory licensing legislation was 1 November 2004. In general, this start date was not met. Instead, it is anticipated that State and Territory licensing regimes will all be in place by Autumn 2005 and that there will be a transition period until 30 June 2005 enabling people to obtain a licence and make required security arrangements.¹⁶

ASIO's functions

ASIO is established under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). Its functions include:

- obtaining, correlating and evaluating intelligence relevant to national security
- communicating this intelligence and advising the Commonwealth about national security, and
- providing security assessments to Commonwealth agencies and for State and Territory purposes.¹⁷

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ASIO security assessments

ASIO is empowered to provide security assessments to Commonwealth agencies in relation to what is called ‘prescribed administrative action’.¹⁸ This includes action relating to whether a person should have access to national security information or to places where access is controlled on national security grounds. As an example, before a Commonwealth agency grants a security clearance for designated positions, it is ‘required to assess candidates’ general suitability for access.’¹⁹ This includes obtaining a security assessment from ASIO.

Assessments can also be made for State or Territory purposes.²⁰ Where ASIO provides assessments for State or Territory purposes it is, in general, prohibited from communicating that assessment directly to the State or Territory.²¹ Instead, the information must be transmitted via a Commonwealth agency. Additionally, ASIO can only make assessments for State and Territory purposes to the extent that proposed State or Territory action affects security connected with the functions and responsibilities of a Commonwealth agency.²²

A security assessment includes advising whether a particular person should have access to national security information or secure places.

If ASIO makes an adverse or qualified assessment of a person,²³ then in general the person must be informed in writing and can apply to the Administrative Appeals Tribunal (AAT) for a review of that assessment.²⁴ However, a person will not know if they have been the subject of a security assessment if the Attorney-General certifies that withholding this information is essential to national security. Similarly, a person will not know the grounds on which a security assessment is made if the Attorney-General certifies that this would be prejudicial to security. The exercise of the Attorney-General’s certification powers thus can effectively prevent a person making an appeal to the AAT.²⁵

Main Provisions

Item 1 of Schedule 1 repeals and replaces paragraph 35(a) of ASIO Act. At present, paragraph (a) enables security assessments to be carried out so that a decision can be made about whether a person should have access to information or to places where access is controlled or limited on security grounds. **New paragraph 35(a)** adds a further provision enabling security assessments to be carried out in relation to action concerning a person’s ability to perform an activity relating to a ‘thing’ (other than ‘information’ or a ‘place’) where that ability is controlled or limited on security grounds.

The Explanatory Memorandum notes that current references to ‘information’ and ‘place’ in paragraph 35(a):

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[Are] not sufficiently broad to cover the range of activities that a person may perform in relation to, or involving, a thing that is not information or a place. For example, whilst the Act covers access to places where ammonium nitrate is stored, it does not, to the extent that they are not linked to access to a 'place', cover other activities such as purchasing, supplying, importing, exporting, possessing, handling, using, storing, guarding, transporting, manufacturing, disposing or any other activity in relation to, or involving, ammonium nitrate if a person's ability to perform that activity is controlled or limited on security grounds.

Subsection 39(2) of the ASIO Act enables a Commonwealth agency to take temporary, urgent action to prevent a person accessing information or places to which access is limited on security grounds on the basis of preliminary advice by ASIO. **Item 3 of Schedule 1** repeals and replaces subsection 39(2) so that a Commonwealth agency will be also able to take temporary, urgent action to prevent a person performing an activity in relation to a 'thing' on security grounds in response to preliminary advice from ASIO.

Concluding Comments

Nature of ASIO security checks

It is unclear whether there will be any resource implications for ASIO in providing security assessments in relation to the use of SSAN. Material published by the Queensland Government suggests that ASIO checks will be '[checks] of a name against a data base to ensure that someone is not of known security concern. It is not an investigation into a person's past or their political activities.'²⁶

Scope of the amendments

The amendments are intended to be broad enough to extend beyond security assessments relating to ammonium nitrate access. As the Explanatory Memorandum makes clear:

Whilst the proposed amendments have arisen as a result of discussions about controlling access to ammonium nitrate, the amendments are intended to be sufficiently broad to cover, to the extent that is possible, issues which may arise in the future such as a person's ability to perform an activity in relation to, or involving other hazardous materials.²⁷

Nor are the amendments limited, in their terms, to activities involving hazardous materials. They are designed to encompass a person's activities involving any 'thing' where the person's ability to perform the activity is controlled on security grounds.

It is important to note that while the amendments add the category of 'thing' to the existing categories of 'information' and 'place', the security assessment regime will only

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apply to activities that are controlled or limited on 'security' grounds.²⁸ The word 'security' is defined in section 4 of the ASIO Act to mean the protection of the Commonwealth, the States and Territories from such things as espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference.

Apart from having to fall within the bounds of 'security' as defined by the Act, ASIO's ability to provide security assessments for State and Territory purposes is also limited by the terms of section 40 of the ASIO Act. Subsection 40(1) provides that any security assessment for State or Territory purposes must be in relation to State or Territory action that 'would affect security in connection with matters within the functions and responsibilities of a Commonwealth agency ...'²⁹ It is unclear how many SSAN licence decisions under State and Territory law relating ammonium nitrate access will satisfy the statutory link with 'security in connection with matters within the functions and responsibilities of a Commonwealth agency' which is necessary to activate ASIO's security assessment powers. Parliament may wish to consider the practical implications of this statutory requirement for the new ammonium nitrate licensing regime.

