



National Security Information (Criminal and Civil Proceedings) Act 2004

Act No. 150 of 2004 as amended

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The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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An Act relating to the protection of certain information from disclosure in federal criminal proceedings and civil proceedings, and for related purposes

Part 1—Preliminary

1 Short title *[see Note 1]*

This Act may be cited as the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	14 December 2004
2. Sections 3 to 49	The 28th day after the day on which this Act receives the Royal Assent.	11 January 2005

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Object of this Act

- (1) The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.
- (2) In exercising powers or performing functions under this Act, a court must have regard to the object of this Act.

4 Extension of Act to external Territories

This Act extends to every external Territory.

5 Act binds Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) This Act does not make the Crown liable to be prosecuted for an offence.

6 Application of Act to federal criminal proceedings

- (1) Subject to subsection (2), this Act applies to a federal criminal proceeding, whether begun before, on or after the day on which this section commences, if the prosecutor gives notice in writing to the defendant, the defendant's legal representative and the court that this Act applies to the proceeding.
- (2) If the prosecutor gives the notice after the proceeding begins, this Act only applies to the parts of the proceeding that occur after the notice is given (whether or not those parts began before that time).
- (3) A notice given under this section is not a legislative instrument.

6A Application of Act to civil proceedings

Application to civil proceedings—Attorney-General not a party to proceedings

- (1) If:

- (a) the Attorney-General is not a party to a civil proceeding, whether begun before, on or after the day on which this section commences; and
- (b) the Attorney-General gives notice in writing to the parties to the proceeding, the legal representatives of the parties to the proceeding and the court that this Act applies to the proceeding;

then, subject to subsection (5), this Act applies to the proceeding.

Application to civil proceedings—Attorney-General a party to proceedings

(2) If:

- (a) the Attorney-General is, or becomes, a party to a civil proceeding, whether begun before, on or after the day on which this section commences; and
- (b) the Minister appointed under subsection (3) or (4) gives notice in writing to the parties to the proceeding, the legal representatives of the parties to the proceeding and the court that this Act applies to the proceeding;

then:

- (c) subject to subsection (5), this Act applies to the proceeding; and
- (d) the Minister must perform the functions and exercise the powers, in relation to the proceeding, that are conferred on the Attorney-General under Divisions 1A, 1, 2, 3 and 4 of Part 3A; and
- (e) references in:
 - (i) Division 4 of Part 2; and
 - (ii) Divisions 1A, 1, 2, 3 and 4 of Part 3A; and
 - (iii) Division 2 of Part 5;to the Attorney-General (other than references to the Attorney-General as a party to the proceeding) are to be read as references to the Minister.

Attorney-General to appoint alternative Minister

- (3) The Attorney-General must, as soon as possible after the commencement of this section, appoint in writing another Minister for the purposes of the operation of subsection (2) in relation to all civil proceedings.

Section 6A

- (4) If the Minister appointed under subsection (3) is, or becomes, a party to a civil proceeding to which the Attorney-General also is or becomes a party, the Attorney-General must appoint a different Minister for the purposes of the operation of subsection (2) in relation to that civil proceeding.

Application to civil proceedings—notice given after a proceeding has begun

- (5) If the Attorney-General or the Minister gives the notice after the proceeding has begun, this Act only applies to the parts of the proceeding that occur after the notice is given (whether or not those parts began before that time).

Notice and appointment are not legislative instruments

- (6) A notice given under subsection (1) or (2) and an appointment made by the Attorney-General under subsection (3) or (4) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Part 2—Interpretation

Division 1—Definitions

7 Definitions

In this Act, unless the contrary intention appears:

apply to the court means apply to the court either orally or in writing.

ceases to be subject to appeal has the meaning given by section 20.

civil proceeding has the meaning given by section 15A.

court official means an individual who:

- (a) is employed or engaged by a court to perform services in the court in relation to a proceeding in the court; or
- (b) in relation to a federal criminal proceeding in a court—supervises the defendant in the court.

criminal proceeding has the meaning given by section 13.

defendant, in relation to a federal criminal proceeding, has the meaning given by subsection 15(1).

disclose information in a criminal proceeding or a civil proceeding means:

- (a) give the information in evidence in the proceeding; or
- (b) otherwise disclose the information to the court conducting the proceeding or to any person for the purposes of the proceeding;

whether orally or by giving, or disclosing the contents of, a document.

document has the same meaning as in the *Evidence Act 1995*.

federal criminal proceeding has the meaning given by section 14.

information means information as defined in subsection 90.1(1) of the *Criminal Code*, whether or not in the public domain.

Section 7

in permitted circumstances has the meaning given by section 16.

international relations has the meaning given by section 10.

law enforcement interests has the meaning given by section 11.

likely to prejudice national security has the meaning given by section 17.

national security has the meaning given by section 8.

national security information means information:

- (a) that relates to national security; or
- (b) the disclosure of which may affect national security.

prosecutor, in relation to a federal criminal proceeding, means the Director of Public Prosecutions or a person representing the Director in relation to the proceeding.

security has the meaning given by section 9.

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.

trial includes a proceeding for the summary conviction of a person.

Division 2—National security and related definitions

8 Meaning of *national security*

In this Act, *national security* means Australia's defence, security, international relations or law enforcement interests.

9 Meaning of *security*

In this Act, *security* has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

10 Meaning of *international relations*

In this Act, *international relations* means political, military and economic relations with foreign governments and international organisations.

11 Meaning of *law enforcement interests*

In this Act, *law enforcement interests* includes interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
- (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
- (c) the protection and safety of informants and of persons associated with informants;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

Division 3—Federal criminal proceeding and related definitions

13 Meaning of *criminal proceeding*

- (1) In this Act, *criminal proceeding* means a proceeding for the prosecution, whether summarily or on indictment, of an offence or offences.
- (2) To avoid doubt, each of the following is part of a *criminal proceeding*:
 - (a) a bail proceeding;
 - (b) a committal proceeding;
 - (c) the discovery, exchange, production, inspection or disclosure of intended evidence, documents or reports;
 - (d) a sentencing proceeding;
 - (e) an appeal proceeding;
 - (f) a proceeding with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth (within the meaning of subsection 39B(1B) of the *Judiciary Act 1903*) in relation to:
 - (i) a decision to prosecute a person for one or more offences against a law of the Commonwealth; or
 - (ii) a related criminal justice process decision (within the meaning of subsection 39B(3) of that Act);
 - (g) any other pre-trial, interlocutory or post-trial proceeding prescribed by regulations for the purposes of this paragraph.
- (3) To avoid doubt, a re-trial, and proceedings relating to the re-trial (including those mentioned in subsection (2)), are part of the same criminal proceeding as the trial.

14 Meaning of *federal criminal proceeding*

In this Act, *federal criminal proceeding* means a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth.

15 Meaning of *defendant* in relation to a federal criminal proceeding

- (1) In this Act, *defendant*, in relation to a federal criminal proceeding, means a person charged with the offence or offences concerned (even if the proceeding occurs after any conviction of the person).
- (2) If there is more than one defendant in a federal criminal proceeding, this Act applies separately in relation to each defendant.

Division 3A—Civil proceeding definition

15A Meaning of *civil proceeding*

- (1) In this Act, *civil proceeding* means any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding.

Note: The Act only applies to a civil proceeding in respect of which a notice has been given under section 6A.

- (2) To avoid doubt, each of the following is part of a *civil proceeding*:
- (a) any proceeding on an ex parte application (including an application made before pleadings are filed in a court);
 - (b) the discovery, exchange, production, inspection or disclosure of intended evidence, documents or reports;
 - (c) an appeal proceeding;
 - (d) any interlocutory or other proceeding prescribed by regulations for the purposes of this paragraph.
- (3) To avoid doubt, a re-hearing, and proceedings relating to the re-hearing (including those mentioned in subsection (2)), are part of the same civil proceeding as the hearing.

Division 4—Other interpretation provisions

16 Disclosure of information in permitted circumstances

A person discloses information *in permitted circumstances* if:

- (a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceeding; or
- (b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.

17 Meaning of *likely to prejudice national security*

- (1) A disclosure of information is *likely to prejudice national security* if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.
- (2) The contravention of a requirement is *likely to prejudice national security* if there is a real, and not merely a remote, possibility that the contravention will prejudice national security.

18 Operation of other Acts etc.

This Act does not affect the operation of the provisions of any other Act, other than:

- (a) sections 26, 27, 29, 43 to 45 and 48 of the *Evidence Act 1995*; and
- (b) sections 70, 80 and 80A of the *Judiciary Act 1903*.

19 General powers of a court

Power of a court in a federal criminal proceeding

- (1) The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.
- (1A) In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as the court

Section 19

considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

- (a) the court is satisfied that it is in the interest of national security to make such orders; and
- (b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a federal criminal proceeding not to prevent later stay order

- (2) An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant's right to receive a fair hearing.

Power of a court in a civil proceeding

- (3) The power of a court to control the conduct of a civil proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.
- (3A) In addition to the powers of a court under this Act in a civil proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:
 - (a) the court is satisfied that it is in the interest of national security to make such orders; and
 - (b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a civil proceeding not to prevent later stay order

- (4) An order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.

Factors to be considered when deciding whether to order a stay of a civil proceeding

- (5) In deciding whether to order a stay of the civil proceeding, the court must consider:
- (a) the extent of any financial loss that a party would suffer as a result of the proceeding being stayed; and
 - (b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and
 - (c) any other matter the court considers relevant.

