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Commonwealth of Australia

HOUSE OF REPRESENTATIVES

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National Security Information (Criminal Proceedings) Bill 2004

No. , 2004

(Attorney-General)

**A Bill for an Act relating to the protection of
certain information from disclosure in federal
criminal proceedings, and for related purposes**

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1 **A Bill for an Act relating to the protection of**
2 **certain information from disclosure in federal**
3 **criminal proceedings, and for 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 Information*
9 *(Criminal Proceedings) Act 2004*.

Section 2

2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Sections 3 to 44	The 28th day after the day on which this Act receives the Royal Assent.	

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

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

3 Object of this Act

- (1) The object of this Act is to prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.
- (2) In exercising powers or performing functions under this Act, a court must have regard to the object of this Act.

4 Extension of Act to external Territories

This Act extends to every external Territory.

1 **5 Act binds Crown**

2 This Act binds the Crown in each of its capacities.

3 **6 Application of Act**

4 (1) Subject to subsection (2), this Act applies to a federal criminal
5 proceeding if:

6 (a) the proceeding begins on or after the day on which this
7 section commences; and

8 (b) the prosecutor gives notice in writing to the defendant and
9 the court that this Act applies to the proceeding.

10 (2) If the prosecutor gives the notice after the proceeding begins, this
11 Act only applies to the part of the proceeding that takes place after
12 the notice is given.

Section 7

1

2 **Part 2—Interpretation**

3 **Division 1—Definitions**

4 **7 Definitions**

5 In this Act, unless the contrary intention appears:

6 *apply* to the court means apply to the court either orally or in
7 writing.

8 *criminal proceeding* has the meaning given by section 13.

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

10 *disclose* information in a criminal proceeding means:

- 11 (a) give the information in evidence in the proceeding; or
12 (b) otherwise disclose the information to the court conducting
13 the proceeding or to any person for the purposes of the
14 proceeding;

15 whether orally or by giving, or disclosing the contents of, a
16 document.

17 *document* has the same meaning as in the *Evidence Act 1995*.

18 *federal criminal proceeding* has the meaning given by section 14.

19 *information* means information as defined in subsection 90.1(1) of
20 the *Criminal Code*, whether or not in the public domain.

21 *in permitted circumstances* has the meaning given by section 16.

22 *international relations* has the meaning given by section 10.

23 *law enforcement interests* has the meaning given by section 11.

24 *national interests* has the meaning given by section 12.

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

Section 7

- 1 ***prosecutor***, in relation to a federal criminal proceeding, means the
2 Director of Public Prosecutions or a person representing the
3 Director in relation to the proceeding.
- 4 ***security*** has the meaning given by section 9.
- 5 ***trial*** includes a proceeding for the summary conviction of a person.

Section 8

Division 2—National security and related definitions

8 Meaning of *national security*

In this Act, *national security* means Australia's defence, security, international relations, law enforcement interests or national interests.

9 Meaning of *security*

In this Act, *security* has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

10 Meaning of *international relations*

In this Act, *international relations* means political, military and economic relations with foreign governments and international organisations.

11 Meaning of *law enforcement interests*

In this Act, *law enforcement interests* includes interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
- (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
- (c) the protection and safety of informants and of persons associated with informants;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

1 **12 Meaning of *national interests***

2 In this Act, ***national interests*** means economic, technological or
3 scientific interests important to the stability and integrity of a
4 nation.

Section 13

Division 3—Federal criminal proceeding and related definitions

13 Meaning of *criminal proceeding*

- (1) In this Act, ***criminal proceeding*** means a proceeding for the prosecution, whether summarily or on indictment, of an offence or offences.
- (2) To avoid doubt, each of the following is part of a ***criminal proceeding***:
- (a) a bail proceeding;
 - (b) a committal proceeding;
 - (c) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence;
 - (d) a sentencing proceeding;
 - (e) an appeal proceeding;
 - (f) a proceeding with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth (within the meaning of subsection 39B(1B) of the *Judiciary Act 1903*) in relation to:
 - (i) a decision to prosecute a person for one or more offences against a law of the Commonwealth; or
 - (ii) a related criminal justice process decision (within the meaning of subsection 39B(3) of that Act);
 - (g) any other pre-trial, interlocutory or post-trial proceeding prescribed by regulations for the purposes of this paragraph.

