



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

**Act No. 150 of 2004 as amended**

This compilation was prepared on 3 August 2005  
taking into account amendments up to Act No. 89 of 2005

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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# Contents

<b>Part 1—Preliminary</b>	1
1 Short title [see Note 1] .....	1
2 Commencement [see Note 1].....	1
3 Object of this Act.....	2
4 Extension of Act to external Territories.....	2
5 Act binds Crown .....	2
6 Application of Act to federal criminal proceedings.....	2
6A Application of Act to civil proceedings.....	2
<b>Part 2—Interpretation</b>	5
<b>Division 1—Definitions</b>	5
7 Definitions.....	5
<b>Division 2—National security and related definitions</b>	7
8 Meaning of <i>national security</i> .....	7
9 Meaning of <i>security</i> .....	7
10 Meaning of <i>international relations</i> .....	7
11 Meaning of <i>law enforcement interests</i> .....	7
<b>Division 3—Federal criminal proceeding and related definitions</b>	8
13 Meaning of <i>criminal proceeding</i> .....	8
14 Meaning of <i>federal criminal proceeding</i> .....	8
15 Meaning of <i>defendant</i> in relation to a federal criminal proceeding.....	9
<b>Division 3A—Civil proceeding definition</b>	10
15A Meaning of <i>civil proceeding</i> .....	10
<b>Division 4—Other interpretation provisions</b>	11
16 Disclosure of information in permitted circumstances.....	11
17 Meaning of <i>likely to prejudice national security</i> .....	12
18 Operation of other Acts etc.....	12
19 General powers of a court.....	12
20 When an order of a court ceases to be subject to appeal .....	13
<b>Part 3—Protection of information whose disclosure in federal             criminal proceedings is likely to prejudice etc. national             security</b>	14
<b>Division 1—Management of information in federal criminal             proceedings</b>	14
21 Pre-trial conferences.....	14
22 Arrangements for federal criminal proceedings about disclosures relating to or affecting national security.....	14

---

23	Protection of certain information disclosed in a federal criminal proceeding.....	15
<b>Division 2—Attorney-General’s certificates for protection of information in federal criminal proceedings</b>		16
<b>Subdivision A—Notifying Attorney-General etc. of expected disclosure in federal criminal proceedings</b>		16
24	Prosecutor and defendant must notify expected disclosure in federal criminal proceedings of information relating to or affecting national security.....	16
<b>Subdivision B—Notifying Attorney-General etc. where disclosure expected by witness answering question in federal criminal proceedings</b>		17
25	Preventing witnesses from disclosing information in federal criminal proceedings by not allowing them to answer questions .....	17
<b>Subdivision C—Attorney-General’s federal criminal proceedings certificates</b>		18
26	Attorney-General’s criminal non-disclosure certificate .....	18
27	Consequences of Attorney-General giving criminal non-disclosure certificate.....	21
28	Attorney-General’s criminal witness exclusion certificate.....	22
<b>Division 3—Closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings</b>		25
29	Closed hearing requirements in federal criminal proceedings.....	25
29A	Request to delay making record available pending appeal decision .....	27
30	Intervention by Attorney-General in federal criminal proceedings.....	27
31	Court orders in federal criminal proceedings .....	28
32	Reasons for court orders.....	30
33	Request to delay giving section 32 statement pending appeal decision .....	31
34	Period of operation of court orders.....	31
35	Consequence of certain court orders.....	31
36	Adjournment after certain court orders.....	32
<b>Division 4—Appeals in federal criminal proceedings</b>		33
36A	Appeal against court decision under section 29 .....	33
37	Appeals against court orders under section 31 .....	33
38	Appeal against court decisions under section 32 .....	33