20 When an order of a court ceases to be subject to appeal

An order of a court *ceases to be subject to appeal* when:

- (a) the period for appealing against the order ends without an appeal being made; or
- (b) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 1A Attorney-General etc. may attend and be heard at federal criminal proceedings

Section 20A

Part 3—Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 1A—Attorney-General etc. may attend and be heard at federal criminal proceedings

20A Attorney-General etc. may attend and be heard at federal criminal proceedings

If, in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

- (a) the Attorney-General;
- (b) the Attorney-General's legal representative;
- (c) any other representative of the Attorney-General.

Division 1B—Court to consider hearing in camera etc.

20B Court to consider hearing in camera etc.

- (1) If, during a hearing in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:
 - (a) subsection 19(1A);
 - (b) section 93.2 of the *Criminal Code*.
- (2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 22.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 1 Management of information in federal criminal proceedings

Section 21

Division 1—Management of information in federal criminal proceedings

21 National security information hearings

- (1) At any time during a federal criminal proceeding, the Attorney-General, the Attorney-General's legal representative, the prosecutor, the defendant or the defendant's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:
 - (a) the making of an arrangement of the kind mentioned in section 22; and
 - (b) the giving of a notice under section 24.
- (1A) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:
 - (a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the prosecutor, the defendant and the defendant's legal representative;
 - (b) if the applicant is the prosecutor—the Attorney-General, the defendant and the defendant's legal representative;
 - (c) if the applicant is the defendant or the defendant's legal representative—the Attorney-General and the prosecutor.
- (2) The court must hold the hearing as soon as possible after the application is made.

22 Arrangements for federal criminal proceedings about disclosures etc. of national security information

- (1) At any time during a federal criminal proceeding:
 - (a) the Attorney-General, on the Commonwealth's behalf; and
 - (b) the prosecutor; and
 - (c) the defendant, or the defendant's legal representative on the defendant's behalf;

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may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

- (2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

23 Protection of national security information disclosed in a federal criminal proceeding

- (1) The regulations may prescribe:
- (a) ways in which national security information that is disclosed, or to be disclosed, in a federal criminal proceeding must be stored, handled or destroyed; and
 - (b) ways in which, and places at which, such information may be accessed and documents or records relating to such information may be prepared.
- (2) This section does not apply to information that is the subject of an order that is in force under section 22.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in federal criminal proceedings

Section 24

Division 2—Attorney-General's certificates for protection of information in federal criminal proceedings

Subdivision A—Notifying Attorney-General etc. of expected disclosure in federal criminal proceedings

24 Notification of expected disclosure of national security information

- (1) If the prosecutor, the defendant or the defendant's legal representative knows or believes that:
 - (a) he or she will disclose national security information in a federal criminal proceeding; or
 - (b) a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by the person's mere presence; or
 - (c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal criminal proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this subsection is an offence in certain circumstances: see section 42.

Note 2: Section 25 deals with the situation where the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in a witness's answer is national security information.

When not required to give notice

- (1A) However, a person need not give notice about the disclosure of information under subsection (1) if:
 - (a) another person has already given notice about the disclosure of the information under that subsection; or
 - (b) the disclosure of the information:

- (i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or
- (ii) is the subject of an order that is in force under section 22 or 31; or
- (c) the disclosure of the information by the witness to be called:
 - (i) is the subject of a certificate given to the person under section 28 and the certificate still has effect; or
 - (ii) is the subject of an order that is in force under section 22 or 31; or
- (d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7) or 28(10).

Requirements for notice

- (2) The notice must:
 - (a) be in the prescribed form; and
 - (b) if paragraph (c) does not apply—include a description of the information; and
 - (c) if the information is contained in a document—be accompanied by a copy of the document or by an extract from the document, that contains the information.

Informing the court etc. of an expected disclosure

- (3) A person who gives notice under subsection (1) must also advise the following, in writing, that notice has been given to the Attorney-General:
 - (a) if the person is the prosecutor:
 - (i) the court; and
 - (ii) the defendant; and
 - (iii) the defendant's legal representative; and
 - (iv) any other person mentioned in paragraph (1)(b) or (c); and
 - (b) if the person is the defendant or the defendant's legal representative:
 - (i) the court; and
 - (ii) the prosecutor; and
 - (iii) any other person mentioned in paragraph (1)(b) or (c).

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in federal criminal proceedings

Section 25

Note: Failure to give advice as required by this subsection is an offence in certain circumstances: see section 42.

- (4) The advice must include a description of the information, unless the advice is being given by the defendant or the defendant's legal representative to the prosecutor.

Note: A contravention of this subsection is an offence in certain circumstances: see section 42.

Adjournment to allow sufficient time for Attorney-General to act on the notice

- (5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:
- (a) gives a copy of a certificate to the court under subsection 26(4) or 28(3); or
 - (b) gives advice to the court under subsection 26(7) or 28(10) (which applies if a decision is made not to give a certificate).

Subdivision B—Notifying Attorney-General etc. where disclosure expected by witness answering question in federal criminal proceedings

25 Preventing witnesses from disclosing information in federal criminal proceedings by not allowing them to answer questions

Witness expected to disclose information in giving evidence

- (1) This section applies if:
- (a) a witness is asked a question in giving evidence in a federal criminal proceeding; and
 - (b) the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in the witness's answer is national security information.
- (2) The prosecutor, the defendant or the defendant's legal representative must advise the court of that knowledge or belief.
-

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Note: Failure to advise the court is an offence: see section 42.

- (2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:
- (a) another person has already advised the court about the disclosure of the information under that subsection; or
 - (b) a notice has been given to the Attorney-General under subsection 24(1) about the disclosure of the information; or
 - (c) the disclosure of the information:
 - (i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or
 - (ii) is the subject of an order that is in force under section 22 or 31; or
 - (d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7).

Witness to give written answer

- (3) If the court is advised under subsection (2) and the witness would, apart from this section, be required to answer the question, the court must order that the witness give the court a written answer to the question.
- (4) The court must show the written answer to the prosecutor and, if present, the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General.
- (5) If:
- (a) under subsection (4), the Attorney-General's representative (other than the Attorney-General's legal representative) is shown the written answer; and
 - (b) he or she knows or believes that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information;
- then he or she must advise the prosecutor of that knowledge or belief.

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Division 2 Attorney-General's certificates for protection of information in federal criminal proceedings

Section 26

Prosecutor must give notice to Attorney-General etc.

- (6) If the prosecutor knows, believes, or is advised under subsection (5), that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information, then the prosecutor must:
- (a) advise the court of that knowledge, belief or advice; and
 - (b) as soon as practicable, give the Attorney-General notice in writing of that knowledge, belief or advice.

Note: Failure to advise the court or to notify the Attorney-General is an offence in certain circumstances: see section 42.

- (7) However, the prosecutor need not advise the court or give the Attorney-General notice about the written answer under subsection (6) if the information disclosed by the written answer:
- (a) is the subject of a certificate or advice given to the prosecutor under section 26 and the certificate still has effect; or
 - (b) is the subject of an order that is in force under section 22 or 31.

Adjournment to allow sufficient time for Attorney-General to act on the notice

- (8) If the court is advised under subsection (6), it must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:
- (a) gives a copy of a certificate to the court under subsection 26(4); or
 - (b) gives advice to the court under subsection 26(7) (which applies if a decision is made not to give a certificate).

Subdivision C—Attorney-General's federal criminal proceedings certificates

26 Attorney-General's criminal non-disclosure certificate

- (1) This section applies if:
- (a) any of the following happens:
-

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- (i) the Attorney-General is notified under section 24 that the prosecutor, the defendant or the defendant's legal representative knows or believes that he or she, or another person, will disclose information in a federal criminal proceeding;
 - (ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs 24(1)(a) to (c) will arise under which the prosecutor, the defendant, the defendant's legal representative or another person will disclose information in a federal criminal proceeding;
 - (iii) the Attorney-General is notified under subsection 25(6) that the prosecutor knows, believes or is advised that an answer by a witness in a hearing in relation to a federal criminal proceeding will disclose information; and
- (b) paragraph 28(1)(a) (about the mere presence of a witness constituting disclosure) does not apply; and
 - (c) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate—case where information is in the form of a document

- (2) If the information would be disclosed in a document (the **source document**), the Attorney-General may give each potential discloser (see subsection (8)) of the information in the proceeding:
 - (a) any of the following:
 - (i) a copy of the document with the information deleted;
 - (ii) a copy of the document with the information deleted and a summary of the information attached to the document;
 - (iii) a copy of the document with the information deleted and a statement of facts that the information would, or would be likely to, prove attached to the document;together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the copy, or the copy and the statement or summary; or

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- (b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

Attorney-General may give a certificate—case where information is not in the form of a document

- (3) If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:
 - (a) either:
 - (i) a written summary of the information; or
 - (ii) a written statement of facts that the information would, or would be likely to, prove;
together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the summary or statement; or
 - (b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).
- (4) The Attorney-General must give the court a copy of:
 - (a) in any case—the certificate; and
 - (b) if paragraph (2)(a) applies—the source document, the document mentioned in subparagraph (2)(a)(i), (ii) or (iii) and the summary or statement mentioned in subparagraph (2)(a)(ii) or (iii); and
 - (c) if paragraph (3)(a) applies—the summary or statement mentioned in that paragraph.

Duration of a certificate

- (5) The certificate ceases to have effect when any order by the court under section 31 on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Certificate is not a legislative instrument

- (6) A certificate given to a potential discloser under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Attorney-General may decide not to give a certificate

- (7) If the Attorney-General decides not to do as mentioned in subsection (2) or (3), the Attorney-General must, in writing, advise each potential discloser and the court of his or her decision.