14 Meaning of *federal criminal proceeding*

In this Act, ***federal criminal proceeding*** means:

- (a) a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth; or

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

3 **15 Meaning of *defendant***

4 (1) In this Act, unless the contrary intention appears, ***defendant***
5 means:

6 (a) in relation to a federal criminal proceeding mentioned in
7 paragraph 14(a)—a person charged with the offence or
8 offences concerned (even if the proceeding takes place after
9 any conviction of the person); or

10 (b) in relation to a federal criminal proceeding mentioned in
11 paragraph 14(b)—a person to whom the proceeding relates.

12 (2) If there is more than one defendant in a federal criminal
13 proceeding, this Act applies separately in relation to each
14 defendant.

Section 16

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Division 4—Other interpretation provisions

3

16 Disclosure of information in permitted circumstances

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A person discloses information *in permitted circumstances* if:

5

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

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

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17 Operation of other Acts etc.

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This Act does not affect the operation of the provisions of any
other Act, other than:

13

14

(a) sections 26, 27, 29, 43 to 45 and 48 of the *Evidence Act*
1995; and

15

16

(b) sections 70, 80 and 80A of the *Judiciary Act 1903*.

17

18 General powers of a court

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The power of a court to control the conduct of a federal criminal
proceeding, in particular with respect to abuse of process, is not
affected by this Act, except so far as this Act expressly or
impliedly provides otherwise.

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21

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

Division 1—Management of information

19 Pre-trial conferences

- (1) Before the trial in a federal criminal proceeding begins, the prosecutor or defendant may apply to the court for the court to hold a conference of the parties to consider issues relating to any disclosure, in the trial, of information that relates to national security or any disclosure, of information in the trial, that may affect national security, including:
 - (a) whether the prosecutor or defendant is likely to be required to give notice under section 22; and
 - (b) whether the parties wish to enter into an arrangement of the kind mentioned in section 20.
- (2) The court must hold the conference as soon as possible after the application is made.

20 Arrangements about disclosures prejudicial to national security

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

21 Protection of certain information disclosed in a proceeding

- (1) The regulations may prescribe ways in which information that is disclosed, or to be disclosed, to the court in a federal criminal proceeding must be stored.

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

Division 1 Management of information

Section 21

- 1 (2) At any time during a federal criminal proceeding, the court may
2 make an order relating to the protection or storage of information
3 that is disclosed, or to be disclosed, to the court in the proceeding.
- 4 (3) A court must not make an order under subsection (2) that is
5 inconsistent with a regulation mentioned in subsection (1).
- 6 Note: The court may also make orders under section 93.2 of the *Criminal*
7 *Code* and under other provisions of this Act in order to protect
8 information from disclosure.

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

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

**22 Prosecutor and defendant must notify expected disclosure of
information relating to or affecting national security**

- (1) If the prosecutor or defendant knows or believes that:
- (a) he or she will disclose, in a federal criminal proceeding, information that relates to national security; or
 - (b) he or she will disclose information in a federal criminal proceeding and the disclosure may affect national security; or
 - (c) a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information in giving evidence or by his or her mere presence and:
 - (i) the information relates to national security; or
 - (ii) the disclosure may affect national security;
- the prosecutor or defendant must, as soon as practicable, give the Attorney-General, the other person (if any) and the court notice in writing of that knowledge or belief.

Note: Section 23 deals with the situation where the prosecutor or defendant knows or believes that a disclosure by a witness in answering a question may relate to or affect national security.

Requirements for notice

- (2) The notice must:
- (a) be in the prescribed form; and
 - (b) if paragraph (c) does not apply—include a description of the information; and
 - (c) if the information is contained in a document—be accompanied by a copy of the document or by an extract from the document, that contains the information.

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

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

Section 23

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

- 3 (3) On receiving the notice, the court must order that the proceeding be
4 adjourned until the Attorney-General gives a copy of a certificate
5 to the court under subsection 24(4) or gives advice to the court
6 under subsection 24(5) (which applies if a decision is made not to
7 give a certificate).

