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Commonwealth of Australia

THE SENATE

Presented and read a first time

**National Security Legislation Monitor
Bill 2009**

No. , 2009

(Cabinet Secretary)

**A Bill for an Act to provide for the appointment of
a National Security Legislation Monitor, and for
related purposes**

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1 **A Bill for an Act to provide for the appointment of**
2 **a National Security Legislation Monitor, and for**
3 **related purposes**

4 The Parliament of Australia enacts:

5 **Part 1—Preliminary**
6

7 **1 Short title**

8 This Act may be cited as the *National Security Legislation Monitor*
9 *Act 2009*.

Section 2

1 **2 Commencement**

2 This Act commences on the day after it receives the Royal Assent.

3 **3 Object**

4 The object of this Act is to appoint a National Security Legislation
5 Monitor who will assist Ministers in ensuring that Australia's
6 counter-terrorism and national security legislation:

- 7 (a) is effective in deterring and preventing terrorism and
8 terrorism-related activity which threatens Australia's
9 security; and
10 (b) is effective in responding to terrorism and terrorism-related
11 activity; and
12 (c) is consistent with Australia's international obligations,
13 including human rights obligations; and
14 (d) contains appropriate safeguards for protecting the rights of
15 individuals.

16 **4 Definitions**

17 In this Act:

18 ***counter-terrorism and national security legislation*** means the
19 following provisions of Commonwealth law:

- 20 (a) Division 3 of Part III of the *Australian Security Intelligence*
21 *Organisation Act 1979* and any other provision of that Act as
22 far as it relates to that Division;
23 (b) Part 4 of the *Charter of the United Nations Act 1945* and any
24 other provision of that Act as far as it relates to that Part;
25 (c) the following provisions of the *Crimes Act 1914*:
26 (i) Division 3A of Part IAA and any other provision of that
27 Act as far as it relates to that Division;
28 (ii) sections 15AA and 19AG and any other provision of
29 that Act as far as it relates to those sections;
30 (iii) Part IC, to the extent that the provisions of that Part
31 relate to the investigation of terrorism offences (within
32 the meaning of that Act), and any other provision of that
33 Act as far as it relates to that Part;

- 1 (d) Chapter 5 of the *Criminal Code* and any other provision of
2 that Act as far as it relates to that Chapter;
3 (e) Part IIIAAA of the *Defence Act 1903* and any other provision
4 of that Act as far as it relates to that Part;
5 (f) the *National Security Information (Criminal and Civil
6 Proceedings) Act 2004*.

7 **head** means:

- 8 (a) in relation to the Australian Federal Police—the
9 Commissioner of Police; or
10 (b) in relation to the Australian Crime Commission—the Chief
11 Executive Officer of the Australian Crime Commission; or
12 (c) in relation to Customs—the Chief Executive Officer of
13 Customs; or
14 (d) in relation to the Australian Security Intelligence
15 Organisation—the Director-General of Security; or
16 (e) in relation to the Australian Secret Intelligence Service—the
17 Director-General of the Australian Secret Intelligence
18 Service; or
19 (f) in relation to the part of the Department of Defence known as
20 the Defence Imagery and Geospatial Organisation—the
21 Director of that part of the Department; or
22 (g) in relation to the part of the Department of Defence known as
23 the Defence Intelligence Organisation—the Director of that
24 part of the Department; or
25 (h) in relation to the part of the Department of Defence known as
26 the Defence Signals Directorate—the Director of that part of
27 the Department; or
28 (i) in relation to any other part of the Department of Defence—
29 the Chief of the Defence Force and the Secretary of the
30 Department; or
31 (j) in relation to the Office of National Assessments established
32 by the *Office of National Assessments Act 1977*—the
33 Director-General of the Office of National Assessments; or
34 (k) in relation to any other Commonwealth government agency:
35 (i) in the case of a Department of the Commonwealth—the
36 Secretary of the Department; or

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- 1 (ii) in the case of a body established for a public purpose—
2 the person holding, or performing the duties of, the
3 principal office in respect of the body; or
4 (l) in relation to a State or Territory government agency—the
5 person holding, or performing the duties of, the principal
6 office in respect of the agency.

