

Regulation of unmarked plastic explosives in Australia

Overview of the Marplex Convention

Convention on the Marking of Plastic Explosives for the purpose of detection, Montreal, 1 March 1991 [1991] ATSD 3903 (Marplex Convention).

1. The Marplex Convention arose as a consequence of the bombing of Pan Am Flight 103 over Lockerbie, Scotland in December 1988. The bomb on Flight 103, which resulted in the deaths of 270 people, was comprised of approximately 250g of plastic explosive hidden in a cassette player loaded into a cargo hold.
2. The Marplex Convention requires each States Party to prohibit and prevent the manufacture in its territory, and the movement into and out of its territory, of unmarked plastic explosives. Each States Party must also exercise strict and effective control over the possession of any existing stocks of unmarked explosives. Within three years of a State becoming a Party to the Marplex Convention, the State must destroy, consume, mark or render permanently ineffective, any plastic explosives that are not held by authorities exercising police or military functions.
3. The Marplex Convention aims to deter misuse by terrorists of plastic explosives by requiring that a prescribed chemical detection agent or ‘marker’ be incorporated into the manufacture of plastic explosives and imposing on States Parties an obligation to control the possession and transfer of existing stocks of unmarked plastic explosives.
4. The theory underlying the Marplex Convention is that plastic explosives marked with a chemical detection agent or taggant are more readily identifiable and easily detected. Without such marking, reliable detection is difficult because often explosives and the items that contain them consist of low concentration chemicals that are odourless and essentially non-volatile.
5. While the inclusion of chemical marking agents increases the propensity for detection of plastic explosives, Australia’s scheme for inventory oversight will also ensure that legitimate sources of unmarked plastic explosives are appropriately regulated. This will assist in identifying whether unmarked plastic explosives have been diverted from a legitimate source or elsewhere and aid in circumventing their unlawful transfer and usage.
6. An overview of the Marplex Convention, including reasons for Australia’s accession, anticipated regulatory compliance costs associated with accession and consultation with government agencies and private industry is contained in Australia’s National Interest Analysis (NIA) tabled by the Attorney-General in Parliament on 11 October 2005 prior to referral of the draft Convention to the Joint Standing Committee on Treaties. The NIA is available at <<http://www.austlii.edu.au/au/other/dfat/nia/2005/18.html>>

Implementation of the Marplex Convention : *Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007*

7. Australia’s international obligations under the Marplex Convention were implemented domestically through the passage of the *Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007* (Cth) (Act). The provisions of the amending

legislation have been inserted into Division 72B of the *Criminal Code Act 1995* (Cth) (Criminal Code) and become operative on 25 August 2007.

8. Division 72B inserted by the Act introduces a series of offences under the Criminal Code relating to the possession, manufacture, trafficking in, import or export of unmarked plastic explosives, unless a person or organisation has a valid written authorisation from the Commonwealth Attorney-General. Under the new requirements, plastic explosives must also be packaged in accordance with prescribed labelling protocols. The Subdivision also sets out statutory requirements for the technical ‘marking’ of plastic explosives. A plastic explosive is ‘marked’ if it contains the minimum concentration of a specified chemical marker or taggant as specified under the Act (the chemical marking protocols are taken directly from the Technical Annex to the Marplex Convention). The Subdivision also identifies a series of exemptions which apply to existing stocks of unmarked plastic explosives and those stocks or consignments which are intended to be directed towards particular purposes such as research and development, forensic testing and training.

9. As an adjunct to the legislative framework, the Department has developed an administrative scheme for receiving and processing applications for ministerial authorisations and issuing authorisations for possession of, trafficking in, manufacture, import or export of consignments of unmarked plastic explosive.

10. The statutory requirement to ‘mark’ plastic explosives manufactured or held by legitimate sources, together with the regulatory regime to manage existing stocks of unmarked plastic explosives is designed to minimise the risk of plastic explosives being diverted from legitimate sources and being used for criminal, including terrorist, activity.

Definition of ‘plastic explosive’ under the Act and Convention

11. The definition of ‘plastic explosive’ under the Marplex Convention has been incorporated into the s 72.36 of the Criminal Code, which defines ‘plastic explosive’ as:

‘an explosive product (including an explosive product in flexible or elastic sheet form) that is:

- (a) formulated with
 - i. one or more high explosives which in their pure form have a vapour pressure less than 10^{-4} Pa at a temperature of 25-C; and
 - ii. a binder material;
- (b) as a mixture, malleable or flexible at normal room temperature’.