8 **Subdivision B—Notifying Attorney-General etc. where**
9 **disclosure expected by witness answering question**

10 **23 Preventing witnesses from disclosing information by not allowing**
11 **them to answer questions**

12 *Witness expected to disclose information in giving evidence*

- 13 (1) This section applies if:
14 (a) a witness is asked a question in giving evidence in a federal
15 criminal proceeding; and
16 (b) the prosecutor or defendant knows or believes that:
17 (i) information that will be disclosed in the witness's
18 answer relates to national security; or
19 (ii) the disclosure of information in the witness's answer
20 may affect national security.

- 21 (2) The prosecutor or defendant must advise the court of that
22 knowledge or belief.

23 *Court must hold hearing*

- 24 (3) The court must adjourn the proceeding and hold a hearing.

- 25 (4) The closed hearing requirements apply.

- 26 (5) At the hearing, the witness must give the court a written answer to
27 the question. The court must show the answer to the prosecutor.

Prosecutor must give notice to Attorney-General etc.

- (6) If the prosecutor knows or believes that, if the written answer were to be given in evidence in the proceeding:
- (a) the information that would be disclosed in the witness's answer relates to national security; or
 - (b) the disclosure of information in the witness's answer may affect national security;
- the prosecutor must advise the court of that knowledge or belief and, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Court must adjourn proceeding

- (7) If the court is advised under subsection (6), it must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 24(4) or gives advice to the court under subsection 24(5) (which applies if a decision is made not to give a certificate).

Subdivision C—Attorney-General's certificates

24 Attorney-General's non-disclosure certificate

- (1) This section applies if:
- (a) any of the following happens:
 - (i) the Attorney-General is notified under section 22 that the prosecutor or defendant knows or believes that the prosecutor or defendant or another person will disclose information in a federal criminal proceeding;
 - (ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs 22(1)(a) to (c) will arise under which the prosecutor or defendant or another person will disclose information in a federal criminal proceeding;
 - (iii) the Attorney-General is notified under subsection 23(6) that the prosecutor considers that an answer by a witness in a hearing in relation to a federal criminal proceeding will disclose information; and

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

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

Section 24

- 1 (b) paragraph 26(1)(a) (about the mere presence of a witness
2 constituting disclosure) does not apply; and
3 (c) the Attorney-General considers that the disclosure is likely to
4 prejudice national security.

5 *Attorney-General may give a certificate—case where information*
6 *is in the form of a document*

- 7 (2) If the information would be disclosed in a document (the ***source***
8 ***document***), the Attorney-General may give each potential discloser
9 (see subsection (6)) of the information in the proceeding:
10 (a) any of the following:
11 (i) a copy of the document with the information deleted;
12 (ii) a copy of the document with the information deleted
13 and a summary of the information attached to the
14 document;
15 (iii) a copy of the document with the information deleted
16 and a statement of facts that the information would, or
17 would be likely to, prove attached to the document;
18 together with a certificate that describes the information and
19 states that the potential discloser must not, except in
20 permitted circumstances, disclose the information (whether in
21 the proceeding or otherwise), but may disclose the copy, or
22 the copy and the statement or summary; or
23 (b) a certificate that describes the information and states that the
24 potential discloser must not, except in permitted
25 circumstances, disclose the information (whether in the
26 proceeding or otherwise).

27 *Attorney-General may give a certificate—case where information*
28 *is not in the form of a document*

- 29 (3) If the information would be disclosed other than in a document, the
30 Attorney-General may give each potential discloser of the
31 information in the proceeding:
32 (a) either:
33 (i) a written summary of the information; or
34 (ii) a written statement of facts that the information would,
35 or would be likely to, prove;
-

Section 24

1 together with a certificate that describes the information and
2 states that the potential discloser must not, except in
3 permitted circumstances, disclose the information (whether in
4 the proceeding or otherwise), but may disclose the summary
5 or statement; or

6 (b) a certificate that describes the information and states that the
7 potential discloser must not, except in permitted
8 circumstances, disclose the information (whether in the
9 proceeding or otherwise).