---

---

<b>Part 3A—Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security</b>	34
<b>Division 1—Management of information in civil proceedings</b>	34
38A    Conferences before the substantive hearings in civil proceedings begin .....	34
38B    Arrangements for civil proceedings about disclosures relating to or affecting national security .....	35
38C    Protection of certain information disclosed in a civil proceeding .....	35
<b>Division 2—Attorney-General’s certificates for protection of information in civil proceedings</b>	36
<b>Subdivision A—Notifying Attorney-General etc. of expected disclosure in civil proceedings</b>	36
38D    Parties must notify expected disclosure in civil proceedings of information relating to or affecting national security.....	36
<b>Subdivision B—Notifying Attorney-General etc. where disclosure expected by witness answering question in civil proceedings</b>	38
38E    Preventing witnesses from disclosing information in civil proceedings by not allowing them to answer questions .....	38
<b>Subdivision C—Attorney-General’s civil proceedings certificates</b>	39
38F    Attorney-General’s civil non-disclosure certificate .....	39
38G    Consequences of Attorney-General giving civil non-disclosure certificate.....	42
38H    Attorney-General’s civil witness exclusion certificate .....	43
<b>Division 3—Closed hearings and non-disclosure or witness exclusion orders in civil proceedings</b>	46
38I    Closed hearing requirements in civil proceedings .....	46
38J    Request to delay making record available pending appeal decision .....	49
38K    Intervention by Attorney-General in civil proceedings.....	49
38L    Court orders in civil proceedings .....	49
38M    Reasons for court orders.....	51
38N    Request to delay giving section 38M statement pending appeal decision .....	52
38O    Period of operation of court orders.....	52
38P    Adjournment after certain court orders.....	53
<b>Division 4—Appeals in civil proceedings</b>	54
38Q    Appeal against court decision under section 38I.....	54
38R    Appeals against court orders under section 38L.....	54
38S    Appeal against court decisions under section 38M.....	54

---

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<b>Part 4—Security clearances</b>	55
<b>Division 1—Security clearances required in federal criminal proceedings</b>	55
39 Security clearance for defendant’s legal representative etc. ....	55
<b>Division 2—Security clearances required in civil proceedings</b>	57
39A Security clearance for parties etc. to a civil proceeding.....	57
<b>Part 5—Offences</b>	60
<b>Division 1—Offences relating to federal criminal proceedings</b>	60
40 Offence to disclose information before Attorney-General gives criminal non-disclosure certificate etc. under section 26 .....	60
41 Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28 .....	61
42 Offence to contravene requirement to notify Attorney-General etc. under sections 24 and 25.....	62
43 Offence to disclose information contrary to Attorney-General’s criminal non-disclosure certificate given under section 26.....	62
44 Offence to call witness contrary to Attorney-General’s criminal witness exclusion certificate given under section 28.....	62
45 Offence to contravene court order.....	62
46 Offence to disclose information in federal criminal proceedings to certain persons without security clearance etc.....	63
<b>Division 2—Offences relating to civil proceedings</b>	64
46A Offence to disclose information before Attorney-General gives civil non-disclosure certificate etc. under section 38F .....	64
46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H.....	65
46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E.....	65
46D Offence to disclose information contrary to Attorney-General’s civil non-disclosure certificate given under section 38F.....	66
46E Offence to call witness contrary to Attorney-General’s civil witness exclusion certificate given under section 38H .....	66
46F Offence to contravene court order.....	66
46G Offence to disclose information in civil proceedings to certain persons without security clearance etc.....	66
<b>Part 6—Miscellaneous</b>	68
47 Report to Parliament on certificates given by Attorney-General etc.....	68

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48	Rules of court .....	68
49	Regulations.....	68
<b>Notes</b>		69





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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 *[see Note 1]*

- (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 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 take place after the notice is given.
- (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 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 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 2, 3 and 4 of Part 3A; and
  - (e) references in:
    - (i) Division 4 of Part 2; and
    - (ii) Divisions 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

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- (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 take place after the notice is given.

*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.

*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.

*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.

Section 7

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

*national security* has the meaning given by section 8.

*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 and reports of persons intended to be called by a party to give evidence;
  - (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.

### 14 Meaning of *federal criminal proceeding*

In this Act, *federal criminal proceeding* means:

- (a) 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; or
- (b) a court proceeding under, or in relation to a matter arising under, the *Extradition Act 1988*.