12. Section 72.36 also defines ‘high explosive’ ‘as an explosive with a velocity of detonation that is greater than the velocity of sound in the explosive (typically greater than 340 metres per second) and includes the following:

- (a) cyclotetramethylenetetranitramine (HMX)
- (b) pentaerythritol tetranitrate (PETN)
- (c) cyclotrimethylenetrinitramine (RDX)’

13. Due to their molecular composition or classification, the following explosives would not fall within the definition of ‘plastic explosive’ within the Act:

- explosives with a water gel base
- ammonium nitrate based explosives
- detonation cord
- explosives described as Types A, B, C and E and classified in the *United Nations Recommendations on the Transport of Dangerous Goods – Model Regulations* (commonly known as the UN Model Code).

Prescribed chemical detection agents – Technical Annex

14. The Criminal Code adopts the prescribed chemical detection agents and their prescribed minimum concentration as outlined in the Technical Annex to the Convention (section 72.34). The detection agents and the minimum prescribed concentrations are as follows:

EGDN (ethylene glycol dinitrate)	0.2% by mass
DMNB (2,3-Dimethyl-2,3-dinitrobutane)	1.0% by mass
p-MNT (para-Mononitrotoluene)	0.5% by mass

15. In general terms, where a chemical marker or taggant is incorporated and dispersed throughout the whole of the plastic explosive during manufacture, the marker emits a chemical vapour which enables the detection of the smallest sample of plastic explosive, using specialised equipment.

Chemical marking requirements

16. Section 72.33 of the Criminal Code sets out two requirements for the ‘marking’ of plastic explosives. The marking requirements implement those prescribed by the Technical Annex under the Marplex Convention.

First marking requirement:

17. Section 72.33(2) provides that the plastic explosive must:

- contain a detection agent at the time of manufacture, and
- the concentration of the detection agent in the plastic explosive must be less than the minimum manufacture concentration for the detection agent, and
- the detection agent must be homogeneously distributed throughout the plastic explosive.

18. The prescribed detection agents are those minimum concentrations of the prescribed chemicals detailed in section 72.34 (and sourced from Part 2 of the Technical Annex to the Marplex Convention). A new substance may only be included in this section through an amendment to the Marplex Convention introduced by the ICAO. The new substance would then be prescribed by regulations made under section 5 of the Criminal Code to supplement the list of prescribed chemicals.

19. The concept of 'homogenous distribution' is sourced directly from Part 2 of the Technical Annex to the Marplex Convention. In general terms, 'homogenous distribution' means that the chemical or marking agent is uniformly distributed throughout the explosive material. Homogenous distribution of the chemical agent means that all constituent elements of the explosive substance are appropriately tagged for detection purposes.

20. If no detection agent can be detected when using a scientifically valid method, it is presumed, unless the contrary is provided, that the plastic explosives breach the first marking requirement. The defendant bears the legal burden of proof in relation to proving the contrary by, for example, supplying documentation that proves that the plastic explosive is marked with a detection agent as prescribed under the legislation.

21. In testing a sample of plastic explosive, the Criminal Code provides that the test used must be either a method generally accepted in the scientific community as a reliable means of measuring the concentration of detection agents in plastic explosives, or by any other method which is set out in regulations.

22. Where a plastic explosive is required to be tested to authenticate whether a prescribed detection agent is present and has the appropriate concentration of the prescribed detection agent, a sample of the plastic explosive will be sent by a specialist handler to laboratories accredited by NATA (National Association of Testing Authorities).

Second marking requirement:

23. The second marking requirement specified in the Criminal Code provides that less than 10 years must have elapsed since the manufacture of the marked plastic explosive (s72.33(3)). That is, a marked plastic explosive cannot be more than 10 years old.

24. The rationale for this restriction is based on the shelf-life (or taggant stability) of plastic explosives. The level of a detection agent in a plastic explosive deteriorates over time, particularly in a less than optimal storage facility. The 10 year limitation period also discourages accumulation of large unused stockpiles of marked plastic explosives, which would increase the opportunity for deterioration of the chemical detection agent.