10 (4) The Attorney-General must give the court a copy of:

11 (a) in any case—the certificate; and

12 (b) if paragraph (2)(a) applies—the source document, the
13 document mentioned in subparagraph (2)(a)(i), (ii) or (iii)
14 and the summary or statement mentioned in
15 subparagraph (2)(a)(ii) or (iii); and

16 (c) if paragraph (3)(a) applies—the summary or statement
17 mentioned in that paragraph.

18 *Attorney-General may decide not to give a certificate*

19 (5) If the Attorney-General decides not to do as mentioned in
20 subsection (2) or (3), the Attorney-General must, in writing, advise
21 each potential discloser and the court of his or her decision.

22 *Definition of **potential discloser***

23 (6) Each of the following persons is a **potential discloser** of the
24 information in the proceeding:

25 (a) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is
26 by the prosecutor or defendant—the prosecutor or defendant;
27 or

28 (b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is
29 by a person other than the prosecutor or defendant—the
30 prosecutor or defendant and the other person; or

31 (c) if subparagraph (1)(a)(iii) applies—the prosecutor, defendant
32 and the witness mentioned in that subparagraph.

Section 25

25 Consequences of Attorney-General giving non-disclosure certificate

Consequences of certificate for pre-trial proceedings

- (1) If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 24, the Attorney-General gives a potential discloser a certificate at any time during a part of the proceeding that takes place before the trial begins, the certificate is conclusive evidence, during that part of the proceeding and any later part that takes place before the trial begins, that disclosure of the information in the proceeding is likely to prejudice national security.

Consequences of certificate for extradition proceedings

- (2) If a proceeding is covered by paragraph 14(b) (about extradition proceedings) and, under section 24, the Attorney-General gives a potential discloser a certificate at any time before or during the proceeding, the certificate is conclusive evidence during the proceeding that disclosure of the information in the proceeding is likely to prejudice national security.

Court hearing

- (3) If subsection (1) applies, the court must:
- (a) in any case where the certificate is given to the court before the trial begins—as soon as the trial begins, hold a hearing to decide whether to make an order under section 29 in relation to the disclosure of the information; or
 - (b) if subparagraph 24(1)(a)(i) or (iii) applies and the certificate is given to the court after the trial begins—continue the adjournment of the proceeding mentioned in subsection 22(3) or 23(7) for the purpose of holding a hearing to decide whether to make an order under section 29 in relation to the disclosure of the information; or
 - (c) if subparagraph 24(1)(a)(ii) applies and the certificate is given to the court after the trial begins—adjourn the proceeding for the purpose of holding a hearing to decide

Section 26

1 whether to make an order under section 29 in relation to the
2 disclosure of the information.

- 3 (4) If subsection (2) applies, the court must:
- 4 (a) in any case where the certificate is given to the court before
5 the proceeding begins—as soon as the proceeding begins,
6 hold a hearing to decide whether to make an order under
7 section 29 in relation to the disclosure of the information; or
8 (b) if the certificate is given to the court after the proceeding
9 begins—adjourn the proceeding for the purpose of holding a
10 hearing to decide whether to make an order under section 29
11 in relation to the disclosure of the information.
- 12 (5) The closed hearing requirements apply to the hearing.

13 **26 Attorney-General's witness exclusion certificate**

- 14 (1) This section applies if:
- 15 (a) either:
- 16 (i) the Attorney-General is notified under section 22 that
17 the prosecutor or defendant knows or believes that a
18 person whom the prosecutor or defendant intends to call
19 as a witness in a federal criminal proceeding will
20 disclose information by his or her mere presence; or
21 (ii) the Attorney-General for any reason expects that a
22 person whom the prosecutor or defendant intends to call
23 as a witness in a federal criminal proceeding will
24 disclose information by his or her mere presence; and
25 (b) the Attorney-General considers that the disclosure is likely to
26 prejudice national security.

27 *Attorney-General may give a certificate*

- 28 (2) The Attorney-General may give a certificate to the prosecutor or
29 defendant, as the case may be, that states that the prosecutor or
30 defendant must not call the person as a witness in the federal
31 criminal proceeding.
- 32 (3) The Attorney-General must give a copy of the certificate to the
33 court.

