



National Security Information Legislation Amendment Act 2005

No. 89, 2005

**An Act to amend the *National Security Information
(Criminal Proceedings) Act 2004*, 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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**An Act to amend the *National Security Information
(Criminal Proceedings) Act 2004*, and for related
purposes**

[Assented to 6 July 2005]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *National Security Information
Legislation Amendment Act 2005*.

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 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	6 July 2005
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	3 August 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 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Part 1—Amendment of the National Security Information (Criminal Proceedings) Act 2004

1 Title

After “**federal criminal proceedings**”, insert “**and civil proceedings**”.

2 Section 1

Omit “(*Criminal Proceedings*)”, substitute “(*Criminal and Civil Proceedings*)”.

3 Subsection 3(1)

After “federal criminal proceedings”, insert “and civil proceedings”.

4 Section 5

Before “This”, insert “(1)”.

5 At the end of section 5

Add:

- (2) This Act does not make the Crown liable to be prosecuted for an offence.

6 At the end of section 6

Add:

- (3) A notice given under this section is not a legislative instrument.

Note: The heading to section 6 is altered by adding at the end “**to federal criminal proceedings**”.

7 After section 6

Insert:

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.
- (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*.

8 Section 7

Insert:

civil proceeding has the meaning given by section 15A.

9 Section 7 (definition of *defendant*)

After “*defendant*”, insert “, in relation to a federal criminal proceeding,”.

10 Section 7 (definition of *disclose*)

After “criminal proceeding”, insert “or a civil proceeding”.

Note: The heading to section 15 is altered by adding at the end “**in relation to a federal criminal proceeding**”.

11 After Division 3 of Part 2

Insert:

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.

12 After paragraph 16(a)

Insert:

- (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

13 At the end of section 19

Add:

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

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Part 1 Amendment of the National Security Information (Criminal Proceedings) Act 2004

(b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and

(c) any other matter the court considers relevant.

Note 1: The following heading to subsection 19(1) is inserted “*Power of a court in a federal criminal proceeding*”.

Note 2: The heading to subsection 19(2) is altered by inserting “*in a federal criminal proceeding*” after “*closed hearings*”.

14 Part 3 (heading)

Repeal the heading, substitute:

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

15 Division 1 of Part 3 (heading)

Repeal the heading, substitute:

Division 1—Management of information in federal criminal proceedings

Note 1: The heading to section 22 is altered by inserting “**for federal criminal proceedings**” after “**Arrangements**”.

Note 2: The heading to section 23 is altered by inserting “**federal criminal**” after “**disclosed in a**”.

16 Division 2 of Part 3 (heading)

Repeal the heading, substitute:

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

17 Subdivision A of Division 2 of Part 3 (heading)

Repeal the heading, substitute:

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

Note: The heading to section 24 is altered by inserting “**in federal criminal proceedings**” after “**disclosure**”.

18 Subdivision B of Division 2 of Part 3 (heading)

Repeal the heading, substitute:

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

Note: The heading to section 25 is altered by inserting “**in federal criminal proceedings**” after “**information**”.

19 Subdivision C of Division 2 of Part 3 (heading)

Repeal the heading, substitute:

**Subdivision C—Attorney-General’s federal criminal
proceedings certificates**

Note 1: The heading to section 26 is altered by inserting “**criminal**” after “**Attorney-General’s**”.

Note 2: The heading to section 27 is altered by inserting “**criminal**” after “**giving**”.

Note 3: The heading to section 28 is altered by inserting “**criminal**” after “**Attorney-General’s**”.

20 Division 3 of Part 3 (heading)

Repeal the heading, substitute:

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

Note 1: The heading to section 29 is altered by adding at the end “**in federal criminal proceedings**”.

Note 2: The headings to sections 30 and 31 are altered by adding at the end “**in federal criminal proceedings**”.

21 Division 4 of Part 3 (heading)

Repeal the heading, substitute:

Division 4—Appeals in federal criminal proceedings

22 After Part 3

Insert:

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.

**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).

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:
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- (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;
 - (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).

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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).

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*.

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.

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

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

Copy of certificate must be given to the court

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

Duration of a certificate

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

Court hearing

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

Attorney-General may decide not to give a certificate

- (9) If the Attorney-General decides not to do as mentioned in subsection (2), the Attorney-General must, in writing, advise 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*.

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; 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:
 - (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;
- 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.

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 Adjournment 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.

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.

23 Before section 39

Insert:

Division 1—Security clearances required in federal criminal proceedings

24 At the end of Part 4

Add:

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

Schedule 1 Amendments

Part 1 Amendment of the National Security Information (Criminal Proceedings) Act 2004

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*.