Offences relating to control over the manufacture, possession, import and export of and trafficking in plastic explosives.

25. From 25 August 2007, it is an offence to manufacture, import, export, traffick in, or possess unmarked plastic explosives unless ministerial authorisation is obtained. These offences are contained in sections 72.12 and 72.15 of the Criminal Code and carry penalties of between 2 and 10 years imprisonment.

26. A person or organisation will contravene each offence provision if they (i) possess, traffick in, manufacture, import, export a plastic explosive (ii) are aware of, or recklessly indifferent to, the fact that the plastic explosive breaches a marking requirement (iii) have not received ministerial authorisation to engage in one or more of the activities identified in (i).

Trafficking in unmarked plastic explosives

27. For the purposes of the trafficking offence under s 72.12, the term ‘trafficking’ includes any transfer of unmarked plastic explosives or possession of unmarked plastic explosives with the intention to transfer (see s 72.36). As such, trafficking relevantly covers the purchase of unmarked plastic explosives from a commercial or government supplier. Section 72.12 supports Australia’s treaty obligation to take necessary and effective measures to prohibit and prevent the movement into or out of its territory of unmarked plastic explosives and exercise strict and effective control over their transfer. The penalty for contravention of s 72.12 is 10 years, consistent with similar offences relating to Tier 2 goods (such as fissionable or radioactive substances or chemical compounds) under the *Customs Act 1901* (Cth) (Customs Act)

Manufacture of unmarked plastic explosives

28. The offence in relation to the manufacture of unmarked plastic explosives extends to the manufacturer of an unmarked plastic explosive as well as to those who exercise control or direction over such manufacture. Accordingly, the manufacturer proper as well as those involved in the manufacturing process such as an employer, director or controller of the manufacturing facility are covered by the offence. The penalty for contravention of s 72.14 of the offence is 2 years.

Importing/Exporting unmarked plastic explosives

29. The importing/exporting offences endorse the Marplex Convention’s imperative to control the passage of unmarked plastic explosives in and out of the territory. The offence places the onus on the importer/exporter to enquire about the regulatory requirements, including applicable authorisation mechanisms. The penalty for contravention of s 72.12 is 10 years, again consistent with similar offences relating to Tier 2 goods under the Customs Act.

Possession of unmarked plastic explosives

30. The offence in relation to the possession of unmarked plastic explosives under s 72.15 is intended to prevent the diversion or use of unmarked plastic explosives for purposes or in a manner inconsistent with the objectives of the Convention. The penalty for contravention of s 72.15 is 2 years imprisonment.

Offence relating to the packaging of plastic explosives

31. It is an offence if a person manufacturing a plastic explosive does not comply with the packaging requirements set out under section 72.17. The penalty for this offence is up to 2 years imprisonment.

32. Prior to the introduction of the new packaging requirements, very small packages of plastic explosives did not need to be marked with the words ‘plastic explosive’ nor were manufacturers or dispensers required to provide details of the type and concentration of the detection agent contained in the explosive.

33. Under s 72.12, details of the types of chemical detection agents including, date of manufacturer, prescribed type of explosive, the name of the detection agent, the concentration of that agent expressed as a percentage by mass, must be clearly stated together with the descriptor 'PLASTIC EXPLOSIVE'

34. The labelling requirements will ensure plastic explosives are easily identifiable and distinguishable from other types of explosives. Clear and consistent labelling of packages of plastic explosives complements the broader offence regime and will encourage more efficacious storage protocols enabling Customs and other law enforcement personnel (for example, AFP and State and Territory Police Services) to effectively identify packages of plastic explosives.

Applicable defences

35. Section 72.16 sets out a number of defences to the new offences. These include circumstances where a defendant charged with a trafficking, importing/exporting, manufacturing or possessing offence establishes that he or she had no reasonable grounds for suspecting that the plastic explosive breached a marking requirement. It is also a defence if a defendant proves that at the time of the alleged commission of the offence, the plastic explosive contained a detection agent and the concentration of that detection agent was consistent with statutory requirements and the detection agent was homogeneously distributed throughout the plastic explosive.

