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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL SECURITY INFORMATION (CRIMINAL PROCEEDINGS) BILL 2004

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

NATIONAL SECURITY INFORMATION
(CRIMINAL PROCEEDINGS) BILL 2004

GENERAL OUTLINE

The National Security Information (Criminal Proceedings) Bill 2004 (the Bill) seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security.

Specifically, the Bill seeks to protect information whose disclosure is likely to prejudice Australia's defence, security, international relations, law enforcement interests or national interests. The compromise of this information could possibly affect the security of the nation.

The existing rules of evidence and procedure do not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a criminal proceeding.

When applied to prosecutions for espionage, treason, terrorism and other security related crimes, these cases may require the disclosure of such information to persons who are not security cleared, such as members of the jury. As a consequence, the Commonwealth may be faced with a choice between accepting the damage resulting from the disclosure of information or protecting that information by abandoning the prosecution.

The Bill is designed to provide a procedure in cases where information relating to, or the disclosure of which may affect, national security could be introduced during a federal criminal proceeding. The aim of the Bill is to allow this information to be introduced in such a form so as to facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial.

Federal Criminal Proceedings

The Bill applies to any criminal proceeding in any court exercising federal jurisdiction in relation to Commonwealth offences. The Bill covers all stages of the criminal process, from the charge through to an appeal of a decision.

The Bill also covers a proceeding that is the subject of certain applications under section 39B of the *Judiciary Act 1903* and the *Extradition Act 1988*. Due to the close connection between section 39B proceedings and the prosecution, it is conceivable that information may arise in such proceedings that relates to or may prejudice national security. The *Extradition Act 1988* has been included to prevent information from being disclosed in extradition proceedings; for example, where the proceedings involve a terror suspect.

Attorney-General's Certificate

Central to the operation of the Bill is the requirement 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 includes information that may be introduced through a document, a witness's answer to a question or the presence of a witness.

Upon notification, the Attorney-General considers the information and determines whether disclosure of the information is likely to prejudice national security. If so, the Attorney-General may issue a certificate (the certificate) which prevents the disclosure of the information or allows the information to be disclosed in a summarised or redacted form.

Pre-trial proceedings

The certificate prevents disclosure in all pre-trial proceedings.

Trial

Before a trial commences, any certificates that have been issued must be considered at a closed hearing of the trial court. The Attorney-General may intervene in the proceeding. The court rules on the admissibility of the original information and considers the certificate. The court may:

1. agree with the Attorney-General, that the information not be disclosed or disclosed other than in a particular form, in which case the trial continues or the defendant appeals; or
2. disagree with the Attorney-General and order disclosure of the information in which case the trial continues or the prosecution appeals.

Security clearance for defence counsel

The defendant's legal representative may apply to the Secretary of the Attorney-General's Department (the Department) for a security clearance by the Department.

If the defendant's legal representative does not apply for the security clearance within 14 days, the court may advise the defendant of the consequences of being represented by an uncleared counsel and may recommend that the defendant engage a legal representative who has been given, or is prepared to seek, a security clearance by the Department.

Uncleared counsel cannot receive access to information that relates to, or the disclosure of which may affect, national security.

Financial impact

The Bill is not expected to have a direct financial impact.

NOTES ON CLAUSES

Part 1

Preliminary

Clause 1: Short title

This clause is a formal provision stating the short title of the Act.

Clause 2: Commencement

This clause states the days on which the various clauses of the Act commence. Clauses 1 and 2 (and anything in the Act that this clause does not cover elsewhere) commence on the day of Royal Assent.

Clauses 3 to 44 of the Act commence on the 28th day after Royal Assent. This later date applies for administration reasons, namely, to provide sufficient time to notify persons that the Act is likely to affect, such as court authorities.

Clause 3: Object of this Act

Subclause (1) states the object of the Act.

Subclause (2) requires a court to consider this object when exercising powers or performing functions under the Act. This requirement reinforces the importance of balancing the protection of information with the administration of justice.

Clause 4: Extension of Act to external Territories

This clause states that the Act extends to all external Territories.

Clause 5: Act binds Crown

This clause states that the Act binds the Crown in each of its capacities.