Endnotes

- 1 Ammonium nitrate and fuel oil.
- 2 There appears to be no evidence that ammonium nitrate was used in the Sari Club bombing in Bali on 12 October 2002. The Sari Club and Paddy's Bar were targeted by this terrorist act, which left 202 people dead, including 88 Australians.
- 3 Attorney-General, second reading speech, Australian Security Intelligence Organisation Amendment Bill 2004, House of Representatives, *Hansard*, 17 November 2004, p. 2.
- 4 In 1947 in Texas City (USA), 2300 tons of ammonium nitrate fertiliser on board a ship initiated a fire and detonated, killing nearly 600 people, injuring 3500 and shattering windows up to 40 km away. In September 2001, in Toulouse (France) there was an explosion in a warehouse in which some 200-300 tonnes of ammonium nitrate was stored. The accident resulted in 30 deaths and over 2400 people were injured. Nigel Brew, Foreign Affairs, Defence and Trade Section, Parliamentary Library, personal communication.
- 5 Queensland Government, Department of Natural Resources and Mines, 'Key points for discussion regarding the regulation of security sensitive ammonium nitrate (SSAN)', 1 November 2004, http://www.nrm.qld.gov.au/mines/explosives/pdf/ssan_discussion.pdf (accessed 24 November 2004).
- 6 *ibid.*
- 7 Australian Customs Service, Trade Measures Branch, *Report No. 28, Ammonium Nitrate from the Russian Federation*, 2 March 2001.

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- 8 Council of Australian Governments, Communique, 6 December 2002.
<http://www.coag.gov.au/meetings/061202/index.htm#terrorism> (accessed 24 November 2004).
- 9 SSAN is defined as ammonium nitrate, ammonium nitrate emulsions and ammonium nitrate mixtures containing greater than 45% ammonium nitrate, excluding solutions.
- 10 Council of Australian Governments, Communique, 25 June 2004.
<http://www.coag.gov.au/meetings/250604/index.htm> (accessed 24 November 2004).
- 11 Council of Australian Governments, Principles for the Regulation of Ammonium Nitrate,
http://www.coag.gov.au/meetings/250604/attachments_d.pdf (accessed 24 November 2004).
- 12 *ibid.*
- 13 *ibid.*
- 14 Peter Beattie, Ministerial Statement, ‘Ammonium Nitrate’, Queensland, Legislative Assembly, *Hansard*, 10 November 2004, pp. 3357–8.
- 15 A ‘high consequence dangerous good’ has been defined by the United Nations to include dangerous goods that have the potential for misuse in a terrorist act resulting in mass casualties or mass destruction. Rob Hulls, second reading speech, Dangerous Goods Legislation (Amendment) Bill 2004, Victoria, Legislative Assembly, *Hansard*, 16 September 2004, p. 564.
- 16 See Queensland Government, Department of Natural Resources and Mines, ‘Frequently Asked Questions about Security Sensitive Ammonium Nitrate’.
http://www.nrm.qld.gov.au/mines/explosives/pdf/faqs_about_ssan.pdf (accessed 24 November 2004).
- 17 Section 17, ASIO Act.
- 18 An expression defined in section 35, ASIO Act.
- 19 Australian Security Intelligence Organisation, *Annual Report 2003-2004*, p. 29.
- 20 Section 40, ASIO Act. The ASIO Act defines ‘a State’ to include the ACT and the Northern Territory (section 4).
- 21 An exception is assessments connected with events designed as ‘special events’ by the Minister—which can be furnished directly to a State or Territory [paragraph 40(1)(b), ASIO Act].
- 22 See section 40, ASIO Act.
- 23 An adverse assessment is a recommendation that the person not be granted the access proposed. A qualified assessment is not a recommendation against access but ‘provides information for the agency to consider in decision-making.’ ASIO, *op. cit.*, p. 30.
- 24 Sections 38 and 54, ASIO Act.

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- 25 For a general discussion see Peter Prince, Communications Legislation Amendment Bill (No. 2) 2003, *Bills Digest No. 21*, 2003-04. <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd021.pdf> (accessed 24 November 2004).
- 26 See Queensland Government, Department of Natural Resources and Mines, 'Frequently Asked Questions about Security Sensitive Ammonium Nitrate'.
- 27 Explanatory Memorandum, p. 1.
- 28 This point was made by the Attorney-General—see Attorney-General, second reading speech, Australian Security Intelligence Organisation Amendment Bill 2004, House of Representatives, *Hansard*, 17 November 2004, p. 3.
- 29 Subsection 40(1) of the ASIO Act also requires security assessments undertaken for State and Territory purposes to be transmitted to the State or Territory via an intermediary Commonwealth agency.

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Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2476—Jennifer Norberry (for questions about the Bill) and (02) 6277 2673—Nigel Brew (for questions about terrorism and the illicit use of ammonium nitrate).

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