Definition of potential discloser

- (8) Each of the following persons is a **potential discloser** of the information in the proceeding:
- (a) in all cases—the prosecutor, the defendant and the defendant's legal representative;
 - (b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than the prosecutor, the defendant or the defendant's legal representative—the other person;
 - (c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

27 Consequences of Attorney-General giving criminal non-disclosure certificate

Consequences of certificate for pre-trial proceedings

- (1) If, in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26 at any time during a part of the proceeding that occurs before the trial begins, then the certificate is conclusive evidence, during that part of the proceeding and any later part that occurs before the hearing mentioned in paragraph (3)(a) begins, that disclosure of the information in the proceeding is likely to prejudice national security.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in federal criminal proceedings

Section 28

Court hearing

- (3) If, in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26 at any time during the proceeding, the court must:
 - (a) in any case where the certificate is given to the court before the trial begins—before the trial begins, hold a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information; or
 - (b) if subparagraph 26(1)(a)(i) or (iii) applies and the certificate is given to the court after the trial begins—continue the adjournment of the proceeding mentioned in subsection 24(5) or 25(8) for the purpose of holding a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information; or
 - (c) if subparagraph 26(1)(a)(ii) applies and the certificate is given to the court after the trial begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information.
- (4) If the Attorney-General revokes the certificate at any time while the proceeding is adjourned or the hearing is being held, the court must end the adjournment or the hearing.
- (5) The closed hearing requirements apply to the hearing.

28 Attorney-General's criminal witness exclusion certificate

- (1) This section applies if:
 - (a) either:
 - (i) the Attorney-General is notified under section 24 that the prosecutor, the defendant or the defendant's legal representative knows or believes that a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the person's mere presence; or
 - (ii) the Attorney-General for any reason expects that a person whom the prosecutor, the defendant or the defendant's legal representative intends to call as a

witness in a federal criminal proceeding will disclose
information by his or her mere presence; and

- (b) the Attorney-General considers that the disclosure is likely to
prejudice national security.

Attorney-General may give a certificate

- (2) The Attorney-General may give a certificate to the prosecutor, the
defendant or the defendant's legal representative, as the case may
be, that states that the prosecutor, the defendant or the defendant's
legal representative must not call the person as a witness in the
federal criminal proceeding.
- (3) The Attorney-General must give a copy of the certificate to the
court.

Duration of a certificate

- (4) The certificate ceases to have effect when any order by the court
under section 31 on the hearing in relation to the certificate ceases
to be subject to appeal, unless the certificate is revoked by the
Attorney-General before then.

Court hearing

- (5) The court must:
- (a) if the certificate is given to the court before the trial begins—
before the trial begins, hold a hearing to decide whether to
make an order under section 31 in relation to the calling of
the witness; or
- (b) if the certificate is given to the court after the trial begins—
adjourn the proceeding for the purpose of holding a hearing
to decide whether to make an order under section 31 in
relation to the calling of the witness.
- (7) The closed hearing requirements apply to the hearing.
- (8) If the Attorney-General revokes the certificate at any time while
the proceeding is adjourned or the hearing is being held, the court
must end the adjournment or the hearing.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in federal criminal proceedings

Section 28

Certificate is not a legislative instrument

- (9) A certificate given to the prosecutor, the defendant or the defendant's legal representative under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Attorney-General may decide not to give a certificate

- (10) If the Attorney-General decides not to do as mentioned in subsection (2), the Attorney-General must, in writing, advise the prosecutor, the defendant or the defendant's legal representative, as the case requires, and the court of his or her decision.

Division 3—Closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings

29 Closed hearing requirements in federal criminal proceedings

- (1) This section sets out the *closed hearing requirements* for a hearing under subsection 27(3) or 28(5).

Note: The fact that those provisions provide that the closed hearing requirements apply to certain hearings does not prevent the court from exercising any powers that it otherwise has eg to exclude persons (such as members of the public) from other hearings or to prevent publication of evidence.

Who may be present

- (2) Subject to this section, no-one, including the jury (if any), must be present at the hearing except:
- (a) the magistrate, judge or judges comprising the court; and
 - (b) court officials; and
 - (c) the prosecutor; and
 - (d) the defendant; and
 - (e) any legal representative of the defendant; and
 - (f) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and
 - (g) any witnesses allowed by the court.
- (3) If the court considers that the information concerned would be disclosed to:
- (a) the defendant; or
 - (b) any legal representative of the defendant who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned; or
 - (c) any court official who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned;
- and that the disclosure would be likely to prejudice national security, the court may order that the defendant, the legal

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 3 Closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings

Section 29

representative or the court official is not entitled to be present during any part of the hearing in which the prosecutor or any person mentioned in paragraph (2)(f):

- (d) gives details of the information; or
- (e) gives information in arguing why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

Defendant's submissions about prosecutor's non-disclosure arguments

- (4) If, at the hearing, the prosecutor or any person mentioned in paragraph (2)(f) argues that any information should not be disclosed, or that the witness should not be called to give evidence, in the proceeding, the defendant and any legal representative of the defendant must be given the opportunity to make submissions to the court about the argument that the information should not be disclosed or the witness should not be called.

Court to make etc. record of hearing

- (5) The court must:
 - (a) whether before or after it makes an order under section 31, make a record of the hearing; and
 - (b) keep the record; and
 - (c) make the record available to:
 - (i) a court that hears an appeal against, or reviews, its decision on the hearing; and
 - (ii) the prosecutor; and
 - (iii) the Attorney-General and any legal representative of the Attorney-General; and
 - (d) allow any legal representative of the defendant, who has been given a security clearance at the level considered appropriate by the Secretary, to have access to the record, and to prepare documents or records in relation to the record, in a way and at a place prescribed by the regulations for the purposes of this paragraph; and
 - (e) not make the record available to, nor allow the record to be accessed by, anyone except as mentioned in this subsection.

Copy of proposed record to be given to prosecutor etc.

- (6) Before the court makes the record under subsection (5), the court must give a copy of the proposed record to the prosecutor and the Attorney-General (each of whom is a **record recipient**).

Statement recipient may request variation of proposed record

- (7) If a record recipient considers that making the proposed record available as mentioned in subparagraph (5)(c)(i) and allowing access to it as mentioned in paragraph (5)(d) will disclose information and the disclosure is likely to prejudice national security, the record recipient may request that the court vary the proposed record so that the information will not be disclosed.

Court's decision

- (8) The court must make a decision on the request.

29A Request to delay making record available pending appeal decision

- (1) If the court makes a decision under subsection 29(8), a record recipient (within the meaning of subsection 29(6)) may request that the court delay making the record to allow time for the record recipient to:
- (a) decide whether to appeal against the court's decision; and
 - (b) if the recipient decides to do so—make the appeal.
- (2) The court must grant the request.

31 Court orders in federal criminal proceedings

Non-disclosure certificate hearings

- (1) After holding a hearing required under subsection 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of subsections (2), (4) and (5) of this section.
- (2) If the information is in the form of a document, the court may order under this subsection that:

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

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Section 31

- (a) any person to whom the certificate mentioned in subsection 26(2) or (3) was given in accordance with that subsection; and
 - (b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and
 - (c) any other specified person;
- must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may, subject to subsection (3), disclose (which disclosure may or may not be the same as was permitted in the Attorney-General's certificate) in the proceeding:
- (d) a copy of the document with the information deleted; or
 - (e) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or
 - (f) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove attached to the document.
- (3) If the court makes an order under subsection (2), the copy of the document is admissible in evidence if, apart from the order, it is admissible. However if:
- (a) a person who is the subject of the order seeks to adduce evidence of the contents of the document; and
 - (b) the contents of the document are admissible in evidence in the proceeding;
- the person may adduce evidence of the contents of the document by tendering the copy, or the copy and the summary or statement, mentioned in that subsection.
- (4) The court may, regardless of the form of the information, order under this subsection that:
- (a) any person to whom the certificate mentioned in subsection 26(2) or (3) was given in accordance with that subsection; and
 - (b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and
 - (c) any other specified person;

must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

- (5) The court may, regardless of the form of the information, order under this subsection that any person may disclose the information in the proceeding. However, the information is only admissible in evidence in the proceeding if, apart from the order, it is admissible.

Witness exclusion certificate hearings

- (6) After holding a hearing required under subsection 28(5), the court must order that:
- (a) the prosecutor, the defendant or the defendant's legal representative must not call the person as a witness in the federal criminal proceeding; or
 - (b) the prosecutor, the defendant or the defendant's legal representative may call the person as a witness in the federal criminal proceeding.

Factors to be considered by court

- (7) The Court must, in deciding what order to make under this section, consider the following matters:
- (a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:
 - (i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or
 - (ii) where the certificate was given under subsection 28(2)—the witness were called;
 - (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;
 - (c) any other matter the court considers relevant.
- (8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 3 Closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings

Section 32

32 Reasons for court orders

Requirement to give reasons

- (1) The court must give a written statement of its reasons for making an order under section 31 to the following people:
 - (a) the person who is the subject of the order;
 - (b) the prosecutor;
 - (c) the defendant;
 - (d) any legal representative of the defendant;
 - (e) the Attorney-General and any legal representative of the Attorney-General.

Copy of proposed statement to be given to prosecutor etc.