Clause 6: Application of Act

This clause specifies the federal criminal proceedings to which the Act applies. The Act applies if a proceeding begins on or after the 28th day after the Act receives Royal Assent and if the prosecutor has notified the defendant and the court in writing that the Act applies to the proceeding. If the prosecutor gives notice after the proceeding begins, the Act applies only to the part of the proceeding that takes place after the notice is given.

Part 2

Interpretation

Division 1 – Definitions

Clause 7: Definitions

This clause defines many terms, including:

‘information’ which, according to subsection 90.1(1) of the *Criminal Code Act 1995*, means information of any kind, whether true or false and whether in a material form or not, including an opinion and a report of a conversation. Information may or may not be in the public domain.

Division 2 – National security and related definitions

Clause 8: Meaning of national security

This clause defines national security based on the definition in the Commonwealth Protective Security Manual.

Clause 9: Meaning of security

This clause defines security, which forms part of the definition of national security in clause 8.

Security means, according to the *Australian Security Intelligence Organisation Act 1979*, the protection of the Commonwealth, States and Territories and their respective people from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system or acts of foreign interference regardless of whether directed from or committed within Australia. Security includes carrying out Australia’s responsibilities to any foreign country in relation to one of these matters.

Clause 10: Meaning of international relations

This clause defines international relations, which forms part of the definition of national security in clause 8.

Clause 11: Meaning of law enforcement interests

This clause provides an inclusive list of interests that are law enforcement interests, which forms part of the definition of national security in clause 8.

Clause 12: Meaning of national interests

This clause defines national interests, which forms part of the definition of national security in clause 8.

Division 3 – Federal criminal proceeding and related definitions

Clause 13: Meaning of criminal proceeding

This clause defines criminal proceeding, which forms part of the definition of federal criminal proceeding in clause 14. This definition reinforces the intention of the Act to apply to all stages of a proceeding for a Commonwealth offence, including pre- and post-trial proceedings.

Section 39B of the *Judiciary Act 1903* deals with applications for a writ of mandamus or prohibition, or an injunction against an officer or officers of the Commonwealth in relation to a ‘related criminal justice process decision’. Related criminal justice process decisions are decisions that are connected with the investigation, committal for trial or prosecution of a defendant.

Jurisdiction to hear an application under section 39B is conferred on the Supreme Court of the State or Territory before which a prosecution or appeal is being heard to prevent defendants from delaying proceedings by applying to the Federal Court of Australia for a writ or injunction.

Although an application under section 39B is not criminal in nature, due to the close connection between these proceedings and the prosecution, it is conceivable that information, whose disclosure may prejudice national security, may arise in such proceedings.

Clause 14: Meaning of federal criminal proceeding

This clause defines federal criminal proceeding. This clause reinforces the intention of the Act to apply to any court exercising federal jurisdiction for a criminal proceeding and a proceeding under, or in relation to a matter arising under, the *Extradition Act 1998*.

Clause 15: Meaning of defendant

This clause defines defendant.

Division 4 – Other interpretation provisions

Clause 16: Disclosure of information in permitted circumstances

This clause states the permitted circumstances in which a person discloses information, namely where the person is a prosecutor or a staff member, as defined by

the *Intelligence Services Act 2001*, and the person discloses the information in the course of his or her duties.

Clause 17: Operation of other Acts etc.

This clause states that the Act does not affect the operation of any other Act except the specified provisions of the *Evidence Act 1995* and the *Judiciary Act 1903*.

Clause 18: General powers of a court

This clause states that a court retains the power to control a federal criminal proceeding, especially in relation to abuse of process, unless the Act expressly or impliedly states otherwise. For example, the court retains the power to stay or dismiss a proceeding and to exclude persons from the court.

Part 3

Protection of information whose disclosure is likely to prejudice national security

Division 1 – Management of information

Clause 19: Pre-trial conferences

This clause provides for pre-trial conferences to consider issues about the disclosure of information that relates to, or the disclosure of which may affect, national security in the trial.

This clause intends to give the court notice of any certificates that the Attorney-General may have already given under clause 24 or about whether either party will give notice under clause 22.

Clause 20: Arrangements about disclosures prejudicial to national security

This clause states that the prosecutor and defendant may agree to an arrangement about any disclosure in the proceeding of information that relates to, or the disclosure of which may affect, national security. The court has a discretion about whether to make an order to give effect to such an arrangement.

Clause 21: Protection of certain information disclosed in a proceeding

This clause intends to provide physical protection for information that is disclosed or is to be disclosed to a court in a federal criminal proceeding. This clause may apply either before or after the information is disclosed.