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

- (1) In this Act, unless the contrary intention appears, *defendant* means:
  - (a) in relation to a federal criminal proceeding mentioned in paragraph 14(a)—a person charged with the offence or offences concerned (even if the proceeding takes place after any conviction of the person); or
  - (b) in relation to a federal criminal proceeding mentioned in paragraph 14(b)—a person to whom the proceeding relates.
- (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 and reports of persons intended to be called by a party to give evidence;
  - (c) an appeal proceeding;
  - (d) any interlocutory or other proceeding prescribed by regulations for the purposes of this paragraph.

## **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
- (aa) the person:
  - (i) is a party to a civil proceeding; and
  - (ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary; and discloses the information in the proceeding, or in a closed hearing in relation to the proceeding; or
- (ab) the person:
  - (i) is a Minister; or
  - (ii) is in the employment of the Commonwealth or an authority of the Commonwealth; or
  - (iii) holds or performs any duties of any office or position under a law of the Commonwealth; and the person discloses the information in the course of his or her duties in relation to a civil proceeding; or
- (ac) the person:
  - (i) is the legal representative of a party to a civil proceeding or, if section 38K applies, of the Attorney-General; and
  - (ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary; and discloses the information in the course of his or her duties in relation to the proceeding; or
- (ad) the person:
  - (i) is assisting a legal representative mentioned in paragraph (ac); and
  - (ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary; and discloses the information in the course of his or her duties in relation to the proceeding; or

Section 17

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- (b) the person is a staff member within the meaning of the *Intelligence Services Act 2001* and the person discloses the information in the course of his or her duties.

**17 Meaning of *likely to prejudice national security***

A disclosure of national security 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.

**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.

*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.

*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 1** Management of information in federal criminal proceedings

Section 21

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## **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**

#### **21 Pre-trial conferences**

- (1) Before the trial in a federal criminal proceeding begins, the prosecutor or defendant may apply to the court for the court to hold a conference of the parties to consider issues relating to any disclosure, in the trial, of information that relates to national security or any disclosure, of information in the trial, that may affect national security, including:
  - (a) whether the prosecutor or defendant is likely to be required to give notice under section 24; and
  - (b) whether the parties wish to enter into an arrangement of the kind mentioned in section 22.
- (2) The court must hold the conference as soon as possible after the application is made.

#### **22 Arrangements for federal criminal proceedings about disclosures relating to or affecting national security**

- (1) At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.
- (2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

### **23 Protection of certain information disclosed in a federal criminal proceeding**

- (1) The regulations may prescribe:
  - (a) ways in which information that is disclosed, or to be disclosed, to the court 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) At any time during a federal criminal proceeding, the court may make an order relating to the protection, storage, handling or destruction of information that is disclosed, or to be disclosed, to the court in the proceeding.
- (3) A court must not make an order under subsection (2) that is inconsistent with a regulation mentioned in subsection (1).

Note: The court may also make orders under section 93.2 of the *Criminal Code* and under other provisions of this Act in order to protect information from disclosure.

**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

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**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 Prosecutor and defendant must notify expected disclosure in federal criminal proceedings of information relating to or affecting national security**

- (1) If the prosecutor or defendant knows or believes that:
- (a) he or she will disclose, in a federal criminal proceeding, information that relates to national security; or
  - (b) he or she will disclose information in a federal criminal proceeding and the disclosure may affect national security; or
  - (c) a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information in giving evidence or by his or her mere presence and:
    - (i) the information relates to national security; or
    - (ii) the disclosure may affect national security;

the prosecutor or defendant must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note: Section 25 deals with the situation where the prosecutor or defendant knows or believes that a disclosure by a witness in answering a question may relate to or affect national security.

*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) The prosecutor or defendant must also advise, in writing, the court, the other party and any person to whom paragraph (1)(c) applies that notice has been given to the Attorney-General. The advice must include a description of the information.

Note: Failure to give notice or advice as required by this section is an offence: see section 42.

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

- (4) On receiving the advice, the court must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 26(4) or gives advice to the court under subsection 26(7) (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 or defendant knows or believes that:
    - (i) information that will be disclosed in the witness's answer relates to national security; or
    - (ii) the disclosure of information in the witness's answer may affect national security.
- (2) The prosecutor or defendant must advise the court of that knowledge or belief.