- (2) Before the court gives its statement under subsection (1), the court must give a copy of the proposed statement to the prosecutor and the Attorney-General (each of whom is a **statement recipient**).

Statement recipient may request variation of proposed statement

- (3) If a statement recipient considers that giving the proposed statement will disclose information and the disclosure is likely to prejudice national security, the statement recipient may request that the court vary the proposed statement so that the information will not be disclosed.

Court's decision

- (4) The court must make a decision on the request.

33 Request to delay giving section 32 statement pending appeal decision

- (1) If the court makes a decision under section 32, a statement recipient (within the meaning of that section) may request that the court delay giving its statement of reasons to allow time for the statement recipient to:
 - (a) decide whether to appeal against the court's decision; and
 - (b) if the statement recipient decides to do so—make the appeal.

- (2) The court must grant the request.

34 Period of operation of court orders

An order made by the court under this Division:

- (a) does not come into force until the order ceases to be subject to appeal; and
- (b) remains in force until it is revoked by the court.

35 Consequence of certain court orders

- (1) If:

- (a) in accordance with paragraph 27(3)(a), the court holds a hearing to decide whether to make an order under section 31 in relation to information described in a certificate given to the court before the trial in a federal criminal proceeding began; and
- (b) after holding the hearing, the court makes an order under subsection 31(5) that any person may disclose the information;

the order does not have the effect that there are grounds for re-conducting any part of the proceeding that took place before the trial began.

- (2) If:

- (a) in accordance with paragraph 28(5)(a), the court holds a hearing to decide whether to make an order under section 31 in relation to the calling of a witness that is the subject of a certificate given to the court before the trial in a federal criminal proceeding began; and
- (b) after holding the hearing, the court makes an order under paragraph 31(6)(b) that the person may be called as a witness;

the order does not have the effect that there are grounds for re-conducting any part of the proceeding that took place before the trial began.

Part 3 Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 3 Closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings

Section 36

36 Adjourment after certain court orders

- (1) If the court makes an order under section 31, the prosecutor may apply to the court for an adjournment of the federal criminal proceeding to allow time for the prosecutor to:
 - (a) decide whether to appeal against the court order or to withdraw the proceeding; and
 - (b) if the prosecutor decides to do so—make the appeal or withdrawal.
- (2) If the court makes an order under section 31, the defendant may apply to the court for an adjournment of the federal criminal proceeding to allow time for the defendant to:
 - (a) decide whether to appeal against the court order; and
 - (b) if the defendant decides to do so—make the appeal.
- (3) The court must grant the adjournment.

Division 4—Appeals in federal criminal proceedings

36A Appeal against court decision under section 29

- (1) A record recipient (within the meaning of subsection 29(6)) may appeal against a decision of the court made under subsection 29(8).
- (2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

37 Appeals against court orders under section 31

- (1) The prosecutor, the defendant or the Attorney-General may appeal against any order of the court made under section 31.
- (2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

38 Appeal against court decisions under section 32

- (1) A statement recipient (within the meaning of section 32) may appeal against any decision of the court made under section 32.
- (2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

Part 3A Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 1A Attorney-General etc. may attend and be heard at civil proceedings

Section 38AA

Part 3A—Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 1A—Attorney-General etc. may attend and be heard at civil proceedings

38AA Attorney-General etc. may attend and be heard at civil proceedings

If, in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

- (a) the Attorney-General;
- (b) the Attorney-General's legal representative;
- (c) any other representative of the Attorney-General.

Division 1B—Court to consider hearing in camera etc.

38AB Court to consider hearing in camera etc.

- (1) If, during a hearing in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:
 - (a) subsection 19(3A);
 - (b) section 93.2 of the *Criminal Code*.
- (2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 38B.

Part 3A Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 1 Management of information in civil proceedings

Section 38A

Division 1—Management of information in civil proceedings

38A National security information hearings

- (1) At any time during a civil proceeding, the Attorney General, the Attorney-General's legal representative, a party to the proceeding or a party's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:
 - (a) the making of an arrangement of the kind mentioned in section 38B; and
 - (b) the giving of a notice under section 38D.
- (2) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:
 - (a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the parties and the parties' legal representatives;
 - (b) if the applicant is a party or a party's legal representative—the Attorney-General, the other parties and the other parties' legal representatives.
- (4) The court must hold the hearing as soon as possible after the application is made.

38B Arrangements for civil proceedings about disclosures etc. of national security information

- (1) At any time during a civil proceeding:
 - (a) the Attorney-General, on the Commonwealth's behalf; and
 - (b) the parties to the proceeding, or their legal representatives on their behalf;may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

- (2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

38C Protection of national security information disclosed in a civil proceeding

- (1) The regulations may prescribe:
- (a) ways in which national security information that is disclosed, or to be disclosed, in a civil proceeding must be stored, handled or destroyed; and
 - (b) ways in which, and places at which, such information may be accessed and documents or records relating to such information may be prepared.
- (2) This section does not apply to information that is the subject of an order that is in force under section 38B.

Part 3A Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in civil proceedings

Section 38D

Division 2—Attorney-General's certificates for protection of information in civil proceedings

Subdivision A—Notifying Attorney-General etc. of expected disclosure in civil proceedings

38D Notification of expected disclosure of national security information

- (1) If a party, or the legal representative of a party, to a civil proceeding knows or believes that:
 - (a) he or she will disclose national security information in the proceeding; or
 - (b) a person whom he or she intends to call as a witness in the proceeding will disclose national security information in giving evidence or by the person's mere presence; or
 - (c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in the proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this section is an offence in certain circumstances: see section 46C.

Note 2: Section 38E deals with the situation where a party, or a party's legal representative, knows or believes that information that will be disclosed in a witness's answer is national security information.

- (2) However, a party or a party's legal representative need not give the Attorney-General notice about the disclosure of the information under subsection (1) if:
 - (aa) another person has already given notice about the disclosure of the information under that subsection; or
 - (a) the information to be disclosed:

- (i) is the subject of a certificate given to the party or the legal representative under section 38F and the certificate still has effect; or
- (ii) is the subject of an order in force under section 38B or 38L; or
- (b) the disclosure of information by the witness to be called:
 - (i) is the subject of a certificate given to the party or the legal representative under section 38H and the certificate still has effect; or
 - (ii) is the subject of an order in force under section 38B or 38L; or
- (c) the Attorney-General has given the party or the legal representative advice about the disclosure of the information under subsection 38F(7) or 38H(9).

Note: Subsections 38F(6) and 38H(5) specify when a certificate ceases to have effect.

Requirements for notice

- (3) The notice must:
 - (a) be in the prescribed form; and
 - (b) if paragraph (c) does not apply—include a description of the information; and
 - (c) if the information is contained in a document—be accompanied by a copy of the document or by an extract from the document, that contains the information.

Informing the court etc. of an expected disclosure

- (4) A person who gives notice under subsection (1) must also advise, in writing:
 - (a) the court; and
 - (b) the other parties; and
 - (c) the other parties' legal representatives; and
 - (d) any other person mentioned in paragraph (1)(b) or (c);that notice has been given to the Attorney-General. The advice must include a description of the information.

Note: Failure to give advice as required by this section is an offence in certain circumstances: see section 46C.

Part 3A Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 2 Attorney-General's certificates for protection of information in civil proceedings

Section 38E

Adjournment to allow sufficient time for Attorney-General to act on the notice

- (5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:
- (a) gives a copy of a certificate to the court under subsection 38F(5) or 38H(4); or
 - (b) gives advice to the court under subsection 38F(7) or 38H(9) (which applies if a decision is made not to give a certificate).

Subdivision B—Notifying Attorney-General etc. where disclosure expected by witness answering question in civil proceedings

38E Preventing witnesses from disclosing information in civil proceedings by not allowing them to answer questions

Witness expected to disclose information in giving evidence

- (1) This section applies if:
- (a) a witness is asked a question in giving evidence in a civil proceeding; and
 - (b) a party, or the legal representative of a party, to the proceeding knows or believes that information that will be disclosed in the witness's answer is national security information.
- (2) The party or legal representative must advise the court of that knowledge or belief.
- Note: Failure to advise the court is an offence: see section 46C.
- (2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:
- (a) another person has already advised the court about the disclosure of the information under that subsection; or
 - (b) a notice has been given to the Attorney-General under subsection 38D(1) about the disclosure of the information; or

- (c) the disclosure of the information:
 - (i) is the subject of a certificate given to the person under section 38F and the certificate still has effect; or
 - (ii) is the subject of an order that is in force under section 38B or 38L; or
- (d) the Attorney-General has given the person advice about the disclosure of the information under subsection 38F(7).

Witness must give written answer to question

- (3) If the court is advised under subsection (2), the court must order that the witness give the court a written answer to the question.

Court must adjourn proceeding

- (4) On receiving the written answer, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. However, the court need not do so if the information disclosed by the written answer:
 - (a) is the subject of a certificate given to the court under section 38F and the certificate still has effect; or
 - (b) is the subject of an order in force under section 38B or 38L.

Note: Subsection 38F(6) specifies when a certificate ceases to have effect.

- (5) If the court adjourns a part of the proceeding under subsection (4), the court must give the written answer to the Attorney-General.
- (6) The court must continue the adjournment until the Attorney-General gives a copy of a certificate to the court under subsection 38F(5) or gives advice to the court under subsection 38F(7) (which applies if a decision is made not to give a certificate).