A regulation or court order may prescribe ways for storing this information. A court order may include an order under any other provision of the Act or under section 93.2 of the *Criminal Code Act 1995* for a hearing in camera.

Division 2 – Attorney-General’s certificates for protection of information

Subdivision A – Notifying Attorney-General etc. of expected disclosure

Clause 22: Prosecutor and defendant must notify expected disclosure of information prejudicial to national security

This clause states that where a party to a proceeding reasonably expects to disclose information that relates to, or the disclosure of which may affect, national security, or where a party intends to call a witness who will disclose information that relates to, or the disclosure of which may affect, national security, that party must notify the Attorney-General, the court and the other party. Notice must be in a prescribed form.

This clause intends to provide the Attorney-General with sufficient time to consider whether to issue a certificate under clause 24 of the Act.

Clause 37 states that it is an offence to contravene this requirement.

Subdivision B – Notifying Attorney-General etc. where disclosure expected by witness answering question

Clause 23: Preventing witnesses from disclosing information by not allowing them to answer questions

This clause sets out a procedure for protecting information that a witness will disclose in giving evidence in a federal criminal proceeding, where the information relates to, or the disclosure of which may affect, national security.

If the prosecutor or defendant reasonably expects the disclosure may prejudice national security, the prosecutor or defendant must advise the court and the court must adjourn the proceedings and hold a closed hearing. At the closed hearing, the witness must give a written answer to the question, which is shown to the prosecutor and the court. If the prosecutor considers that the answer may prejudice national security if disclosed, the prosecutor must advise the court and notify the Attorney-General under clause 22. If the Attorney-General is notified, the court must adjourn the proceeding until the Attorney-General gives a certificate under subclause 24(4) or advises the court under subclause 24(5) that a certificate will not be issued.

Clause 27 sets out the closed hearing requirements.

Subdivision C – Attorney-General’s certificates

Clause 24: Attorney-General’s non-disclosure certificate

This clause applies if the Attorney-General has been notified under clause 22 or subclause 23(6), or the Attorney-General expects that any of the circumstances in paragraphs 22(1)(a) to (c) will arise and the Attorney-General considers that the disclosure of the information is likely to prejudice national security. This clause does not apply where the mere presence of a witness may prejudice national security. Clause 26 applies in that situation.

If this clause applies, the Attorney-General may give the potential discloser and the court a certificate that states that the information in question must not be disclosed at all or in part. Subclause 25(1) provides that during any part of the proceeding that occurs before the trial, this certificate is conclusive evidence of the matters contained inside it.

The certificate is not conclusive of any matters relating to evidence during a trial. Before a trial commences, the court must hold a closed hearing to decide whether to make an order under clause 29. The Attorney-General may intervene in such proceedings. If the Attorney-General issues a certificate during trial proceedings, the court must adjourn the proceedings to hold a closed hearing to decide whether to make an order under clause 29.

Clause 27 sets out the closed hearing requirements.

If the Attorney-General decides that the information is not information whose disclosure will prejudice national security, the Attorney-General must advise the potential discloser and court in writing so that the proceeding can continue.

Clauses 35 and 38 state that it is an offence to disclose information that relates to, or the disclosure of which may affect, national security before or contrary to the Attorney-General's non-disclosure certificate respectively.

Clause 25: Consequences of Attorney-General giving non-disclosure certificate

Subclause (1) states that in a pre-trial proceeding under paragraph 14(a), where the Attorney-General has given a potential discloser a certificate under clause 24 before the trial begins, the certificate is conclusive evidence before the trial that disclosure of the information in the proceeding is likely to prejudice national security. If this subclause applies, the court must hold a hearing as soon as the trial begins, adjourn or continue to adjourn the proceedings to decide whether to make an order under clause 29.

Subclause (2) states that in an extradition proceeding under paragraph 14(b), where the Attorney-General has given a potential discloser a certificate under clause 24 either before or during the proceeding, the certificate is conclusive evidence during the proceeding that disclosure of the information in the proceeding is likely to prejudice national security. If this subclause applies, the court must hold a hearing as soon as the trial begins or adjourn the proceedings to decide whether to make an order under clause 29.

Clause 27 sets out the closed hearing requirements.