7 ***law enforcement or security agency*** means any of the following
8 agencies:

- 9 (a) the Australian Federal Police;
10 (b) the Australian Crime Commission;
11 (c) Customs;
12 (d) the Australian Security Intelligence Organisation;
13 (e) the Australian Secret Intelligence Service;
14 (f) the Australian Defence Force;
15 (g) the part of the Department of Defence known as the Defence
16 Imagery and Geospatial Organisation;
17 (h) the part of the Department of Defence known as the Defence
18 Intelligence Organisation;
19 (i) the part of the Department of Defence known as the Defence
20 Signals Directorate;
21 (j) the Office of National Assessments established by the *Office*
22 *of National Assessments Act 1977*;
23 (k) the police force of a State or Territory;
24 (l) any other agency prescribed by the regulations for the
25 purposes of this definition.

26 ***National Security Legislation Monitor*** means the person
27 appointed in accordance with section 11.

28 ***operationally sensitive information*** means:

- 29 (a) information about information sources or operational
30 activities or methods available to a law enforcement or
31 security agency; or
32 (b) information about particular operations that have been, are
33 being or are proposed to be undertaken by a law enforcement
34 or security agency, or about proceedings relating to those
35 operations; or

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1 (c) information provided by a foreign government, or by an
2 agency of a foreign government, where that government does
3 not consent to the public disclosure of the information.

4 ***responsible Minister***, in relation to a review of a matter, means the
5 Minister (including a State or Territory Minister) responsible for
6 the agency concerned in relation to the matter.

7 ***secrecy provision*** means:

- 8 (a) a provision of a law of the Commonwealth, of a State or of a
9 Territory, being a provision that purports to prohibit; or
10 (b) anything done, under a provision of a law of the
11 Commonwealth, of a State or of a Territory, to prohibit;
12 the communication, divulging or publication of information, the
13 production of, or the publication of the contents of, a document, or
14 the production of a thing.

Part 2 National Security Legislation Monitor

Division 1 Establishment, functions and powers of National Security Legislation Monitor

Section 5

1

2 **Part 2—National Security Legislation Monitor**

3 **Division 1—Establishment, functions and powers of**
4 **National Security Legislation Monitor**

5 **5 National Security Legislation Monitor**

6 There is to be a National Security Legislation Monitor.

7 **6 Functions of the National Security Legislation Monitor**

8 (1) The National Security Legislation Monitor has the following
9 functions:

- 10 (a) to review the operation, effectiveness and implications of:
- 11 (i) Australia’s counter-terrorism and national security
12 legislation; and
- 13 (ii) any other law of the Commonwealth to the extent that it
14 relates to Australia’s counter-terrorism and national
15 security legislation;
- 16 (b) to consider whether Australia’s counter-terrorism and
17 national security legislation:
- 18 (i) contains appropriate safeguards for protecting the rights
19 of individuals; and
- 20 (ii) remains necessary;
- 21 (c) if a matter relating to counter-terrorism or national security is
22 referred to the Monitor by the Prime Minister—to report on
23 the reference.

24 (2) To avoid doubt, the following are not functions of the National
25 Security Legislation Monitor:

- 26 (a) to review the priorities of, and use of resources by, agencies
27 that have functions relating to, or are involved in the
28 implementation of, Australia’s counter-terrorism and national
29 security legislation;
- 30 (b) to consider any individual complaints about the activities of
31 Commonwealth agencies that have functions relating to, or

1 are involved in the implementation of, Australia's
2 counter-terrorism and national security legislation.

3 (3) The National Security Legislation Monitor has the power to do all
4 things necessary or convenient to be done for or in connection with
5 the performance of the Monitor's functions.

6 **7 References to the National Security Legislation Monitor**

7 (1) The Prime Minister may refer a matter relating to counter-terrorism
8 or national security to the National Security Legislation Monitor,
9 either at the Monitor's suggestion or on his or her own initiative.

10 (2) The Prime Minister may alter the terms of a reference.

11 (3) The Prime Minister may give the National Security Legislation
12 Monitor directions about the order in which he or she is to deal
13 with references.