36. It was considered that a legal burden of proof on defendant (discharged on the balance of probabilities) is warranted because it is reasonable to expect that a person handling dangerous plastic explosives has had appropriate training and expertise to establish the technical and personal experience required of the defence.

Authorisations/exemptions

37. The Criminal Code provides for a number of exemptions which enable the authorised manufacture, possession, import and export of unmarked plastic explosives in certain circumstances. These exemptions (the application of which requires ministerial authorisation) are intended to reduce economic burdens imposed on holders of existing unmarked stocks or consignments, ensure that legitimate training and research based activities are not unduly impaired by the new regulatory conditions and recognise the need for a transitional period to enable commercial manufacturers and government organisations to comply with the new regime.

Authorisation for Australian manufacturers – section 72.21

38. Section 72.21 provides for a 6 month transitional period to allow Australian manufacturers, with a valid authorisation from the Attorney-General, to manufacture, traffick in, and possess unmarked plastic explosives manufactured after commencement of Division 72 (i.e. 25 August 2007).

39. This exemption is intended to afford Australian manufacturers a reasonable period in which to establish protocols, operations and equipment necessary to comply with the new regulatory requirements.

40. A ministerial authorisation under this section will only be granted where the Minister is satisfied that the plastic explosive will be used exclusively for use in connection with the Australian Defence Force, the operation in Australia of a visiting force (within the meaning of the *Defence (Visiting Force) Act 1963* (Cth) or the operational of the Australian Federal Police or the police force or police service of a State or Territory.

41. The effect of this transitional period is that Australian manufacturers have 12 months from the date of Royal Assent of the Act (19 February 2007) in order to comply with the scheme, where plastic explosives are to be used for defence or police purposes.

Authorisation for existing users of unmarked plastic explosives – section 72.20

42. Section 72.20 gives effect to Article 4.2 of the Marplex Convention to provide for a 3 year period from the date of the commencement of the Act, within which existing stocks of unmarked plastic explosives manufactured before the Marplex Convention's entry into force, and held by private industry can be used up, destroyed, marked or made permanently ineffective.

43. The Attorney-General may authorise the trafficking in, import, export or possession of an unmarked plastic explosive manufactured before commencement of the Act, if the unmarked plastic explosive will not exist or made permanently ineffective within 3 years from the date of commencement of the legislation.

Authorisation for research etc purposes – section 72.18

44. Section 72.18 gives effect to the broad exemptions in the Convention and particularly the Technical Annex to the Convention in the case of unmarked plastic explosives used for research purposes.

45. Under this section, the Attorney-General may only authorise the manufacture, traffic, import, export and possession of unmarked plastic explosives if satisfied that:

- (a) the plastic explosive is used exclusively for research, development or testing of new or modified explosives, development or testing of explosives detection equipment, training in explosives detection or for forensic science purposes; or
- (b) the plastic explosive is an integral part of an explosive device that was manufactured exclusively for defence purposes; and the explosive device is to be used exclusively for defence purposes; or
- (c) the plastic explosive will, within 3 years after commencement of Division 72B, become an integral part of an explosive device manufactured exclusively for defence purposes.

46. The Attorney-General's authorisation must specify the grounds upon which it was given and, in the case an authorisation for research or developmental science, (as per paragraph (a) above), the authorisation must impose a limit on the quantity of plastic explosive able to be acquired and used for this purpose.

47. This exemption allows legitimate research to continue with respect to unmarked plastic explosives in a range of areas including the testing of new or modified explosives, explosives detection equipment or work in the field of forensic or developmental science.

Authorisation for Defence / police purposes – section 72.19

48. Section 72.19 gives effect to Article 4.3 of the Marplex Convention which provides for a general 15 year exemption from the prohibition on the use of unmarked plastic explosives in the case of plastic explosives used for defence and police purposes.

49. Under this section, the Attorney-General may authorise the trafficking in, import, export, or possession of an unmarked plastic explosive manufactured before or after commencement of the legislation.

50. The Attorney-General may give an authorisation only if satisfied the unmarked plastic explosive will be used for Australian Defence Force operations, the operation in Australia of a visiting force or the operation of the Australian Federal Police or the police force of a State or Territory.