Subdivision C—Attorney-General's civil proceedings certificates

38F Attorney-General's civil non-disclosure certificate

- (1) This section applies if:
 - (a) any of the following happens:

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Division 2 Attorney-General's certificates for protection of information in civil proceedings

Section 38F

- (i) the Attorney-General is notified under section 38D that a party, or the legal representative of a party, to a civil proceeding knows or believes that he or she or another person will disclose information in the proceeding;
 - (ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs 38D(1)(a) to (c) will arise under which a party, the legal representative of a party or another person will disclose information in a civil proceeding;
 - (iii) the Attorney-General considers that a written answer given by a witness under section 38E in a civil proceeding will disclose information; and
- (b) paragraph 38H(1)(a) (about the mere presence of a witness constituting disclosure) does not apply; and
- (c) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate—case where information is in the form of a document

- (2) If the information would be disclosed in a document (the *source document*), the Attorney-General may give each potential discloser (see subsection (9)) of the information in the proceeding:
- (a) any of the following:
 - (i) a copy of the document with the information deleted;
 - (ii) a copy of the document with the information deleted and a summary of the information attached to the document;
 - (iii) a copy of the document with the information deleted and a statement of facts that the information would, or would be likely to, prove attached to the document;together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the copy, or the copy and the statement or summary; or
 - (b) a certificate that describes the information and states that the potential discloser must not, except in permitted

circumstances, disclose the information (whether in the proceeding or otherwise).

Attorney-General may give a certificate—case where information is not in the form of a document

- (3) If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:
- (a) either:
 - (i) a written summary of the information; or
 - (ii) a written statement of facts that the information would, or would be likely to, prove;together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the summary or statement; or
 - (b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

Certificate may be given at same time as notice is given under section 6A

- (4) If subparagraph (1)(a)(ii) applies in respect of the proceeding, the certificate may be given at the same time as notice is given under section 6A that this Act applies to the proceeding.

Copy of certificate must be given to the court

- (5) The Attorney-General must give the court a copy of:
- (a) in any case—the certificate; and
 - (b) if paragraph (2)(a) applies—the source document, the document mentioned in subparagraph (2)(a)(i), (ii) or (iii) and the summary or statement mentioned in subparagraph (2)(a)(ii) or (iii); and
 - (c) if paragraph (3)(a) applies—the summary or statement mentioned in that paragraph.

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Section 38G

Duration of a certificate

- (6) The certificate ceases to have effect when:
- (a) the court makes an order under section 38B about the disclosure, in the proceeding, of information that is the subject of the certificate, unless the certificate is revoked by the Attorney-General before then; or
 - (b) any order by the court under section 38L on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Attorney-General may decide not to give a certificate

- (7) If the Attorney-General decides not to do as mentioned in subsection (2) or (3), the Attorney-General must, in writing, advise each potential discloser and the court of his or her decision.

Certificate and written advice are not legislative instruments

- (8) A certificate given under subsection (2) or (3) and a written advice given under subsection (7) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Definition of potential discloser

- (9) Each of the following persons is a **potential discloser** of the information in the proceeding:
- (a) in all cases—the parties and the parties' legal representatives;
 - (b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than a party or a party's legal representative—the other person;
 - (c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

38G Consequences of Attorney-General giving civil non-disclosure certificate

- (1) If, under section 38F, the Attorney-General gives a potential discloser a certificate at any time during a civil proceeding, the court must:
-

- (a) in any case where the certificate is given to the court before the substantive hearing in the proceeding begins—before the substantive hearing in the proceeding begins, hold a hearing to decide whether to make an order under section 38L in relation to the disclosure of the information; or
 - (b) if subparagraph 38F(1)(a)(i) or (iii) applies and the certificate is given to the court after the substantive hearing in the proceeding begins—continue the adjournment of the proceeding mentioned in subsection 38D(5) or 38E(6) for the purpose of holding a hearing to decide whether to make an order under section 38L in relation to the disclosure of the information; or
 - (c) if subparagraph 38F(1)(a)(ii) applies and the certificate is given to the court after the substantive hearing in the proceeding begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 38L in relation to the disclosure of the information.
- (2) If, while the proceeding is adjourned or the hearing is being held:
- (a) the court makes an order under section 38B about the disclosure, in the proceeding, of information that is the subject of the certificate; or
 - (b) the Attorney-General revokes the certificate;
the court must end the adjournment or the hearing.
- (3) The closed hearing requirements apply to the hearing to decide whether to make an order under section 38L.

38H Attorney-General's civil witness exclusion certificate

- (1) This section applies if:
- (a) either:
 - (i) the Attorney-General is notified under section 38D that a party, or the legal representative of a party, to a civil proceeding knows or believes that a person whom the party or legal representative intends to call as a witness in the proceeding will disclose information by his or her mere presence; or

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Division 2 Attorney-General's certificates for protection of information in civil proceedings

Section 38H

- (ii) the Attorney-General for any reason expects that a person whom a party, or the legal representative of a party, to a civil proceeding intends to call as a witness in the proceeding will disclose information by his or her mere presence; and
- (b) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate

- (2) The Attorney-General may give a certificate to the relevant party or legal representative that states that he or she must not call the person as a witness in the proceeding.

Certificate may be given at same time as notice is given under section 6A

- (3) If subparagraph (1)(a)(ii) applies in respect of the proceeding, the certificate may be given at the same time as notice is given under section 6A that this Act applies to the proceeding.

Copy of certificate must be given to the court

- (4) The Attorney-General must give a copy of the certificate to the court.

Duration of a certificate

- (5) The certificate ceases to have effect when:
 - (a) the court makes an order under section 38B about the disclosure, in the proceeding, of information by the mere presence of the person who is the subject of the certificate, unless the certificate is revoked by the Attorney-General before then; or
 - (b) any order by the court under section 38L on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Court hearing

- (6) The court must:
-

- (a) if the certificate is given to the court before the substantive hearing in the proceeding begins—before the substantive hearing in the proceeding begins, hold a hearing to decide whether to make an order under section 38L in relation to the calling of the witness; or
 - (b) if the certificate is given to the court after the substantive hearing in the proceeding begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 38L in relation to the calling of the witness.
- (7) The closed hearing requirements apply to the hearing to decide whether to make an order under section 38L.
- (8) If, while the proceeding is adjourned or the hearing is being held:
- (a) the court makes an order under section 38B about the disclosure, in the proceeding, of information by the mere presence of the person who is the subject of the certificate; or
 - (b) the Attorney-General revokes the certificate;
- the court must end the adjournment or the hearing.

Attorney-General may decide not to give a certificate

- (9) If the Attorney-General decides not to do as mentioned in subsection (2), the Attorney-General must, in writing, advise:
- (a) the relevant party or legal representative; and
 - (b) the court;
- of his or her decision.

Certificate and written advice are not legislative instruments

- (10) A certificate given under subsection (2) and a written advice given under subsection (9) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Part 3A Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security

Division 3 Closed hearings and non-disclosure or witness exclusion orders in civil proceedings

Section 38I

Division 3—Closed hearings and non-disclosure or witness exclusion orders in civil proceedings

38I Closed hearing requirements in civil proceedings

- (1) This section sets out the *closed hearing requirements* for a hearing under subsection 38G(1) or 38H(6).

Note: The fact that those provisions provide that the closed hearing requirements apply to certain hearings does not prevent the court from exercising any powers that it otherwise has eg to exclude persons (such as members of the public) from other hearings or to prevent publication of evidence.

Who may be present

- (2) Subject to this section, no-one, including the jury (if any), must be present at the hearing except:
- (a) the magistrate, judge or judges comprising the court; and
 - (b) court officials; and
 - (c) the parties to the proceeding; and
 - (d) the parties' legal representatives; and
 - (e) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and
 - (f) any witnesses allowed by the court.
- (3) If the court considers that:
- (a) the information concerned would be disclosed to any of the following persons:
 - (i) a party to the proceeding;
 - (ii) a party's legal representative;
 - (iii) any court official;who have not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned; and
 - (b) the disclosure would be likely to prejudice national security;

the court may order that the party, the legal representative or the court official is not entitled to be present during any part of the hearing in which any person referred to in paragraph (2)(e):

- (c) gives details of the information; or
- (d) gives information in arguing why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

Submissions about non-disclosure arguments

- (4) If, at the hearing, any person referred to in paragraph (2)(e) argues that:
 - (a) any information should not be disclosed; or
 - (b) the witness should not be called to give evidence in the proceeding;

the other parties to the proceeding and any legal representatives of the other parties must be given the opportunity to make submissions to the court about the argument that the information should not be disclosed or the witness should not be called.

Court to make etc. record of hearing

- (5) The court must:
 - (a) whether before or after it makes an order under section 38L, make a record of the hearing; and
 - (b) keep the record; and
 - (c) make the record available to a court that hears an appeal against, or reviews, its decision on the hearing; and
 - (d) not make the record available to, nor allow the record to be accessed by, anyone except as mentioned in this section.

Copy of record to be given to the Attorney-General etc.

- (6) If section 38K applies, the court must give a copy of the record to the Attorney-General and his or her legal representative.

Request to vary record

- (7) If the Attorney-General considers that:
 - (a) allowing access to the record by:

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Section 38I

- (i) a party who has been given a security clearance at the level considered appropriate by the Secretary but who has not engaged a legal representative; or
 - (ii) any party's legal representative who has been given a security clearance at the level considered appropriate by the Secretary;
- will disclose information; and
- (b) the disclosure is likely to prejudice national security;
- the Attorney-General or his or her legal representative may request that the court vary the record so that the information will not be disclosed.

Decision by the court

- (8) The court must make a decision on the request.