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

**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 26

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### *Court must hold hearing*

- (3) The court must adjourn the proceeding and hold a hearing.
- (4) The closed hearing requirements apply.
- (5) At the hearing, the witness must give the court a written answer to the question. The court must show the answer to the prosecutor.

### *Prosecutor must give notice to Attorney-General etc.*

- (6) If the prosecutor knows or believes that, if the written answer were to be given in evidence in the proceeding:
  - (a) the information that would be disclosed in the witness's answer relates to national security; or
  - (b) the disclosure of information in the witness's answer may affect national security;

the prosecutor must advise the court of that knowledge or belief and, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

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

### *Court must adjourn proceeding*

- (7) If the court is advised under subsection (6), it must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 26(4) or 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:
    - (i) the Attorney-General is notified under section 24 that the prosecutor or defendant knows or believes that the

- prosecutor or defendant 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 or defendant or another person will disclose information in a federal criminal proceeding;
  - (iii) the Attorney-General is notified under subsection 25(6) that the prosecutor considers 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
  - (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).

**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 26

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*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) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by the prosecutor or defendant—the prosecutor or defendant; or
  - (b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than the prosecutor or defendant—the prosecutor or defendant and the other person; or
  - (c) if subparagraph (1)(a)(iii) applies—the prosecutor, defendant and the witness mentioned in that subparagraph;
- and, if the defendant is a potential discloser under any of the above paragraphs, the defendant's legal representative is also a **potential discloser**.

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

*Consequences of certificate for pre-trial proceedings*

- (1) If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 26, the Attorney-General gives a potential discloser a certificate at any time during a part of the proceeding that takes place before the trial begins, the certificate is conclusive evidence, during that part of the proceeding and any later part that takes place 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

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### *Consequences of certificate for extradition proceedings*

- (2) If a proceeding is covered by paragraph 14(b) (about extradition proceedings) and, under section 26, the Attorney-General gives a potential discloser a certificate at any time before or during the proceeding, the certificate is conclusive evidence during the proceeding that disclosure of the information in the proceeding is likely to prejudice national security.

### *Court hearing*

- (3) If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 26, the Attorney-General gives a potential discloser a certificate 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(4) or 25(7) 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 or defendant knows or believes that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence; or
  - (ii) the Attorney-General for any reason expects that a person whom the prosecutor or defendant 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 or defendant, as the case may be, that states that the prosecutor or defendant 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) If the proceeding is covered by paragraph 14(a) (about a proceeding involving a trial), 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.

**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

---

- (6) If the proceeding is covered by paragraph 14(b) (about extradition proceedings), the certificate is conclusive evidence during the proceeding that the person, if called as a witness in the proceeding, will disclose information by his or her mere presence and that the disclosure is likely to prejudice national security.
- (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.

*Certificate is not a legislative instrument*

- (9) A certificate given to the prosecutor or defendant 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 or defendant, 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 25(3), 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) if section 30 applies—the Attorney-General and any legal 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 representative or the court official is not entitled to be present

**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

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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) if section 30 applies—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.

Section 29A

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*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, if section 30 applies, 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 national security 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.

**30 Intervention by Attorney-General in federal criminal proceedings**

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a hearing in a federal criminal proceeding in relation to which the closed hearing requirements apply.
- (2) If the Attorney-General intervenes in the hearing, he or she is treated as if he or she is a party to the hearing.

**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 31

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### **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:
  - (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 or defendant must not call the person as a witness in the federal criminal proceeding; or
  - (b) the prosecutor or defendant 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;

**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

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- (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).

### **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) if section 30 applies—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, if section 30 applies, 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 national security 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

**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

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(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.