51. Authorisations for defence or police purposes will expire on 26 August 2022 or another such period as specified by the Attorney-General. As a matter of practice, the Attorney-General is granting initial authorisations of 5 years duration to applicants (including State and Territory police tactical and operational teams) pursuant to s 72.19 to enable them to carry out training and skills enhancement activities as part of the National Counter-Terrorism Plan.

Authorisation for overseas defence purposes – 7 day limit – section 72.22

Authorisation for overseas Australian Federal Police purposes – 7 day limit – section 72.23

52. Section 72.22 allows a member of the Australian Defence Force (ADF) to possess, import or traffick in unmarked plastic explosives for a period of 7 days following possession, in circumstances where the member of the ADF is unable to obtain an immediate written authorisation from the Attorney-General.

53. Such circumstances may occur in operations overseas where it is difficult to obtain written authorities at short notice due to an emergency or any other sudden or unexpected circumstances.

54. Section 72.23 makes a similar provision in the case of overseas Australian Federal Police (AFP) purposes.

The authorisation scheme and role of the Attorney-General

55. As canvassed above, the Act introduces provisions which require certain dealings with unmarked plastic explosives to be authorised at the Ministerial level. The Department has developed an administrative scheme which enables applicants to seek authorisation for existing or newly acquired stocks of unmarked plastic explosives through a simple application process. The regulatory scheme, as devised by the Security

Law Branch of the Department, does not impose onerous requirements on applicants in terms of time or resources and there are no fees associated with the application process.

Steps required to obtain an authorisation to possess, traffick in, import, export or manufacture unmarked plastic explosives

1. Determine whether an authorisation can be sought

56. A written authorisation from the Attorney-General will only be provided where the unmarked plastic explosives will be used:

- (i) by Australian manufacturers for a 6 month period until 25 February 2008;
- (ii) by users of existing stocks of unmarked plastic explosives until 25 August 2010;
- (iii) for defence and / or police purposes;
- (iv) for research, development, testing of explosives or explosives detection equipment, training in explosives detection or forensic science.

57. Activities which fall outside these designated categories cannot be authorised by the Attorney-General under Division 72B of the Criminal Code.

2. Determine for what purpose authorisation is required

58. The authorisation required will depend on whether the individual or organisation wishes to traffick in, possess, import/export or manufacture unmarked plastic explosives. Applicants must consider how proposed activities in connection with unmarked plastic explosives fit within one or all of these categories. Departmental officers are available to assist applicants in determining the appropriate ambit of the authorisation which should be sought.

3. Complete an application for authorisation

59. The relevant form - "Application for Authorisation" is available on the Department's website at: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Counterterrorism_PlasticExplosives>.

60. In order to obtain authorisation to possess, manufacture, traffick in, import or export unmarked plastic explosives under Division 72 of the Criminal Code, an application using the form entitled "Application for Authorisation" must be completed.

61. In completing this form, applicants are required to provide details of the intended use of the unmarked plastic explosive (i.e. is the individual or organisation intending to possess, traffick in, import or export unmarked plastic explosives or undertake one or all of these activities and how do their proposed activities involve 'trafficking in', possession of etc unmarked plastic explosives). The application should also include details of existing consignments and/or consignments of unmarked plastic explosives sought to be acquired. For each unmarked plastic explosive, the applicant should provide a technical description of the plastic explosive including information such as batch/serial number, UN number, quantity held, manufacturing source and date of manufacture (if known)). If

an individual or organisation has various types of unmarked plastic explosives each of a different quantity or composition, a list or schedule of stocks in relation to which authorisation is sought should be submitted to the Department with the application form.

62. Where an individual or organisation seeks to import or export unmarked plastic explosives, they must satisfy certain formalities in addition to completing an application for authorisation under Division 72B to import or export unmarked plastic explosives.

63. In order to import unmarked plastic explosives, an individual or organisation must (1) obtain a State or Territory permit or license to import unmarked plastic explosives (2) complete an Application for Authorisation to import unmarked plastic explosives and (3) complete an Application for Permission to import unmarked plastic explosives recording the State or Territory permit/licence number (4) complete a Manufacturers Certificate. The Manufacturers Certificate should include details of the manufacturer and technical particulars of the plastic explosive (including the date of manufacture).