Access to the record by a party or party's legal representative

- (9) The court must:
 - (a) allow:
 - (i) a party who has been given a security clearance at the level considered appropriate by the Secretary but who has not engaged a legal representative; or
 - (ii) any party's legal representative who has been given a security clearance at the level considered appropriate by the Secretary;
 - to have access to:
 - (iii) the record as varied in accordance with this section, and if applicable, section 38J; or
 - (iv) if subparagraph (iii) does not apply—the record; and to prepare documents or records in relation to the varied record or the record, in a way and at a place prescribed by the regulations for the purposes of this paragraph; and
 - (b) not make the varied record available to, nor allow the varied record to be accessed by, anyone except as mentioned in this subsection.

38J Request to delay making record available pending appeal decision

- (1) If the court makes a decision under subsection 38I(8), the Attorney-General or his or her legal representative may request that the court delay allowing access to the varied record or the record as mentioned in paragraph 38I(9)(a) to allow time for the Attorney-General to:
 - (a) decide whether to appeal against the court's decision; and
 - (b) if the Attorney-General decides to do so—make the appeal.
- (2) The court must grant the request.

38L Court orders in civil proceedings

Civil non-disclosure certificate hearings

- (1) After holding a hearing required under subsection 38G(1) in relation to the disclosure of information in a civil proceeding, the court must make an order under one of subsections (2), (4) and (5) of this section.
- (2) If the information is in the form of a document, the court may order under this subsection that:
 - (a) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection; and
 - (b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and
 - (c) any other specified person;must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may, subject to subsection (3), disclose (which disclosure may or may not be the same as was permitted in the Attorney-General's certificate) in the proceeding:
 - (d) a copy of the document with the information deleted; or
 - (e) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or

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- (f) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove attached to the document.
- (3) If the court makes an order under subsection (2), the copy of the document is admissible in evidence if, apart from the order, it is admissible. However, if:
- (a) a person who is the subject of the order seeks to adduce evidence of the contents of the document; and
 - (b) the contents of the document are admissible in evidence in the proceeding;
- the person may adduce evidence of the contents of the document by tendering the copy, or the copy and the summary or statement, mentioned in that subsection.
- (4) The court may, regardless of the form of the information, order under this subsection that:
- (a) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection; and
 - (b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and
 - (c) any other specified person;
- must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).
- (5) The court may, regardless of the form of the information, order under this subsection that any person may disclose the information in the proceeding. However, the information is only admissible in evidence in the proceeding if, apart from the order, it is admissible.

Civil witness exclusion certificate hearings

- (6) After holding a hearing required under subsection 38H(6), the court must order that:
- (a) the relevant party or legal representative must not call the person as a witness in the civil proceeding; or
 - (b) the relevant party or legal representative may call the person as a witness in the civil proceeding.

Factors to be considered by court

- (7) The court must, in deciding what order to make under this section, consider the following matters:
 - (a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:
 - (i) where the certificate was given under subsection 38F(2) or (3)—the information were disclosed in contravention of the certificate; or
 - (ii) where the certificate was given under subsection 38H(2)—the witness were called;
 - (b) whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding;
 - (c) any other matter the court considers relevant.
- (8) In making its decision, the court must give greatest weight to the matter mentioned in paragraph (7)(a).

38M Reasons for court orders

Requirement to give reasons

- (1) The court must give a written statement of its reasons for making an order under section 38L to the following people:
 - (a) the person who is the subject of the order;
 - (b) the parties to the proceeding;
 - (c) the parties' legal representatives;
 - (d) the Attorney-General and his or her legal representative.

Copy of proposed statement to be given to the Attorney-General etc.

- (2) Before the court gives its statement under subsection (1), the court must give a copy of the proposed statement to the Attorney-General and his or her legal representative.

Request to vary proposed statement

- (3) If the Attorney-General considers that giving the proposed statement will disclose information and the disclosure is likely to prejudice national security, the Attorney-General or his or her legal

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representative may request that the court vary the proposed statement so that the information will not be disclosed.

Court's decision

- (4) The court must make a decision on the request.

38N Request to delay giving section 38M statement pending appeal decision

- (1) If the court makes a decision under section 38M, the Attorney-General or his or her legal representative may request that the court delay giving its statement of reasons to allow time for the Attorney-General to:
 - (a) decide whether to appeal against the court's decision; and
 - (b) if the Attorney-General decides to do so—make the appeal.
- (2) The court must grant the request.

38O Period of operation of court orders

An order made by the court under this Division:

- (a) does not come into force until the order ceases to be subject to appeal; and
- (b) remains in force until it is revoked by the court.

38P Adjourment after certain court orders

- (1) If the court makes an order under section 38L, a party who brought the civil proceeding may apply to the court for an adjourment of the proceeding to allow time for the party to:
 - (a) decide whether to appeal against the court order or to withdraw the proceeding; and
 - (b) if the party decides to do so—make the appeal or withdrawal.

- (2) If the court makes an order under section 38L, a party against whom the civil proceeding was brought may apply to the court for an adjournment of the proceeding to allow time for the party to:
 - (a) decide whether to appeal against the court order; and
 - (b) if the party decides to do so—make the appeal.
- (3) The court must grant the adjournment.

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Division 4 Appeals in civil proceedings

Section 38Q

Division 4—Appeals in civil proceedings

38Q Appeal against court decision under section 38I

- (1) The Attorney-General may appeal against a decision of the court made under subsection 38I(8).
- (2) The court that has jurisdiction to hear and determine appeals from the judgment in the proceeding has jurisdiction to hear and determine any appeal under this section.

38R Appeals against court orders under section 38L

- (1) A party to a civil proceeding or the Attorney-General may appeal against any order of the court made under section 38L.
- (2) The court that has jurisdiction to hear and determine appeals from the judgment in the proceeding has jurisdiction to hear and determine any appeal under this section.

38S Appeal against court decisions under section 38M

- (1) The Attorney-General may appeal against any decision of the court made under section 38M.
- (2) The court that has jurisdiction to hear and determine appeals from the judgment in the proceeding has jurisdiction to hear and determine any appeal under this section.

Part 4—Security clearances

Division 1—Security clearances required in federal criminal proceedings

39 Security clearance for defendant’s legal representative etc.

- (1) This section applies if, before or during a federal criminal proceeding, the Secretary of the Attorney-General’s Department gives written notice to any of the following persons:
 - (a) a legal representative of the defendant;
 - (b) a person assisting a legal representative of the defendant;that in the proceeding an issue is likely to arise relating to a disclosure, of information in the proceeding, that is likely to prejudice national security.
- (1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

Person may apply for security clearance

- (2) A person who receives a notice under subsection (1) may apply to the Secretary for a security clearance at the level considered appropriate by the Secretary in relation to the information.

Note 1: Security clearances are given in accordance with the Australian Government Protective Security Manual.

Note 2: If the person does not obtain the security clearance, anyone who discloses such information to the person will, except in limited circumstances, commit an offence under section 46.

Adjournment to allow sufficient time for defendant’s legal representative to be given security clearance

- (3) The defendant, or the defendant’s legal representative (on the defendant’s behalf), may apply to the court for a deferral or adjournment of the proceeding until:

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- (a) the legal representative has been given a security clearance at the level considered appropriate by the Secretary in relation to the information; or
 - (b) if the legal representative is not given such a security clearance—another legal representative is given such a security clearance.
- (4) The court must defer or adjourn the proceeding accordingly.

Prosecutor may advise the court that the defendant's legal representative has not been given a security clearance etc.

- (5) 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:
- (a) the prosecutor may advise the court of the fact; and
 - (b) the court may:
 - (i) advise the defendant of the consequences of engaging a legal representative who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information; and
 - (ii) recommend that the defendant engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Division 2—Security clearances required in civil proceedings

39A Security clearance for parties etc. to a civil proceeding

- (1) This section applies if, in a civil proceeding, the Secretary of the Attorney-General's Department gives written notice to any of the following persons:
- (a) a party to the proceeding;
 - (b) a party's legal representative;
 - (c) a person assisting a party's legal representative;
- that in the proceeding an issue is likely to arise relating to a disclosure, of information in the proceeding, that is likely to prejudice national security.

- (1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

Person may apply for security clearance

- (2) A person who receives a notice under subsection (1) may apply to the Secretary for a security clearance at the level considered appropriate by the Secretary in relation to the information.

Note 1: Security clearances are given in accordance with the Australian Government Protective Security Manual.

Note 2: If the person does not obtain the security clearance, anyone who discloses such information to the person will, except in limited circumstances, commit an offence under section 46G.

Adjournment to allow sufficient time for a person to be given security clearance

- (3) A party to the proceeding, or the party's legal representative (on the party's behalf), may apply to the court for a deferral or adjournment of the proceeding to allow time for:

Part 4 Security clearances

Division 2 Security clearances required in civil proceedings

Section 39A

- (a) a person who receives a notice under subsection (1) to apply for and be given a security clearance at the level considered appropriate by the Secretary in relation to the information; or
 - (b) if the party's legal representative is not given such a security clearance—another legal representative to apply for and be given such a security clearance.
- (4) The court must defer or adjourn the proceeding accordingly.

Secretary may advise the court that a party has not been given a security clearance

- (5) If:
- (a) a party is not given a security clearance; or
 - (b) a party 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;
- then:
- (c) the Secretary may advise the court of the fact; and
 - (d) the court may advise the party of the consequences of not being given a security clearance at the level considered appropriate by the Secretary in relation to the information and:
 - (i) if the party is not given a security clearance and has not engaged a legal representative—recommend that the party engage a legal representative who has been given, or is prepared to apply for, such a security clearance; or
 - (ii) if the party has not applied for the security clearance and has not engaged a legal representative—recommend that the party apply for the security clearance or engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Secretary may advise the court that a party's legal representative etc. has not been given a security clearance etc.