14 **8 Regard to be had to international obligations and constitutional** 15 **arrangements**

16 When performing the National Security Legislation Monitor's
17 functions, the Monitor must have regard to:

- 18 (a) Australia's obligations under international agreements (as in
19 force from time to time); and
20 (b) arrangements agreed from time to time between the
21 Commonwealth, the States and the Territories to ensure a
22 national approach to countering terrorism.

23 **9 Emphasis to be given to counter-terrorism and national security** 24 **legislation that has been applied or considered recently**

25 When performing functions relating to Australia's
26 counter-terrorism and national security legislation in a particular
27 financial year, the National Security Legislation Monitor must give
28 particular emphasis to provisions of that legislation that have been
29 applied, considered or purportedly applied by employees of
30 agencies that have functions relating to, or are involved in the

Part 2 National Security Legislation Monitor

Division 1 Establishment, functions and powers of National Security Legislation Monitor

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1 implementation of, that legislation during that financial year or the
2 immediately preceding financial year.

3 **10 Consultation with agencies etc.**

- 4 (1) When performing functions relating to Australia's
5 counter-terrorism and national security legislation, the National
6 Security Legislation Monitor must have regard to:
- 7 (a) the functions of agencies that have functions relating to, or
8 are involved in the implementation of, that legislation; and
 - 9 (b) functions relating to that legislation that are conferred on a
10 person who holds any office or appointment under a law of
11 the Commonwealth or of a State or Territory.
- 12 (2) When performing functions relating to Australia's
13 counter-terrorism and national security legislation, the National
14 Security Legislation Monitor may consult with:
- 15 (a) the head of any relevant agency (of a kind mentioned in
16 paragraph (1)(a)); or
 - 17 (b) the Ombudsman; or
 - 18 (c) the Inspector-General of Intelligence and Security; or
 - 19 (d) a person mentioned in paragraph (1)(b);
- 20 as the Monitor considers necessary.

1

2 **Division 2—Appointment of National Security Legislation**
3 **Monitor**

4 **11 Appointment**

- 5 (1) The National Security Legislation Monitor is to be appointed by
6 the Governor-General by written instrument, on a part-time basis.
- 7 (2) Before a recommendation is made to the Governor-General for the
8 appointment of a person as the National Security Legislation
9 Monitor, the Prime Minister must consult with the Leader of the
10 Opposition in the House of Representatives.
- 11 (3) A person must not be appointed as the National Security
12 Legislation Monitor unless the person is, in the
13 Governor-General's opinion, suitable for appointment because of
14 the person's qualifications, training or experience.
- 15 (4) A person's appointment as the National Security Legislation
16 Monitor is not invalid because of a defect or irregularity in
17 connection with the person's appointment.

18 **12 Term of appointment**

- 19 (1) The National Security Legislation Monitor holds office for the
20 period specified in the instrument of appointment. The period must
21 not exceed 3 years.
- 22 (2) The National Security Legislation Monitor is eligible for
23 reappointment once only.

24 **13 Remuneration and allowances**

- 25 (1) The National Security Legislation Monitor is to be paid such
26 remuneration as is determined by the Remuneration Tribunal. If no
27 determination of that remuneration is in operation, the Monitor is
28 to be paid such remuneration as is prescribed by the regulations.

Section 14

1 (2) The National Security Legislation Monitor is to be paid the
2 allowances that are prescribed by the regulations.

3 (3) This section has effect subject to the *Remuneration Tribunal Act*
4 *1973*.

5 **14 Leave of absence**

6 The Prime Minister may grant leave of absence to the National
7 Security Legislation Monitor on the terms and conditions that the
8 Governor-General determines in writing.

9 **15 Outside employment**

10 The National Security Legislation Monitor must not engage in any
11 paid employment that conflicts or may conflict with the proper
12 performance of his or her duties without the Prime Minister's
13 written consent.

14 **16 Disclosure of interests to the Prime Minister**

15 The National Security Legislation Monitor must give written notice
16 to the Prime Minister of all interests, pecuniary or otherwise, that
17 the Monitor has or acquires and that conflict or could conflict with
18 the proper performance of his or her functions.

19 **17 Other terms and conditions**

20 The National Security Legislation Monitor holds office on such
21 terms and conditions (if any) in relation to matters not provided for
22 by this Act as are determined, in writing, by the Governor-General.