64. The completed forms and Manufacturers Certificate must be submitted to the Department. If the Application for Authorisation is approved, the Attorney-General will issue a permit number. The individual or organisation must present the permit number allocated by the Attorney-General to Australian Customs at the time of lodging an import declaration.

65. In order to export unmarked plastic explosives, an individual or organisation must (1) obtain permission from the Defence Export Control Office within the Department of Defence as plastic explosives are a prohibited export under the *Customs (Prohibited Export) Regulations 1958* (Cth) and (2) complete an application for authorisation to export unmarked plastic explosives. For export approval and information on the requirements for supporting documentation see: <www.defence.gov.au/strategy/deco>

4. Submit the application form to the Department

66. Applications should be submitted to the Security Law Branch of the Department. Applications may be sent by mail or by fax to: +61 02 6250 5985. Departmental officers may be consulted about the application process on +61 02 6250 6666.

5. Individual or organisation receives written confirmation regarding application for authorisation

67. If the application for authorisation is approved by the Attorney-General, the applicant will be advised by letter attaching a photocopy of the instrument of authorisation. Each applicant will be issued with an individual permit number. Original authorisation signed by the Attorney-General will be kept permanently on the Department's files.

68. Where applications are made to the Attorney-General, the Department is required to:

- receive applications from persons or organisations seeking permission to import or export plastic explosives.
- process applications, including checking that marking is certified by a manufacturer, arranging for accredited laboratory testing of any

consignments where there is a concern about marking and liaising with Customs officials.

- manage the process for authorisations issued by the Attorney-General and the Minister for Defence for use, possession, trafficking in and import and export of unmarked explosives by defence, for police or research purposes.

69. To date, a number of authorisations under s 72.19 (defence or police purposes) have been granted including to the Department of Defence and various State and Territory police tactical and operational groups.

Importing and exporting marked plastic explosives

70. The authorisation scheme detailed above applies to 'unmarked' plastic explosives. However, as from 25 August 2007, Customs regulations prohibit the import or export of plastic explosives without a permit. There are also other formal requirements which must be complied with in order for an individual or organisation to import or export marked plastic explosives.

Import of marked plastic explosives

71. Persons or organisations intending to import marked plastic explosives will be required to (1) obtain a permit or licence from the relevant State or Territory to import marked plastic explosives (1) complete an Application for Permission to Import Marked Plastic Explosives (recording the State or Territory permit number) and (3) complete a Manufacturers Certificate which includes details of the manufacturer, technical particulars of the marked plastic explosive (including the date of manufacture) and whether the plastic explosive contains a chemical detection agent.

72. The completed Manufacturers Certificate and Application to Import Marked Plastic Explosives must be submitted to the Attorney-General's Department. If the Attorney-General approves the application, the Department will issue a permit number for the import of the marked plastic explosives to be presented to Customs at the time of lodging an import declaration.

Export of marked plastic explosives

73. Persons or organisations intending to export marked plastic explosives will be required to obtain a permit from the Defence Export Control Office within the Department of Defence. The export of all military explosives (including plastic explosives) from Australia is subject to a case-by case approval under the Defence Strategic Goods List (DSGL).

74. In order to obtain a permit from Defence, a person or organisation must forward to the Defence Export Control Office (1) a completed Manufacturers Certificate and (2) a completed Export Application form.

75. The Manufacturers Certificate will serve as a confirmation that the plastic explosive is marked and will enable Customs officials to assess the legitimacy of the export.

Administration of the authorisation scheme under the Division 72B

76. While applications for authorisation may be submitted to the Minister for Defence or the Attorney-General under the legislation, as a matter of practice, applications for an authorisation to possess, traffick in or import unmarked plastic explosives are handled by the Department. An authorisation will only be made for one or more of the authorisations provided for under ss 72.18-72.23 inclusive (see paragraphs 37-54 above). Applications to export unmarked plastic explosives are directed to the Defence Export Control Office within the Department of Defence.

77. The Attorney-General may grant authorisations subject to various conditions such as that the Department be advised of future stocks of unmarked plastic explosives acquired by the individual or organisation and/or that future stocks of unmarked plastic explosives only be acquired from a specified source (for example, Australian Defence Industries). The Attorney-General may only give an authorisation to use existing stocks of unmarked plastic explosives on the condition that, within 3 years after 25 August 2007, the unmarked plastic explosives will not exist or will be made permanently ineffective. An authorisation for existing stocks will expire on 25 August 2010.