Clause 26: Attorney-General's witness exclusion certificate

This clause sets out a procedure for protecting information that is reasonably expected to be disclosed by the mere presence of a witness to be called in a federal criminal proceeding.

This clause applies if the Attorney-General has been notified under clause 22 or if the Attorney-General considers that the mere presence of an intended witness will disclose information and the Attorney-General considers that the disclosure is likely to prejudice national security.

If this clause applies, the Attorney-General may give a certificate to the prosecutor or defendant and the court, stating that the prosecutor or defendant must not call that intended witness.

As soon as the trial begins, the court must hold a closed hearing to decide whether to make an order under clause 29. If the Attorney-General issues a certificate during trial proceedings, the court must adjourn the proceedings to hold a closed hearing to decide whether to make an order under clause 29.

Clause 27 sets out the closed hearing requirements.

Clauses 36 and 39 state that it is an offence to disclose information that relates to, or the disclosure of which may affect, national security before the Attorney-General gives a witness exclusion certificate or contrary to a witness exclusion certificate respectively.

Division 3 – Closed hearings and non-disclosure or witness exclusion orders

Clause 27: Closed hearing requirements

This clause sets out the requirements for a closed hearing. It lists the persons who may be present at the hearing. This clause also states that a court may order that the defendant or his or her legal representative is not entitled to be present during any part of the closed hearing where his or her presence is likely to prejudice national security. If present during any part of the hearing, the defendant or his or her legal representative must be able to make representations to the court about the certificate that resulted in the hearing. The court must maintain a sealed record of the hearing, which is made available only to an appeal or review court.

The requirement of showing the certificate issued by the Attorney-General to the defendant ensures that the defendant can make representations about the application or certificate.

Clause 28: Intervention by Attorney-General

The Attorney-General may intervene on behalf of the Commonwealth in a hearing in relation to which the closed hearing requirements apply. As a result of the intervention, the Attorney-General will be treated as a party to the proceeding.

Clause 29: Court orders

A court may make orders under subclauses (2), (4) and (5) after it has held a hearing required under subclause 25(3) or 25(4).

Subclause (2) states that if the information is in a document, the court may make an order specifying the way the information must be disclosed. A person subject to this order may adduce evidence of the contents of the document by tendering the document in the way that the court has ordered.

Subclause (4) states that regardless of the form of information, the court may make an order prohibiting the disclosure of information, except in permitted circumstances, by any person to whom a certificate under subclause 24(2) or 24(3) was given and any person to whom the certificate has been disclosed for the purposes of the hearing.

Subclause (5) states that the court may order that any person may disclose the information in the proceeding, regardless of the form of the information.

Subclause (6) states that before a court makes an order under subclause (2), (4) or (5), the court must first decide whether the information in question is admissible in evidence in the proceeding. If the information is not admissible in evidence, the court must not make the order.

Subclause (7) states that after a court has held a hearing required under subclause 26(4), the court may order that the prosecutor or defendant either must not or may call the person as a witness in the federal criminal proceeding.

Subclause (8) lists a number of factors that a court must consider in deciding whether to make an order under clause 29, and if so, what order to make. A court need not consider these factors where subclause (6) prevents the court from making an order under clause 29. Subclause (9) states that a court must give the factor in paragraph (8)(a) the greatest weight.

Clause 40 provides that it is an offence to contravene a court order.

Clause 30: Duration of court orders

This clause states that court orders made under Division 4 of the Act remain in force until the court or another court cancels the order or otherwise causes it to cease to have effect.

Clause 31: Consequence of certain court orders

This clause seeks to avoid the time and cost of re-conducting any part of the pre-trial proceeding where the court makes an order under subclause 29(5) or 29(7) during the trial in relation to information that was not disclosed pre-trial.

Clause 32: Adjournment after certain court orders

This clause states that where the court makes an order under clause 29, the prosecutor or defendant may apply to the court to adjourn the proceeding to decide whether to appeal against the order or, in the case of the prosecutor only, to withdraw the proceeding, and if so, to make the appeal or withdrawal. The court must grant the adjournment.

Division 4 – Appeals

Clause 33: Appeals

This clause reinforces the appeal rights of the prosecutor and defendant, as well as the Attorney-General if the Attorney-General is an intervener under clause 28.

The Rules of Court of the appeal court will determine the time period for appeals.

