



National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 14 December 2017

Peter Cosgrove
Governor-General

By His Excellency's Command

George Brandis QC
Attorney-General

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1 Name

This instrument is the *National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017*.

2 Commencement

- (1) Each provision of this instrument 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
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	20 December 2017

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

National Security Information (Criminal and Civil Proceedings) Regulation 2015

1 Subsection 5(1)

Omit “(1)” (first occurring).

2 After paragraph 5(1)(b)

Insert:

(ba) for the purposes of subsection 38PA(2) or 38PI(1) of the Act—matters relating to special advocates; and

3 Subsection 5(1) (note)

Omit “Note”, substitute “Note 1”.

4 At the end of subsection 5(1)

Add:

Note 2: Subsections 23(2) and 38C(2) of the Act have the effect that this instrument does not apply in relation to certain matters to the extent that orders in force under section 22 or 38B of the Act apply in relation to those matters.

5 Subsection 5(2)

Repeal the subsection.

6 Section 6 (at the end of the note)

Add:

; (f) special advocate.

7 Section 6

Insert:

Deputy Director-General of Security means a person who holds, or is acting in, a position known as Deputy Director-General of Security.

Director-General of Security means the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979*.

eligible former judge means a former judge of any of the following courts:

- (a) the High Court;
- (b) a court that is or was created by the Parliament under Chapter III of the Constitution;
- (c) the Supreme Court of a State or Territory;
- (d) the District Court (or equivalent) of a State or Territory.

eligible legal practitioner means a person who:

- (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory; and
- (b) holds a practising certificate (however described); and

- (c) has at least 5 years' legal advocacy experience; and
- (d) holds a Negative Vetting Level 2 security clearance.

eligible senior counsel means a person who:

- (a) is a Queen's Counsel or Senior Counsel; and
- (b) holds a Negative Vetting Level 2 security clearance.

Negative Vetting Level 2 security clearance means a security clearance that:

- (a) is issued by the Australian Government Security Vetting Agency or by another Commonwealth, State or Territory agency that is authorised or approved by the Commonwealth to issue security clearances; and
- (b) permits ongoing access to information that has been assigned any of the following security classifications:
 - (i) PROTECTED;
 - (ii) CONFIDENTIAL;
 - (iii) SECRET;
 - (iv) TOP SECRET.

8 Section 6 (definition of *security classification*)

Omit "by the Commonwealth".

9 Section 6 (examples at the end of the definition of *security classification*)

Repeal the examples, substitute:

- Note: The following are examples of security classifications that may be, or may have been, assigned to information:
- (a) PROTECTED;
 - (b) CONFIDENTIAL;
 - (c) SECRET;
 - (d) TOP SECRET;
 - (e) Codeword material;
 - (f) Restricted.

10 Before section 8

Insert:

7A When Part does not apply

If:

- (a) an order is made under subsection 19(1A) or (3A) of the Act in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding or a civil proceeding; and
- (b) the order is inconsistent with this Part to the extent that this Part relates to the disclosure, protection, storage, handling or destruction of national security information in the federal criminal proceeding or the civil proceeding; and
- (c) the order was made on an application by the Attorney-General or a representative of the Attorney-General;

this Part does not apply to the extent of that inconsistency.

11 Sections 10, 11, 12 and 13

Omit “Top secret” (wherever occurring), substitute “TOP SECRET”.

12 After Part 3

Insert:

Part 3A—Special advocates

20A Appointment requirements

The following requirements are specified in relation to the appointment of a person as a special advocate of a party to a civil proceeding:

- (a) the person is:
 - (i) an eligible former judge; or
 - (ii) an eligible senior counsel; or
 - (iii) an eligible legal practitioner;
- (b) the person has received training in accessing, storing, handling and destroying security classified documents and national security information for the purposes of exercising powers, or performing functions, as a special advocate of a party to a civil proceeding;
- (c) the person is not:
 - (i) a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; or
 - (ii) the Director-General of Security or a Deputy Director-General of Security; or
 - (iii) the Director of Public Prosecutions or a person performing a similar function appointed under the law of a State or Territory; or
 - (iv) the Solicitor-General of the Commonwealth, or of a State or Territory;
- (d) the Attorney-General is satisfied that the person is suitable for appointment because of the person’s qualifications, training or experience.

20B Remuneration

Eligible former judges and eligible senior counsel

- (1) If a special advocate of a party to a civil proceeding is an eligible former judge or eligible senior counsel, the special advocate may charge the Commonwealth for the time spent by the special advocate in the performance of his or her functions, or the exercise of his or her powers, as a special advocate of the party to the proceeding as follows:
 - (a) per day—either:
 - (i) at the maximum daily rate payable to senior counsel without the approval of the Attorney-General, as set out in Appendix D of the *Legal Services Directions 2017*; or
 - (ii) at such higher rate as the Attorney-General approves;
 - (b) per hour—either:
 - (i) at one-sixth of the maximum daily rate mentioned in paragraph (a), up to a maximum of 6 hours per day; or

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- (ii) at such higher rate as the Attorney-General approves.

Eligible legal practitioners

- (2) If a special advocate of a party to a civil proceeding is an eligible legal practitioner, the special advocate may charge the Commonwealth for the time spent by the special advocate in the performance of his or her functions, or the exercise of his or her powers, as a special advocate of the party to the proceeding as follows:
 - (a) per day—either:
 - (i) at the maximum daily rate payable to junior counsel without the approval of the Attorney-General, as set out in Appendix D of the *Legal Services Directions 2017*; or
 - (ii) at such higher rate as the Attorney-General approves;
 - (b) per hour—either:
 - (i) at one-sixth of the maximum daily rate mentioned in paragraph (a), up to a maximum of 6 hours per day; or
 - (ii) at such higher rate as the Attorney-General approves.

20C Disclosure of interests to court

A special advocate of a party to a civil proceeding must give the court that appointed the special advocate written notice of all interests, pecuniary or otherwise, that the special advocate has or acquires and that conflict or could conflict with the proper performance of his or her functions, or the exercise of his or her powers, as a special advocate of the party to the proceeding.

20D Conflicts of interest

A special advocate of a party to a civil proceeding must take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the proper performance of his or her functions, or the exercise of his or her powers, as a special advocate of the party to the proceeding.

20E Immunity from legal action

No action, suit or proceeding may be brought against a person who is, or has been, a special advocate of a party to a civil proceeding in relation to anything done, or omitted to be done, in good faith by the person:

- (a) in the performance, or purported performance, of his or her functions as a special advocate of the party to the proceeding; or
- (b) in the exercise, or purported exercise, of his or her powers as a special advocate of the party to the proceeding.