Interrelationship between the Commonwealth, State and Territory government agency layers of regulation in relation to the Marplex scheme

78. The application process and the issuing of authorisations do not impact upon existing regulation by States and Territories of explosives, including plastic explosives. Further, the authorisation process does not involve additional incursion on State and Territory licensing autonomy. Various State and Territory legislation governs the regulation of dangerous goods including plastic explosives such as production, use, sale, handling, disposal and licensing requirements. The Marplex scheme simply adds an additional requirement (coordinated and administered at the Commonwealth level) that plastic explosives be marked.

79. The Marplex scheme deals specifically with plastic explosives and, as such, is somewhat outside the purview of the PC's terms of reference. However, the efficiency and workability of the Marplex scheme will be strengthened by enhanced national uniformity and consistency in regulatory standards.

80. The establishment of a best practice governance framework including options to enhance national consistency (as per the PC's term of reference no. 5) will augment and support the Department's initiatives with respect to inventory control of unmarked plastic explosives into and within Australia.

PC's terms of reference and regulatory compliance costs associated with the Marplex authorisation scheme

81. Article 4 of the PC's terms of reference indicates that the PC seeks to report on the efficiency and effectiveness of current institutional and regulatory frameworks for chemicals and plastics regulation in Australia, including in achieving economic outcomes.

82. The monitoring and regulation of stocks of unmarked plastic explosives as well as compliance with new packaging and labelling conventions may impose some regulatory

costs on organisations or individuals holding existing stocks of unmarked plastic explosives. However, economic impact upon government and non-government sectors in complying with the new regime is minimised by inclusion of provisions which enable individuals and organisations, with ministerial authorisation, to continue to use existing stocks of unmarked plastic explosives for a prescribed period at the expiry of which they must be surrendered, wholly consumed or destroyed. These provisions assist private and public sectors (including State and Territory law enforcement groups) in reducing compliance costs associated with the Marplex regulatory scheme.

Other provisions of the Act

Destruction of plastic explosives by overseas Australian Defence Force or overseas Australian Federal Police operations

83. Section 72.26 allows member of the ADF and the AFP to destroy an unmarked plastic explosive if the plastic explosive was obtained in the course of an ADF or AFP operation outside Australia.

Forfeited or surrendered plastic explosives

84. Section 72.24 provides that if a court convicts a person of one of the offences in relation to plastic explosives, or makes an order under the *Crimes Act 1914* (Cth), the court may order the forfeiture of the unmarked plastic explosive to the Commonwealth.

85. Once forfeited to the Commonwealth, the unmarked plastic explosive may be used as the responsible Minister (Attorney-General or Minister for Defence) directs. Such use may include that it be used for research, development or testing of new or modified explosives, development or testing of explosives detection equipment or training in explosives detection or forensic science. The responsible Minister may also direct that forfeited unmarked plastic explosives be destroyed.

86. Section 72.25 provides that a person or organisation may surrender unmarked plastic explosives to the Commonwealth at any time. Unmarked plastic explosives which are surrendered to the Commonwealth become the property of the Commonwealth and may be used in a manner as the responsible Minister directs. This provision allows for stocks of unmarked plastic explosives to be handed over to the authorities in circumstances where they are subsequently discovered in sheds etc.

Review by the Administrative Appeals Tribunal (AAT) of authorisation decisions

87. An application may be made to the AAT for a review of the Attorney-General's decision to refuse to grant an authorisation (s 72.30) or the Attorney-General's decision to specify a condition or restriction in an authorisation made under section 72.18(1) (authorisation for research), 72.19(1) (authorisation for defence and police purposes), 72.20(1) (authorisation for use of existing stocks) or 72.21(2) (authorisation for manufacturers).

88. An application for administrative review of a decision to refuse an authorisation or qualify its ambit may only be made by a person or organisation to whom/which the authorisation applies.

Consequential amendments – Customs Act

89. Division 72 of the Criminal Code amends the Customs Act to give the Australian Customs Service appropriate powers to regulate, investigate, search and seize in relation to unmarked plastic explosives. Such powers of search and seizure are necessary to facilitate the application of the legislation at Australia's borders.