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

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

Section 26

1

Court hearing

2

(4) The court must:

3

(a) if the certificate is given to the court before the trial begins—
as soon as the trial begins, hold a hearing to decide whether
to make an order under section 29 in relation to the calling of
the witness; or

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(b) if the certificate is given to the court after the trial begins—
adjourn the proceeding for the purpose of holding a hearing
to decide whether to make an order under section 29 in
relation to the calling of the witness.

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11

(5) The closed hearing requirements apply to the hearing.

12

Attorney-General may decide not to give a certificate

13

(6) If the Attorney-General decides not to do as mentioned in
subsection (2), the Attorney-General must, in writing, advise the
prosecutor or defendant, as the case requires, and the court of his or
her decision.

14

15

16

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

27 Closed hearing requirements

- (1) This section sets out the *closed hearing requirements* for a hearing under subsection 23(3), 25(3) or (4) or 26(4).

Note: The fact that those provisions provide that the closed hearing requirements apply to certain hearings does not prevent the court from exercising any powers that it otherwise has eg to exclude persons (such as members of the public) from other hearings or to prevent publication of evidence.

Who may be present

- (2) Subject to this section, no-one, including the jury (if any), must be present at the hearing except:
- (a) the magistrate, judge or judges comprising the court; and
 - (b) court officials; and
 - (c) the prosecutor; and
 - (d) the defendant; and
 - (e) any legal representative of the defendant; and
 - (f) if section 28 applies—the Attorney-General and any legal representative of the Attorney-General; and
 - (g) any witnesses allowed by the court.
- (3) The court may, if it considers that the presence of the defendant or any legal representative of the defendant is likely to prejudice national security, order that the defendant or the legal representative, or both, are not entitled to be present during any part of the hearing in which the prosecutor:
- (a) gives details of the information concerned; or
 - (b) argues why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

Section 28

Court to make etc. record of hearing

- (4) The court must:
- (a) make and keep a sealed record of the hearing; and
 - (b) make the record available to, and only to, a court that hears an appeal against, or reviews, its decision on the hearing.

28 Intervention by Attorney-General

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

29 Court orders

Non-disclosure certificate hearings

- (1) After holding a hearing required under subsection 25(3) or (4) in relation to the disclosure of information in a federal criminal proceeding, the court may 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 24(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 disclose (which disclosure may or may not be the same as was permitted in the Attorney-General's certificate):
- (d) a copy of the document with the information deleted; or

Section 29

- 1 (e) a copy of the document with the information deleted and a
2 summary of the information, as set out in the order, attached
3 to the document; or
4 (f) a copy of the document with the information deleted and a
5 statement of facts, as set out in the order, that the information
6 would, or would be likely to, prove attached to the document.
- 7 (3) If the court makes an order under subsection (2), a person who is
8 the subject of the order may adduce evidence of the contents of the
9 document by tendering the copy, or the copy and the summary or
10 statement, mentioned in that subsection.
- 11 (4) The court may, regardless of the form of the information, order
12 under this subsection that:
13 (a) any person to whom the certificate mentioned in subsection
14 24(2) or (3) was given in accordance with that subsection;
15 and
16 (b) any person to whom the contents of the certificate have been
17 disclosed for the purposes of the hearing; and
18 (c) any other specified person;
19 must not, except in permitted circumstances, disclose the
20 information (whether in the proceeding or otherwise).
- 21 (5) The court may, regardless of the form of the information, order
22 under this subsection that any person may disclose the information
23 in the proceeding.
- 24 *Court must first decide admissibility of information*
- 25 (6) In deciding whether to make an order under subsection (2), (4) or
26 (5), the court must first decide whether the information concerned
27 is admissible in evidence in the proceeding. If the court decides
28 that it is not, the court must not make the order.
- 29 *Witness exclusion certificate hearings*
- 30 (7) After holding a hearing required under subsection 26(4), the court
31 may order that:
32 (a) the prosecutor or defendant must not call the person as a
33 witness in the federal criminal proceeding; or

Section 30

- 1 (b) the prosecutor of defendant may call the person as a witness
2 in the federal criminal proceeding.