23 **18 Resignation**

24 (1) The National Security Legislation Monitor may resign by giving to
25 the Governor-General a signed notice of resignation.

26 (2) The resignation takes effect on the day on which it is received by
27 the Governor-General or, if a later day is specified in the
28 resignation, on that later day.

1 **19 Termination of appointment**

- 2 (1) The Governor-General may terminate the appointment of the
3 National Security Legislation Monitor for misbehaviour or
4 physical or mental incapacity.
- 5 (2) The Governor-General must terminate the appointment of the
6 National Security Legislation Monitor:
- 7 (a) if the Monitor:
- 8 (i) becomes bankrupt; or
9 (ii) applies to take the benefit of any law for the relief of
10 bankrupt or insolvent debtors; or
11 (iii) compounds with his or her creditors; or
12 (iv) makes an assignment of his or her remuneration for the
13 benefit of his or her creditors; or
- 14 (b) if the Monitor fails, without reasonable excuse, to comply
15 with section 16; or
- 16 (c) if the Monitor engages, except with the Prime Minister's
17 written consent, in paid employment that conflicts or may
18 conflict with the proper performance of the Monitor's duties;
19 or
- 20 (d) if the Monitor is absent, except on leave of absence granted
21 under section 14, for 7 consecutive days or for 14 days in any
22 12 months.

23 **20 Acting National Security Legislation Monitor**

- 24 (1) The Prime Minister may appoint a person to act as the National
25 Security Legislation Monitor:
- 26 (a) during a vacancy in the office of the Monitor (whether or not
27 an appointment has previously been made to the office); or
- 28 (b) during a period, or during all periods, when the Monitor:
- 29 (i) is absent from duty or from Australia; or
30 (ii) is, for any reason, unable to perform the duties of the
31 office;
- 32 so long as the period, or the total of all periods, is not more
33 than 12 months.

Part 2 National Security Legislation Monitor

Division 2 Appointment of National Security Legislation Monitor

Section 20

1 Note: A person may not act for more than 12 months: see paragraphs
2 33A(1)(ba) and (c) of the *Acts Interpretation Act 1901*.

3 (2) Anything done by or in relation to a person purporting to act under
4 an appointment is not invalid merely because:

5 (a) the occasion for the appointment had not arisen; or

6 (b) there is a defect or irregularity in connection with the
7 appointment; or

8 (c) the appointment had ceased to have effect; or

9 (d) the occasion to act had not arisen or had ceased.

10 Note: See sections 20 and 33A of the *Acts Interpretation Act 1901*.

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Part 3—Information gathering powers2
3**21 National Security Legislation Monitor may hold hearings**

- 4
- 5 (1) The National Security Legislation Monitor may hold a hearing for
6 the purposes of performing his or her functions under this Act.
- 7 (2) A hearing, or a part of a hearing:
- 8 (a) may be held in private if the National Security Legislation
9 Monitor so directs; and
- 10 (b) must be held in private for any time during which a person is
11 giving evidence that discloses operationally sensitive
12 information.
- 13 Otherwise, a hearing must be held in public.
- 14 (3) A hearing may otherwise be conducted in such a manner as the
15 National Security Legislation Monitor thinks fit.
- 16 (4) The National Security Legislation Monitor must ensure that a
17 record of a hearing is made.
- 18 (5) A direction given under paragraph (2)(a) is not a legislative
19 instrument.

22 National Security Legislation Monitor may summon person

- 20
- 21 (1) The National Security Legislation Monitor may, by notice in
22 writing, summon a person to attend a hearing at a time and place
23 specified in the notice:
- 24 (a) to give evidence; or
25 (b) to produce documents or things specified in the notice.
- 26 Note: Failure to comply with a notice is an offence: see section 25.
- 27 (2) The notice must:
- 28 (a) be in writing and be signed by the National Security
29 Legislation Monitor; and
30 (b) be served on the person required to attend a hearing.

Section 23

- 1 (3) A time specified in a notice must be at least 14 days after the day
2 on which the notice is given.
- 3 (4) A person summoned to appear as a witness at a hearing is entitled
4 to be paid by the Commonwealth any allowances for travelling and
5 other expenses that are prescribed by the regulations.