25 Before section 40

Insert:

Division 1—Offences relating to federal criminal proceedings

Note 1: The heading to section 40 is altered by omitting “**non-disclosure certificate etc.**” and substituting “**criminal non-disclosure certificate etc. under section 26**”.

Note 2: The heading to section 41 is altered by omitting “**witness exclusion certificate etc.**” and substituting “**criminal witness exclusion certificate etc. under section 28**”.

Note 3: The heading to section 42 is altered by adding at the end “**under sections 24 and 25**”.

Note 4: The heading to section 43 is altered by omitting “**non-disclosure certificate**” and substituting “**criminal non-disclosure certificate given under section 26**”.

Note 5: The heading to section 44 is altered by omitting “**witness exclusion certificate**” and substituting “**criminal witness exclusion certificate given under section 28**”.

26 Paragraph 45(a)

After “this Act”, insert “in relation to a federal criminal proceeding”.

Note: The heading to section 46 is altered by inserting “**in federal criminal proceedings**” after “**disclose information**”.

27 At the end of Part 5

Add:

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 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.

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.

28 Section 47

Repeal the section, substitute:

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.

Part 2—Amendment of other Acts

Administrative Decisions (Judicial Review) Act 1977

29 Subsection 9A(4) (paragraph (b) of the definition of *related criminal justice process decision*)

Omit “(*Criminal Proceedings*)”, substitute “(*Criminal and Civil Proceedings*)”.

30 After section 9A

Insert:

9B Limitation of jurisdiction to review related civil proceeding decisions

- (1) At any time when a civil proceeding, or an appeal arising out of a civil proceeding, is taking place, no court has jurisdiction to hear, continue to hear or determine an application under this Act, by a person who is or was a party to the proceeding, in relation to a related civil proceeding decision.

- (2) In this section:

appeal includes a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.

civil proceeding has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

related civil proceeding decision, in relation to a civil proceeding, means:

- (a) a decision of the Attorney-General to give:
- (i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding; or
- (b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:

- (i) notice under section 6A of that Act in relation to the proceeding; or
- (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

31 Paragraph (da) of Schedule 2

Repeal the paragraph, substitute:

- (da) decisions of the Attorney-General to give:
 - (i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; or
 - (ii) a certificate under section 26, 28, 38F or 38H of that Act;
- (db) decisions of the Minister appointed by the Attorney-General under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to give:
 - (i) notice under section 6A of that Act; or
 - (ii) a certificate under section 38F or 38H of that Act;

Judiciary Act 1903

32 Subsection 39B(1)

Omit “and (1C)”, substitute “, (1C) and (1EA)”.

Note 1: The following heading to subsection 39B(1) is inserted “*Scope of original jurisdiction*”.

Note 2: The following heading to subsection 39B(1B) is inserted “*Jurisdiction for certain writs that relate to criminal prosecutions etc.*”.

33 After subsection 39B(1E)

Insert:

Jurisdiction for certain writs that relate to civil proceedings

(1EA) If:

- (a) a civil proceeding is before the Family Court of Australia, the Federal Magistrates Court or a court of a State or Territory; or
 - (b) an appeal arising out of such a proceeding is before the Family Court of Australia or a court of a State or Territory;
- the following apply:

- (c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision;
- (d) the following court is invested with, or has conferred on it, jurisdiction with respect to any such matter:
 - (i) if the civil proceeding or appeal is before the Family Court of Australia—that court; or
 - (ii) if the civil proceeding is before the Federal Magistrates Court—that court; or
 - (iii) if the civil proceeding or appeal is before a court of a State or Territory—the Supreme Court of the State or Territory.

34 Subsection 39B(1F)

Omit “and (1E)”, substitute “, (1E) and (1EA)”.

Note: The following heading to subsection 39B(1F) is inserted “*Jurisdictional rules to apply despite any other law*”.

35 Paragraphs 39B(1F)(a) and (b)

Omit “or (1C)”, substitute “, (1C) or (1EA)”.

36 Subsection 39B(2)

Omit “or (1C)”, substitute “, (1C) or (1D)”.

Note: The following heading to subsection 39B(2) is inserted “*References to officer or officers of the Commonwealth*”.

37 Subsection 39B(3)

Insert:

civil proceeding has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

Note: The following heading to subsection 39B(3) is inserted “*Definitions*”.

38 Subsection 39B(3)

Insert:

related civil proceeding decision, in relation to a civil proceeding, means:

- (a) a decision of the Attorney-General to give:
 - (i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding; or
- (b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:
 - (i) notice under section 6A of that Act in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

39 Subsection 39B(3) (paragraph (b) of the definition of *related criminal justice process decision*)

Omit “(Criminal Proceedings)”, substitute “(Criminal and Civil Proceedings)”.

[Minister’s second reading speech made in—
House of Representatives on 10 March 2005
Senate on 16 March 2005]

(36/05)