- (6) If:
- (a) a party's legal representative or a person assisting the legal representative is not given a security clearance; or
 - (b) a party's legal representative or a person assisting the 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;

then:

- (c) the Secretary may advise the court of the fact; and
- (d) the court may:
 - (i) advise the relevant party of the consequences of engaging a legal representative who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information; and
 - (ii) recommend that the relevant party engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Notice given by Secretary not a legislative instrument

- (7) A notice given under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Part 5—Offences

Division 1—Offences relating to federal criminal proceedings

40 Offence to disclose information before Attorney-General gives criminal non-disclosure certificate etc. under section 26

Disclosure where notice given to Attorney-General under subsection 24(1)

- (1) A person commits an offence if:
- (a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and
 - (b) the person gives notice to the Attorney-General under subsection 24(1) about the disclosure of information in the proceeding; and
 - (c) section 41 does not apply; and
 - (d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and
 - (e) the disclosure does not take place in permitted circumstances; and
 - (f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where advice given under subsection 24(3)

- (1A) A person commits an offence if:
- (a) the person is advised under subsection 24(3) that a notice about the disclosure of information in a federal criminal proceeding has been given to the Attorney-General; and
 - (b) the advice includes a description of the information; and
 - (c) section 41 does not apply; and

- (d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and
- (e) the disclosure does not take place in permitted circumstances; and
- (f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where notice given to Attorney-General under section 25

- (2) If:
 - (a) the prosecutor gives notice to the Attorney-General under subsection 25(6) that the prosecutor knows, believes or is advised that an answer by a witness in a hearing in relation to a federal criminal proceeding will disclose information; and
 - (b) section 41 does not apply; and
 - (c) the prosecutor or the witness discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the prosecutor or the witness a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and
 - (d) the disclosure does not take place in permitted circumstances; and
 - (e) the disclosure is likely to prejudice national security;the prosecutor or the witness commits an offence.

Penalty: Imprisonment for 2 years.

41 Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28

A person commits an offence if:

- (a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and
- (b) the person notifies the Attorney-General under subsection 24(1) that he or she knows or believes that a person (the

second person) whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the second person's mere presence; and

- (c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under subsection 28(2) or advice under subsection 28(10) in relation to the calling of the second person as a witness; and
- (d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

42 Offence to contravene requirement to notify Attorney-General etc. under sections 24 and 25

A person commits an offence if:

- (a) the person contravenes subsection 24(1), (2), (3) or (4) or 25(2) or (6); and
- (b) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

43 Offence to disclose information contrary to Attorney-General's criminal non-disclosure certificate given under section 26

A person commits an offence if:

- (a) the person is given a certificate under subsection 26(2) or (3) in relation to the disclosure of information; and
- (b) the person discloses the information in contravention of the certificate.

Penalty: Imprisonment for 2 years.

44 Offence to call witness contrary to Attorney-General's criminal witness exclusion certificate given under section 28

A person commits an offence if:

- (a) the person is given a certificate under subsection 28(2) in relation to the calling of a witness; and

- (b) the person calls the witness in contravention of the certificate.

Penalty: Imprisonment for 2 years.

45 Offence to contravene court order

If:

- (a) the court makes an order under this Act in relation to a federal criminal proceeding; and
 - (b) a person intentionally contravenes the order;
- the person commits an offence.

Penalty: Imprisonment for 2 years.

45A Offence to contravene regulations

- (1) A person commits an offence if:
 - (a) regulations made under section 23 require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and
 - (b) the person engages in conduct; and
 - (c) the conduct results in the requirement being contravened; and
 - (d) the contravention of the requirement is likely to prejudice national security.

Penalty: 6 months imprisonment.

- (2) In this section:

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

46 Offence to disclose information in federal criminal proceedings to certain persons without security clearance etc.

A person commits an offence if:

- (a) for the purposes of a federal criminal proceeding, the person discloses, other than in giving evidence in that proceeding or in permitted circumstances, information to:
 - (i) a legal representative of the defendant; or

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Section 46

- (ii) a person assisting a legal representative of the defendant; and
- (b) the disclosure is likely to prejudice national security; and
- (c) none of the following subparagraphs apply:
 - (i) the legal representative or person mentioned in subparagraph (a)(ii) has a security clearance at the level considered appropriate by the Secretary in relation to the information;
 - (ii) the disclosure has been approved by the Secretary;
 - (iii) the disclosure takes place in compliance with conditions approved by the Secretary.

Penalty: Imprisonment for 2 years.

Division 2—Offences relating to civil proceedings

46A Offence to disclose information before Attorney-General gives civil non-disclosure certificate etc. under section 38F

Disclosure where notice given to Attorney-General under subsection 38D(1)

- (1) A person commits an offence if:
- (a) the person is a party, or a legal representative of a party, to a civil proceeding; and
 - (b) the person gives notice to the Attorney-General under subsection 38D(1) about the disclosure of information in the proceeding; and
 - (c) section 46B does not apply; and
 - (d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and
 - (e) the disclosure does not take place in permitted circumstances; and
 - (f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where advice given under subsection 38D(4)

- (1A) A person commits an offence if:
- (a) the person is advised under subsection 38D(4) that a notice about the disclosure of information in a civil proceeding has been given to the Attorney-General; and
 - (b) the advice includes a description of the information; and
 - (c) section 46B does not apply; and
 - (d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

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Section 46B

- (e) the disclosure does not take place in permitted circumstances; and
- (f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where notice given to Attorney-General under section 38E

(2) If:

- (a) a witness gives a written answer to the court under section 38E in a civil proceeding; and
 - (b) section 46B does not apply; and
 - (c) the witness discloses information given in the written answer (whether in the proceeding or otherwise) at any time after the written answer is given to the court and before the Attorney-General gives the witness a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and
 - (d) the disclosure does not take place in permitted circumstances; and
 - (e) the disclosure is likely to prejudice national security;
- the witness commits an offence.

Penalty: Imprisonment for 2 years.

46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H

A person commits an offence if:

- (a) the person is a party, or the legal representative of a party, to a civil proceeding; and
- (b) the person notifies the Attorney-General under subsection 38D(1) that he or she knows or believes that a person (the *second person*) whom he or she intends to call as a witness in the proceeding will disclose information by the second person's mere presence; and
- (c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under

- subsection 38H(2) or advice under subsection 38H(9) in relation to the calling of the second person as a witness; and
- (d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E

A person commits an offence if:

- (a) the person is a party, or the legal representative of a party, to a civil proceeding; and
- (b) the person contravenes subsection 38D(1), (3) or (4) or 38E(2); and
- (c) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

46D Offence to disclose information contrary to Attorney-General's civil non-disclosure certificate given under section 38F

A person commits an offence if:

- (a) the person is given a certificate under subsection 38F(2) or (3) in relation to the disclosure of information; and
- (b) the person discloses the information in contravention of the certificate.

Penalty: Imprisonment for 2 years.

46E Offence to call witness contrary to Attorney-General's civil witness exclusion certificate given under section 38H

A person commits an offence if:

- (a) the person is given a certificate under subsection 38H(2) in relation to the calling of a witness; and
- (b) the person calls the witness in contravention of the certificate.

Penalty: Imprisonment for 2 years.

46F Offence to contravene court order

If:

- (a) the court makes an order under this Act in relation to a civil proceeding; and
 - (b) a person intentionally contravenes the order;
- the person commits an offence.

Penalty: Imprisonment for 2 years.

46FA Offence to contravene regulations

(1) A person commits an offence if:

- (a) regulations made under section 38C require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and
- (b) the person engages in conduct; and
- (c) the conduct results in the requirement being contravened; and
- (d) the contravention of the requirement is likely to prejudice national security.

Penalty: 6 months imprisonment.

(2) In this section:

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

46G Offence to disclose information in civil proceedings to certain persons without security clearance etc.

A person commits an offence if:

- (a) for the purposes of a civil proceeding, the person discloses, other than in giving evidence in that proceeding or in permitted circumstances, information to:
 - (i) a party to the proceeding; or
 - (ii) a party's legal representative; or
 - (iii) a person assisting a party's legal representative; and
 - (b) the disclosure is likely to prejudice national security; and
 - (c) none of the following subparagraphs apply:
-

- (i) the party to the proceeding, the legal representative or the person mentioned in subparagraph (a)(iii) has a security clearance at the level considered appropriate by the Secretary in relation to the information;
- (ii) the disclosure has been approved by the Secretary;
- (iii) the disclosure takes place in compliance with conditions approved by the Secretary.

Penalty: Imprisonment for 2 years.

Part 6—Miscellaneous

47 Report to Parliament on certificates given by Attorney-General etc.

As soon as practicable after 30 June in each year, the Attorney-General must cause to be laid before each House of the Parliament a report that:

- (a) states the number of certificates given during the year:
 - (i) under sections 26, 28, 38F and 38H by the Attorney-General; and
 - (ii) under sections 38F and 38H by the Minister appointed by the Attorney-General under section 6A; and
- (b) identifies the criminal proceedings and civil proceedings to which the certificates relate.