6 **23 Evidence on oath or by affirmation**

- 7 (1) At a hearing, the National Security Legislation Monitor may:
8 (a) require a witness to either take an oath or make an
9 affirmation; and
10 (b) administer an oath or affirmation to the witness.

11 Note 1: Failure to take an oath or make an affirmation is an offence: see
12 section 25.

13 Note 2: This means that a hearing is a judicial proceeding for the purposes of
14 Part III of the *Crimes Act 1914*, which creates various offences in
15 relation to judicial proceedings.

- 16 (2) The oath or affirmation is an oath or affirmation that the evidence
17 the person will give will be true.
- 18 (3) The National Security Legislation Monitor may allow a person
19 attending a hearing who has been sworn, or who has made an
20 affirmation, to give evidence by tendering a written statement and
21 verifying it by oath or affirmation.

22 **24 National Security Legislation Monitor may request production of**
23 **a document or thing**

- 24 (1) For the purposes of performing his or her functions under this Act,
25 the National Security Legislation Monitor may request, by written
26 notice, a person:
27 (a) to give the Monitor the information referred to in the notice;
28 or
29 (b) to produce to the Monitor the documents or things referred to
30 in the notice.

31 Note: Failure to give the information, or produce the documents or things, is
32 an offence: see section 25.

- 33 (2) The notice must:
-

- 1 (a) be in writing; and
2 (b) specify the period within which the person must comply with
3 the notice.
- 4 (3) The period specified in a notice must end at least 14 days after the
5 day on which the notice is given.

6 **25 Offences**

7 *Failure to attend hearing*

- 8 (1) A person commits an offence if:
9 (a) the person is served with a notice to attend a hearing; and
10 (b) the person fails to attend as required by the notice.

11 Penalty: Imprisonment for 6 months or 30 penalty units, or both.

12 *Failure to swear an oath, make an affirmation or answer a 13 question*

- 14 (2) A person commits an offence if:
15 (a) the person is served with a notice to attend a hearing; and
16 (b) either:
17 (i) the person fails to be sworn or to make an affirmation at
18 the hearing; or
19 (ii) the person fails to answer a question at the hearing that
20 the National Security Legislation Monitor requires the
21 person to answer.

22 Penalty: Imprisonment for 6 months or 30 penalty units, or both.

23 *Failure to produce a document or thing*

- 24 (3) A person commits an offence if:
25 (a) the person receives a notice to produce a document or thing
26 specified in the notice; and
27 (b) the person fails to produce the document or thing that the
28 person was required to produce.

29 Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Section 26

1 *Failure to provide information*

- 2 (4) A person commits an offence if:
3 (a) the person receives a notice to provide information specified
4 in the notice; and
5 (b) the person fails to provide the information that the person
6 was required to provide.

7 Penalty: Imprisonment for 6 months or 30 penalty units, or both.

8 *Exception—reasonable excuse*

- 9 (5) This section does not apply if the person has a reasonable excuse.

10 Note: A defendant bears an evidential burden in relation to the matter in
11 subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- 12 (6) It is a reasonable excuse for a person to fail to:
13 (a) answer a question; or
14 (b) produce a document or thing; or
15 (c) provide information;
16 on the ground that to do so might tend to incriminate the person or
17 expose the person to a penalty.

18 **26 No criminal or civil liability under secrecy provisions**

19 A person who is served with a notice under section 22 or 24 does
20 not commit an offence, and is not liable to any penalty, under a
21 secrecy provision because the person:

- 22 (a) answers a question at a hearing that the National Security
23 Legislation Monitor requires the person to answer; or
24 (b) provides information that the person is required to provide in
25 accordance with the notice; or
26 (c) produces a document or thing that the person is required to
27 produce in accordance with the notice.

27 National Security Legislation Monitor may retain documents or things

- 1
2
- 3 (1) Subject to section 28, if a document or thing is produced to the
4 National Security Legislation Monitor in accordance with
5 section 22 or 24, the Monitor:
- 6 (a) may take possession of, and make copies of, the document or
7 thing, or take extracts from the document; and
8 (b) may retain possession of the document or thing for such
9 period as is necessary for the performance of the Monitor's
10 functions under this Act.
- 11 (2) While the National Security Legislation Monitor retains the
12 document or thing, the Monitor must allow a person who would
13 otherwise be entitled to possession of the document or thing, or a
14 person authorised by that person:
- 15 (a) reasonable access to the document for the purposes of
16 inspecting and making copies of, or taking extracts from, it;
17 and
18 (b) reasonable access to the thing.