### **36 Adjournment 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, if the Attorney-General is an intervener under section 30, 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 1** Management of information in civil proceedings

Section 38A

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## **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**

#### **38A Conferences before the substantive hearings in civil proceedings begin**

- (1) Before the substantive hearing in a civil proceeding begins, a party to the proceeding may apply to the court for the court to hold a conference of the parties to consider issues relating to:
  - (a) any disclosure, in the substantive hearing in the proceeding, of information that relates to national security; or
  - (b) any disclosure, of information in the substantive hearing in the proceeding, that may affect national security;including:
  - (c) whether a party is likely to be required to give notice under section 38D; and
  - (d) whether the parties wish to enter into an arrangement of the kind mentioned in section 38B.
- (2) If the Attorney-General is not a party to the proceeding, the Attorney-General, on behalf of the Commonwealth, must be given notice of the conference and either the Attorney-General or his or her legal representative, or both, may attend it.
- (3) If the Attorney-General is a party to the proceeding, the Minister appointed by the Attorney-General under section 6A must be given notice of the conference and either the Minister or his or her legal representative, or both, may attend it.
- (4) The court must hold the conference as soon as possible after the application is made.

**38B Arrangements for civil proceedings about disclosures relating to or affecting national security**

- (1) At any time during a civil proceeding:
  - (a) if the Attorney-General is not a party to the proceeding—the Attorney-General, on behalf of the Commonwealth, and the parties to the proceeding; or
  - (b) if the Attorney-General is a party to the proceeding—the Minister appointed by the Attorney-General under section 6A and the parties to the proceeding;may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.
- (2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

**38C Protection of certain information disclosed in a civil proceeding**

- (1) The regulations may prescribe:
  - (a) ways in which information that is disclosed, or to be disclosed, to the court 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) At any time during a civil proceeding, the court may make an order relating to the protection, storage, handling or destruction of information that is disclosed, or to be disclosed, to the court in the proceeding.
- (3) A court must not make an order under subsection (2) that is inconsistent with a regulation mentioned in subsection (1).

Note: The court may also make orders under section 93.2 of the *Criminal Code* and under other provisions of this Act in order to protect information from disclosure.

**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

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**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 Parties must notify expected disclosure in civil proceedings of information relating to or affecting national security**

- (1) If a party to a civil proceeding knows or believes that:
- (a) he or she will disclose, in the proceeding, information that relates to national security; or
  - (b) he or she will disclose information in the proceeding and the disclosure may affect national security; or
  - (c) a person whom the party intends to call as a witness in the proceeding will disclose information in giving evidence or by his or her mere presence and:
    - (i) the information relates to national security; or
    - (ii) the disclosure may affect national security;

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

Note: Section 38E deals with the situation where a party knows or believes that a disclosure by a witness in answering a question may relate to or affect national security.

- (2) Despite subsection (1), a party need not give the Attorney-General notice if:
- (a) the information to be disclosed:
    - (i) is the subject of a certificate given to the party 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 under section 38H and the certificate still has effect; or
    - (ii) is the subject of an order in force under section 38B or 38L.

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 party who gives notice under subsection (1) must also advise, in writing:
- (a) the court; and
  - (b) the other parties to the proceeding; and
  - (c) any person to whom paragraph (1)(c) applies;
- that notice has been given to the Attorney-General. The advice must include a description of the information.

Note: Failure to give notice or advice as required by this section is an offence: see section 46C.

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

- (5) On receiving the advice, the court must order that the proceeding be adjourned 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).

**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

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**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 to the proceeding knows or believes that:
    - (i) information that will be disclosed in the witness's answer relates to national security; or
    - (ii) the disclosure of information in the witness's answer may affect national security.

- (2) The party must advise the court of that knowledge or belief.

Note: Failure to advise the court is an offence: see section 46C.

*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) The court must adjourn the proceeding on receiving the written answer. However, the court need not adjourn the proceeding 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 the proceeding, the court must give the written answer to the Attorney-General.

- (6) The court must continue the adjournment of the proceeding 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:
    - (i) the Attorney-General is notified under section 38D that 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 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;

**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 38F

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- (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.

*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*.

**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 38G

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### *Definition of potential discloser*

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

### **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 to a civil proceeding knows or believes that a person whom the party intends to call as a witness in the proceeding will disclose information by his or her mere presence; or
    - (ii) the Attorney-General for any reason expects that a person whom 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:
  - (a) the relevant party to the proceeding; and
  - (b) the party's legal representative;that states that the party must not call the person as a witness in the proceeding.

**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 38H

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*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.
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- (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 the relevant party and 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

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**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) if section 38K applies—the Attorney-General and his or her legal representative; 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;

Section 38I

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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:

**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

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- (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 national security 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.