48 Rules of court

The power to make rules of court extends to making rules, not inconsistent with this Act or the regulations, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

49 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Table of Acts

Notes to the *National Security Information (Criminal and Civil Proceedings) Act 2004*

Note 1

The *National Security Information (Criminal and Civil Proceedings) Act 2004* as shown in this compilation comprises Act No. 150, 2004 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>National Security Information (Criminal Proceedings) Act 2004</i>	150, 2004	14 Dec 2004	Ss. 3–49: 11 Jan 2005 Remainder: Royal Assent	
<i>National Security Information (Criminal Proceedings) Amendment (Application) Act 2005</i>	27, 2005	21 Mar 2005	21 Mar 2005	—
<i>National Security Information Legislation Amendment Act 2005</i>	89, 2005	6 July 2005	Schedule 1 (items 1–28): 3 Aug 2005	—
<i>National Security Legislation Amendment Act 2010</i>	127, 2010	24 Nov 2010	Schedule 8 (items 1–16, 18–102, 104–106, 108–110): 22 Dec 2010 Schedule 8 (items 17, 103, 107): 24 May 2011	Sch. 8 (items 109, 110)

Table of Amendments

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Title	am. No. 89, 2005
Part 1	
S. 1.....	am. No. 89, 2005
S. 3.....	am. No. 89, 2005
S. 5.....	am. No. 89, 2005
Heading to s. 6	am. No. 89, 2005
S. 6.....	rs. No. 27, 2005 am. No. 89, 2005; No. 127, 2010
S. 6A	ad. No. 89, 2005 am. No. 127, 2010
Part 2	
Division 1	
S. 7.....	am. No. 89, 2005; No. 127, 2010
Division 3	
S. 13.....	am. No. 127, 2010
S. 14.....	rs. No. 127, 2010
Heading to s. 15	am. No. 89, 2005
S. 15.....	am. No. 127, 2010
Division 3A	
Div. 3A of Part 2	ad. No. 89, 2005
S. 15A	ad. No. 89, 2005 am. No. 127, 2010
Division 4	
S. 16.....	am. No. 89, 2005; No. 127, 2010
S. 17.....	am. No. 127, 2010 rs. No. 127, 2010
Subhead to s. 19(1)	ad. No. 89, 2005
Subhead to s. 19(2)	am. No. 89, 2005
S. 19.....	am. No. 89, 2005; No. 127, 2010
Part 3	
Heading to Part 3.....	rs. No. 89, 2005
Division 1A	
Div. 1A of Part 3	ad. No. 127, 2010
S. 20A	ad. No. 127, 2010
Division 1B	
Div. 1B of Part 3	ad. No. 127, 2010
S. 20B	ad. No. 127, 2010

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Division 1	
Heading to Div. 1 of Part 3.....	rs. No. 89, 2005
Heading to s. 21	rs. No. 127, 2010
S. 21.....	am. No. 127, 2010
Heading to s. 22	am. No. 89, 2005; No. 127, 2010
S. 22.....	am. No. 127, 2010
Heading to s. 23	am. No. 89, 2005; No. 127, 2010
S. 23.....	am. No. 127, 2010
Division 2	
Heading to Div. 2 of Part 3.....	rs. No. 89, 2005
Subdivision A	
Heading to Subdiv. A of Div. 2 of Part 3	rs. No. 89, 2005
Heading to s. 24	am. No. 89, 2005 rs. No. 127, 2010
S. 24.....	am. No. 127, 2010
Subdivision B	
Heading to Subdiv. B of Div. 2 of Part 3	rs. No. 89, 2005
Heading to s. 25	am. No. 89, 2005
S. 25.....	am. No. 127, 2010
Subdivision C	
Heading to Subdiv. C of Div. 2 of Part 3	rs. No. 89, 2005
Heading to s. 26	am. No. 89, 2005
S. 26.....	am. No. 127, 2010
Heading to s. 27	am. No. 89, 2005
S. 27.....	am. No. 127, 2010
Heading to s. 28	am. No. 89, 2005
S. 28.....	am. No. 127, 2010
Division 3	
Heading to Div. 3 of Part 3.....	rs. No. 89, 2005
Heading to s. 29	am. No. 89, 2005
S. 29.....	am. No. 127, 2010
Heading to s. 30	am. No. 89, 2005 rep. No. 127, 2010
S. 30.....	rep. No. 127, 2010
Heading to s. 31	am. No. 89, 2005
Ss. 31, 32	am. No. 127, 2010
Division 4	
Heading to Div. 4 of Part 3.....	rs. No. 89, 2005
S. 37.....	am. No. 127, 2010

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
Part 3A	
Part 3A	ad. No. 89, 2005
Division 1A	
Div. 1A of Part 3A.....	ad. No. 127, 2010
S. 38AA.....	ad. No. 127, 2010
Division 1B	
Div. 1B of Part 3A.....	ad. No. 127, 2010
S. 38AB.....	ad. No. 127, 2010
Division 1	
Heading to s. 38A.....	rs. No. 127, 2010
S. 38A	ad. No. 89, 2005 am. No. 127, 2010
Heading to s. 38B.....	am. No. 127, 2010
S. 38B	ad. No. 89, 2005 am. No. 127, 2010
Heading to s. 38C.....	am. No. 127, 2010
S. 38C	ad. No. 89, 2005 am. No. 127, 2010
Division 2	
Subdivision A	
Heading to s. 38D.....	rs. No. 127, 2010
S. 38D	ad. No. 89, 2005 am. No. 127, 2010
Subdivision B	
S. 38E	ad. No. 89, 2005 am. No. 127, 2010
Subdivision C	
S. 38F.....	ad. No. 89, 2005 am. No. 127, 2010
S. 38G.....	ad. No. 89, 2005
S. 38H.....	ad. No. 89, 2005 am. No. 127, 2010
Division 3	
S. 38I.....	ad. No. 89, 2005 am. No. 127, 2010
S. 38J.....	ad. No. 89, 2005
S. 38K	ad. No. 89, 2005 rep. No. 127, 2010
Ss. 38L, 38M	ad. No. 89, 2005 am. No. 127, 2010
Ss. 38N–38P	ad. No. 89, 2005
Division 4	
S. 38Q.....	ad. No. 89, 2005

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted	
Provision affected	How affected
S. 38R	ad. No. 89, 2005 am. No. 127, 2010
S. 38S	ad. No. 89, 2005
Part 4	
Division 1	
Heading to Div. 1 of Part 4.....	ad. No. 89, 2005
S. 39.....	am. No. 127, 2010
Division 2	
Div. 2 of Part 4.....	ad. No. 89, 2005
S. 39A	ad. No. 89, 2005 am. No. 127, 2010
Part 5	
Division 1	
Heading to Div. 1 of Part 5.....	ad. No. 89, 2005
Heading to s. 40	am. No. 89, 2005
S. 40.....	am. No. 127, 2010
Heading to s. 41	am. No. 89, 2005 rs. No. 127, 2010
S. 41.....	rs. No. 127, 2010
Heading to s. 42	am. No. 89, 2005
S. 42.....	am. No. 127, 2010
Heading to s. 43	am. No. 89, 2005
Heading to s. 44	am. No. 89, 2005
S. 45.....	am. No. 89, 2005
S. 45A	ad. No. 127, 2010
Heading to s. 46	am. No. 89, 2005
S. 46.....	am. No. 127, 2010
Division 2	
Div. 2 of Part 5.....	ad. No. 89, 2005
S. 46A	ad. No. 89, 2005 am. No. 127, 2010
Ss. 46B, 46C	ad. No. 89, 2005 rs. No. 127, 2010
Ss. 46D–46F	ad. No. 89, 2005
S. 46FA	ad. No. 127, 2010
S. 46G	ad. No. 89, 2005 am. No. 127, 2010
Part 6	
S. 47.....	rs. No. 89, 2005

Table A

Table A

Application, saving or transitional provisions

National Security Legislation Amendment Act 2010 (No. 127, 2010)

Schedule 8

109 Application of amendments

Notice given after commencement

- (1) The amendments made by this Schedule (other than items 17, 103 and 107) apply on and after the commencement of this item to:
- (a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and
 - (b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;
- whether or not the proceeding begins before or after that commencement.

- (2) The amendments made by items 17, 103 and 107 of this Schedule apply on and after the commencement of those items to:
- (a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and
 - (b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;
- whether or not the proceeding begins before or after that commencement.

Notice given before commencement

- (3) The amendments made by this Schedule (other than items 17, 103 and 107) apply on and after the commencement of this item to:
- (a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security*

Table A

Information (Criminal and Civil Proceedings) Act 2004
before that commencement; and

- (b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

- (4) The amendments made by items 17, 103 and 107 of this Schedule apply on and after the commencement of those items to:

- (a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before that commencement; and

- (b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

- (5) If, under section 6 or 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, a notice was given before the commencement of this item, then:

- (a) any orders that were made; and
- (b) any certificates, advices or notices that were given;

before that commencement under a provision of that Act continue in force (and may be dealt with) as if they were made or given under:

- (c) in the case of an order made under subsection 23(2) of that Act—subsection 19(1A) of that Act as amended by this Schedule; and
- (d) in the case of an order made under subsection 38C(2) of that Act—subsection 19(3A) of that Act as amended by this Schedule; and
- (e) in any other case—the provision of that Act as amended by this Schedule.

Table A

110 Saving

Despite the amendments made to sections 23 and 38C of the *National Security Information (Criminal and Civil Proceedings) Act 2004* by this Schedule, regulations made under those sections and that are in force immediately before the commencement of this item continue in force (and may be dealt with) after that commencement, as if they were made under those sections as amended by this Schedule.