28 Protection of information and documents

- 19
- 20 (1) This section applies if documents having a national security
21 classification or containing operationally sensitive information are
22 provided by an agency to the National Security Legislation
23 Monitor.
- 24 (2) The National Security Legislation Monitor must:
- 25 (a) make arrangements with the head of the agency for the
26 protection of those documents while they remain in the
27 Monitor's possession; and
28 (b) ensure that the documents are returned to the agency as soon
29 as possible after the Monitor has examined them.

1

2 **Part 4—Reporting requirements**

3

4 **29 Annual report**

5 (1) The National Security Legislation Monitor must prepare and give
6 to the Prime Minister a report (an *annual report*) relating to the
7 performance of the Monitor's functions as set out in paragraphs
8 6(1)(a) and (b).

9 (2) The annual report must be given to the Prime Minister as soon as
10 practicable after 30 June in each financial year and, in any event,
11 by the following 31 December.

12 (3) The annual report must not contain:

13 (a) any operationally sensitive information; or

14 (b) any information that would or might prejudice:

15 (i) Australia's national security or the conduct of

16 Australia's foreign relations; or

17 (ii) the performance by a law enforcement or security

18 agency of its functions; or

19 (c) any information that, if included in the report, would or

20 might endanger a person's safety; or

21 (d) any information obtained from a document prepared for the

22 purposes of a meeting of:

23 (i) the Cabinet, or of a Committee of the Cabinet, of the

24 Commonwealth or of a State; or

25 (ii) the Australian Capital Territory Executive or of a

26 committee of that Executive; or

27 (iii) the Executive Council of the Northern Territory or of a

28 committee of that Executive Council; or

29 (e) any information that would disclose the deliberations or

30 decisions of:

31 (i) the Cabinet, or of a Committee of the Cabinet, of the

32 Commonwealth or of a State; or

33 (ii) the Australian Capital Territory Executive or of a

34 committee of that Executive; or

Section 30

- 1 (iii) the Executive Council of the Northern Territory or of a
2 committee of that Executive Council.
- 3 (4) The National Security Legislation Monitor must get the advice of
4 the responsible Minister or responsible Ministers concerned as to
5 whether any part of the annual report contains information referred
6 to in subsection (3).
- 7 (5) The Prime Minister must present an annual report to each House of
8 the Parliament within 15 sitting days of that House after the day on
9 which he or she receives the report.
- 10 (6) However, before presenting an annual report to each House of the
11 Parliament, the Prime Minister must be satisfied that the annual
12 report does not contain information referred to in subsection (3).
- 13 (7) If, because of subsection (3), the National Security Legislation
14 Monitor excludes information from an annual report, the Monitor
15 must prepare and give to the Prime Minister a supplementary
16 report that sets out that information.
- 17 (8) Section 34C of the *Acts Interpretation Act 1901* does not apply in
18 relation to a report given to the Prime Minister under this section.

30 Report on a reference

- 19
- 20 (1) The National Security Legislation Monitor must report to the
21 Prime Minister on a reference.
- 22 (2) The National Security Legislation Monitor may, before giving his
23 or her report on a reference, give an interim report to the Prime
24 Minister on the Monitor's work on the reference.
- 25 (3) The Prime Minister may, before the National Security Legislation
26 Monitor gives his or her report on a reference, direct the Monitor to
27 give an interim report to the Prime Minister on the Monitor's work
28 on the reference.

Section 31

1

2 **Part 5—Miscellaneous**

3

4 **31 Immunity from legal action**

5

No action, suit or proceeding may be brought against a person who is, or has been, the National Security Legislation Monitor in relation to anything done, or omitted to be done, in good faith by the Monitor:

6

7

8

9

(a) in the performance, or purported performance, of his or her functions; or

10

11

(b) in the exercise, or purported exercise, or his or her powers.

12

32 Regulations

13

The Governor-General may make regulations prescribing matters:

14

(a) required or permitted by this Act to be prescribed; or

15

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

16