



National Security Information (Criminal Proceedings) Act 2004

No. 150, 2004

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

Note: An electronic version of this Act is available in SCALEplus (<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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National Security Information (Criminal Proceedings) Act 2004

No. 150, 2004

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

[Assented to 14 December 2004]

The Parliament of Australia enacts:

Section 1

Part 1—Preliminary

1 Short title

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

2 Commencement

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

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

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

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

3 Object of this Act

- (1) The object of this Act is to prevent the disclosure of information in federal criminal proceedings 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

This Act binds the Crown in each of its capacities.

6 Application of Act

- (1) Subject to subsection (2), this Act applies to a federal criminal proceeding if:
 - (a) the proceeding begins on or after the day on which this section commences; and
 - (b) 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 part of the proceeding that takes place after the notice is given.

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.

criminal proceeding has the meaning given by section 13.

defendant has the meaning given by subsection 15(1).

disclose information in a criminal 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.

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

Section 7

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

Part 2 Interpretation

Division 3 Federal criminal proceeding and related definitions

Section 15

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

15 Meaning of *defendant*

- (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 4—Other interpretation provisions

16 Disclosure of information in permitted circumstances

A person discloses information *in permitted circumstances* if:

- (a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceeding; or
- (b) the person 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

- (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 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

Part 2 Interpretation

Division 4 Other interpretation provisions

Section 20

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.

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 is likely to prejudice etc. national security

Division 1—Management of information

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 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 proceeding

- (1) The regulations may prescribe:

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

Division 1 Management of information

Section 23

- (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.

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

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

24 Prosecutor and defendant must notify expected disclosure 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.

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

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

Section 25

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

25 Preventing witnesses from disclosing information 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.

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 certificates

26 Attorney-General's 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;

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

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

Section 26

- (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).

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.

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

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

Section 27

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 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.

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.
-

Section 28

28 Attorney-General's 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.
- (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

29 Closed hearing requirements

- (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 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.

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

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

Section 29A

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

- (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.

31 Court orders

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;

Section 31

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;

- (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.

Part 3 Protection of information whose disclosure is likely to prejudice etc. national security

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

Section 33

33 Request to delay giving section 32 statement pending appeal decision

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

34 Period of operation of court orders

An order made by the court under this Division:

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

35 Consequence of certain court orders

- (1) If:
 - (a) in accordance with paragraph 27(3)(a), the court holds a hearing to decide whether to make an order under section 31 in relation to information described in a certificate given to the court before the trial in a federal criminal proceeding began; and
 - (b) after holding the hearing, the court makes an order under subsection 31(5) that any person may disclose the information;the order does not have the effect that there are grounds for re-conducting any part of the proceeding that took place before the trial began.
- (2) If:
 - (a) in accordance with paragraph 28(5)(a), the court holds a hearing to decide whether to make an order under section 31 in relation to the calling of a witness that is the subject of a

certificate given to the court before the trial in a federal criminal proceeding began; and

- (b) after holding the hearing, the court makes an order under paragraph 31(6)(b) that the person may be called as a witness;

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

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

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 4—Security clearances

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.
- (4) The court must defer or adjourn the proceeding accordingly.

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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.

Part 5—Offences

40 Offence to disclose information before Attorney-General gives non-disclosure certificate etc.

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:
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- (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 witness exclusion certificate etc.

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.

42 Offence to contravene requirement to notify Attorney-General etc.

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 non-disclosure certificate

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 witness exclusion certificate

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; and
 - (b) a person intentionally contravenes the order;
- the person commits an offence.

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Penalty: Imprisonment for 2 years.

46 Offence to disclose information 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.

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 by the Attorney-General under sections 26 and 28 during the year; and
- (b) identifies the criminal 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.

*[Minister's second reading speech made in—
Senate on 17 November 2004
House of Representatives on 7 December 2004]*

(212/04)