### **38K Intervention by Attorney-General in civil proceedings**

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a hearing in a civil proceeding in relation to which the closed hearing requirements apply.
- (2) If the Attorney-General intervenes in the hearing, he or she is treated as if he or she is a party to the hearing.

Note: The Attorney-General is not treated as a party to the civil proceeding itself.

### **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;

**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 38L

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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 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 must not call the person as a witness in the civil proceeding; or
  - (b) the relevant party 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) if section 38K applies—the Attorney-General and his or her legal representative.

**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 38N

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

- (2) If section 38K applies, 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 representative may request that the court vary the proposed statement so that the national security 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 adjournment 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.

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

**Division 4** Appeals in civil proceedings

Section 38Q

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## **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 if the Attorney-General is an intervener under section 38K, 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.

*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 by the Department 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 may apply to the court for a deferral or adjournment of the proceeding until:
- (a) the legal representative has been given a security clearance by the Department 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.

**Part 4** Security clearances

**Division 1** Security clearances required in federal criminal proceedings

Section 39

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- (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 by the Department 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.

*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 by the Department 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 may apply to the court for a deferral or adjournment of the proceeding to allow time for:
- (a) a person who receives a notice under subsection (1) to apply for and be given a security clearance by the Department 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.

**Part 4** Security clearances

**Division 2** Security clearances required in civil proceedings

Section 39A

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- (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 by the Department 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 by the Department 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 section 24*

- (1) If:
- (a) the prosecutor or defendant gives notice to the Attorney-General under subsection 24(1) about the disclosure of information in a federal criminal proceeding by the prosecutor or defendant or another person; and
  - (b) section 41 does not apply; and
  - (c) the following person:
    - (i) if the disclosure is by the prosecutor or defendant—the prosecutor or defendant, as the case may be; or
    - (ii) if the disclosure is by a person other than the prosecutor or defendant—the prosecutor or the defendant, as the case may be, or the other 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
  - (d) the disclosure does not take place in permitted circumstances; and
  - (e) the disclosure is likely to prejudice national security;
- the person who discloses the information commits an offence.

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 or believes 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**

- If:
- (a) the prosecutor or defendant notifies the Attorney-General under section 24 that the prosecutor or defendant knows or believes that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence; and
  - (b) the prosecutor or the defendant calls the person as a witness in the federal criminal proceeding at any time before the Attorney-General gives the prosecutor or defendant a certificate under subsection 28(2) or advice under subsection 28(10) in relation to the calling of the witness; and
  - (c) the disclosure of the information by the mere presence of the person is likely to prejudice national security;
- the prosecutor or the defendant commits an offence.

Penalty: Imprisonment for 2 years.

Section 42

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**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) or (3) 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.

**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
  - (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 Attorney-General's Department has given the legal representative or person mentioned in subparagraph (a)(ii) 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 section 38D*

- (1) If:
- (a) a party to a civil proceeding gives notice to the Attorney-General under subsection 38D(1) about the disclosure of information in the proceeding by the party or another person; and
  - (b) section 46B does not apply; and
  - (c) either:
    - (i) if the disclosure is by the party—the party; or
    - (ii) if the disclosure is by a person other than the party—the party or the other person;discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the party, or both the party and the other person, 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 person who discloses the information commits an offence.

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
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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**

If:

- (a) a party to a civil proceeding notifies the Attorney-General under section 38D that the party knows or believes that a person whom the party intends to call as a witness in the proceeding will disclose information by his or her mere presence; and
  - (b) the party calls the person as a witness in the proceeding at any time before the Attorney-General gives the party a certificate under subsection 38H(2) or advice under subsection 38H(9) in relation to the calling of the witness; and
  - (c) the disclosure of the information by the mere presence of the person is likely to prejudice national security;
- the party commits an offence.

Penalty: Imprisonment for 2 years.

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

A party to a civil proceeding commits an offence if:

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

Penalty: Imprisonment for 2 years.

Section 46D

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**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.

**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 Attorney-General's Department has given the party to the proceeding, the legal representative or the person mentioned in subparagraph (a)(iii) 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.