Part 4

Security Clearances

Clause 34: Defendant’s legal representative etc. must apply for a security clearance

This clause relates to security clearances by counsel and provides that the defendant’s legal representative must apply to the Secretary for a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information.

If the defendant’s legal representative does not apply for the security clearance within 14 days after the day on which the notice is received, or within such further period as the Secretary allows, the prosecutor may advise the court that the defendant’s counsel has not sought clearance. The court may advise the defendant of the consequences of being represented by an uncleared counsel and may recommend that the defendant engage a legal representative who has been given, or is prepared to seek, a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information.

Uncleared defence counsel cannot receive information that relates to, or the disclosure of which may affect, national security.

Part 5

Offences

This Part creates a number of offences and imposes a penalty for each, reflecting the serious harm that the Commonwealth may suffer from the disclosure of information that may prejudice national security.

Clause 35: Offence to disclose information before Attorney-General gives non-disclosure certificate etc.

This clause contains two offences. It is an offence to disclose information, where the disclosure is likely to prejudice national security, if the Attorney-General has received

notice under subclause 22(1) or 23(6) and the disclosure occurs before the Attorney-General gives a certificate under subclause 24(2) or (3) or advice under subclause 24(5) in relation to the disclosure of information. This clause does not apply where clause 36 applies or the disclosure takes place in permitted circumstances.

The maximum penalty for these offences is 2 years imprisonment.

Clause 36: Offence to disclose information before Attorney-General gives witness exclusion certificate etc.

This clause applies if the prosecutor or defendant notifies the Attorney-General under subclause 22(6). The prosecutor or defendant, as the case may be, must not call the person as a witness in the federal criminal proceeding before the Attorney-General gives a certificate under subclause 26(2) or advice under subclause 26(6) in relation to the calling of the witness.

The maximum penalty for this offence is 2 years imprisonment.

Clause 37: Offence to contravene requirement to notify Attorney-General etc.

This clause states that it is an offence if a person intentionally contravenes subclause 22(1), 22(2), 23(2) or 23(6), and the disclosure of information mentioned in that subclause is likely to prejudice national security.

The maximum penalty for this offence is 2 years imprisonment.

Clause 38: Offence to disclose information contrary to Attorney-General's non-disclosure certificate

This clause states that it is an offence if a person is given a certificate under subclause 24(2) or 24(3) and that person discloses the information in contravention of the certificate. However, the person does not commit an offence where disclosure occurs after the court orders disclosure under subclause 29(5).

The maximum penalty for this offence is 2 years imprisonment.

This offence addresses the disclosure of information that relates to, or the disclosure of which may affect, national security outside of a criminal proceeding itself.

Clause 39: Offence to call witness contrary to Attorney-General's witness exclusion certificate

This clause states that it is an offence if a person is given a certificate under subclause 26(2), and that person calls the witness in contravention of the certificate. However, the person does not commit an offence where disclosure occurs after the court orders that a witness may be called under paragraph 29(7)(b).

The maximum penalty for this offence is 2 years imprisonment.

Clause 40: Offence to contravene court order

This clause states that it is an offence if a person intentionally contravenes a court order made under the Act.

The maximum penalty for this offence is 2 years imprisonment.

This criminal penalty reinforces the serious nature of a court order.

Clause 41: Offence to disclose information to certain persons without security clearance etc

This clause states that it is an offence if, for the purposes of a federal criminal proceeding, a person discloses to a legal representative of the defendant or a person assisting a legal representative of the defendant information the disclosure of which is likely to prejudice national security. However, an offence is not committed where the disclosure occurs in giving evidence in the proceeding, the legal representative or his or her assistant has received from the Department a security clearance considered appropriate by the Secretary, the Secretary has approved the disclosure or the disclosure takes place in compliance with conditions that the Secretary has approved.

The maximum penalty for this offence is 2 years imprisonment.

Part 6

Miscellaneous

Clause 42: Report to Parliament on certificates given by Attorney-General etc.

This clause requires the Attorney-General to give, as soon as practicable after 30 June each year, each House of Parliament a report stating the number of certificates the Attorney-General has given under clauses 24 and 26 throughout that year and identifying the criminal proceedings to which the certificates relate.

Clause 43: Rules of Court

This clause describes the power to make rules of court that prescribe matters relating to the Act.

Clause 44: Regulations

This clause describes the Governor-General's power to make regulations that prescribe matters relating to the Act.