**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: 3 Aug 2005 Remainder: Royal Assent	—



**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		
<b>Part 1</b>			
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		
S. 6A.....	ad. No. 89, 2005		
<b>Part 2</b>			
<b>Division 1</b>			
S. 7 .....	am. No. 89, 2005		
<b>Division 3</b>			
Heading to s. 15.....	am. No. 89, 2005		
<b>Division 3A</b>			
Div. 3A of Part 2.....	ad. No. 89, 2005		
S. 15A.....	ad. No. 89, 2005		
<b>Division 4</b>			
S. 16 .....	am. No. 89, 2005		
Subhead to s. 19(1) .....	ad. No. 89, 2005		
Subhead to s. 19(2) .....	am. No. 89, 2005		
S. 19 .....	am. No. 89, 2005		
<b>Part 3</b>			
Heading to Part 3 .....	rs. No. 89, 2005		
<b>Division 1</b>			
Heading to Div. 1 of Part 3 .....	rs. No. 89, 2005		
Heading to s. 22.....	am. No. 89, 2005		
Heading to s. 23.....	am. No. 89, 2005		
<b>Division 2</b>			
Heading to Div. 2 of Part 3 .....	rs. No. 89, 2005		
<b>Subdivision A</b>			
Heading to Subdiv. A of .....	rs. No. 89, 2005		
Div. 2 of Part 3			
Heading to s. 24.....	am. No. 89, 2005		
<b>Subdivision B</b>			
Heading to Subdiv. B of .....	rs. No. 89, 2005		
Div. 2 of Part 3			
Heading to s. 25.....	am. No. 89, 2005		

## Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted	
Provision affected	How affected
<b>Subdivision C</b>	
Heading to Subdiv. C of ..... Div. 2 of Part 3	rs. No. 89, 2005
Heading to s. 26 .....	am. No. 89, 2005
Heading to s. 27 .....	am. No. 89, 2005
Heading to s. 28 .....	am. No. 89, 2005
<b>Division 3</b>	
Heading to Div. 3 of Part 3 .....	rs. No. 89, 2005
Heading to s. 29 .....	am. No. 89, 2005
Heading to s. 30 .....	am. No. 89, 2005
Heading to s. 31 .....	am. No. 89, 2005
<b>Division 4</b>	
Heading to Div. 4 of Part 3 .....	rs. No. 89, 2005
<b>Part 3A</b>	
Part 3A.....	ad. No. 89, 2005
<b>Division 1</b>	
Ss. 38A–38C .....	ad. No. 89, 2005
<b>Division 2</b>	
<b>Subdivision A</b>	
S. 38D.....	ad. No. 89, 2005
<b>Subdivision B</b>	
S. 38E.....	ad. No. 89, 2005
<b>Subdivision C</b>	
Ss. 38F–38H .....	ad. No. 89, 2005
<b>Division 3</b>	
Ss. 38I–38P .....	ad. No. 89, 2005
<b>Division 4</b>	
Ss. 38Q–38S.....	ad. No. 89, 2005
<b>Part 4</b>	
<b>Division 1</b>	
Heading to Div. 1 of Part 4 .....	ad. No. 89, 2005
<b>Division 2</b>	
Div. 2 of Part 4 .....	ad. No. 89, 2005
S. 39A.....	ad. No. 89, 2005
<b>Part 5</b>	
<b>Division 1</b>	
Heading to Div. 1 of Part 5 .....	ad. No. 89, 2005
Heading to s. 40.....	am. No. 89, 2005
Heading to s. 41 .....	am. No. 89, 2005
Heading to s. 42.....	am. No. 89, 2005
Heading to s. 43.....	am. No. 89, 2005



## Table of Amendments

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ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted	
Provision affected	How affected
Heading to s. 44 .....	am. No. 89, 2005
S. 45 .....	am. No. 89, 2005
Heading to s. 46 .....	am. No. 89, 2005
<b>Division 2</b>	
Div. 2 of Part 5 .....	ad. No. 89, 2005
Ss. 46A–46G .....	ad. No. 89, 2005
<b>Part 6</b>	
S. 47 .....	rs. No. 89, 2005

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