3 *Factors to be considered by court*

- 4 (8) If the court is not prevented by subsection (6) from making an
5 order under this section, the Court must, in deciding whether to
6 make an order under this section, and if so what order to make,
7 consider the following matters:
8 (a) whether, having regard to the Attorney-General's certificate,
9 there would be a risk of prejudice to national security if:
10 (i) where the certificate was given under subsection 24(2)
11 or (3)—the information were disclosed in contravention
12 of the certificate; or
13 (ii) where the certificate was given under subsection
14 26(2)—the witness were called;
15 (b) whether any such order would have a substantial adverse
16 effect on the defendant's right to receive a fair hearing;
17 (c) any other matter the court considers relevant.
18 (9) In making its decision, the Court must give greatest weight to the
19 matter mentioned in paragraph (8)(a).

20 **30 Duration of court orders**

21 An order made by the court under this Division remains in force
22 until the court, or another court, revokes the order or otherwise
23 causes it to cease to have effect.

24 **31 Consequence of certain court orders**

- 25 (1) If:
26 (a) in accordance with paragraph 25(3)(a), the court holds a
27 hearing to decide whether to make an order under section 29
28 in relation to information described in a certificate given to
29 the court before the trial in a federal criminal proceeding
30 began; and
31 (b) after holding the hearing, the court makes an order under
32 subsection 29(5) that any person may disclose the
33 information;
-

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

(2) If:

(a) in accordance with paragraph 26(4)(a), the court holds a hearing to decide whether to make an order under section 29 in relation to the calling of a witness that is the subject of a certificate given to the court before the trial in a federal criminal proceeding began; and

(b) after holding the hearing, the court makes an order under paragraph 29(7)(b) that the person may be called as a witness;

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

32 Adjournment after certain court orders

(1) If the court makes an order under section 29, the prosecutor may apply to the court for an adjournment of the federal criminal proceeding to allow time for the prosecutor to:

(a) decide whether to appeal against the court order or to withdraw the proceeding; and

(b) if the prosecutor decides to do so—make the appeal or withdrawal.

(2) If the court makes an order under section 29, the defendant may apply to the court for an adjournment of the federal criminal proceeding to allow time for the defendant to:

(a) decide whether to appeal against the court order; and

(b) if the defendant decides to do so—make the appeal.

(3) The court must grant the adjournment.

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Division 4—Appeals

33 Appeals

- (1) The prosecutor, the defendant or, if the Attorney-General is an intervener under section 28, the Attorney-General may appeal against any order of the court made under subsection 29(2), (4) or (5), or any decision of the court not to make an order under section 29.
- (2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

Part 4—Security clearances

34 Security clearance for defendant's legal representative etc.

- (1) This section applies if, before or during a federal criminal proceeding, the Secretary of the Attorney-General's Department gives written notice to any of the following persons:

- (a) a legal representative of the defendant;
 - (b) a person assisting a legal representative of the defendant;
- that in the proceeding an issue is likely to arise relating to a disclosure, of information in the proceeding, that is likely to prejudice national security.

Person may apply for security clearance

- (2) A person who receives a notice under subsection (1) may apply to the Secretary for a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information.

Note 1: Security clearances are given in accordance with the Australian Government Protective Security Manual.

Note 2: If the person does not obtain the security clearance, anyone who discloses such information to the person will, except in limited circumstances, commit an offence under section 41.

Adjournment to allow sufficient time for defendant's legal representative to be given security clearance

- (3) The defendant may apply to the court for a deferral or adjournment of the proceeding until:

- (a) the legal representative has been given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information; or
- (b) if the legal representative is not given such a security clearance—another legal representative is given such a security clearance.

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

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- 1 *Prosecutor may advise the court that the defendant's legal*
2 *representative has not been given a security clearance etc.*
- 3 (5) If the defendant's legal representative does not apply for the
4 security clearance within 14 days after the day on which the notice
5 is received, or within such further period as the Secretary allows:
6 (a) the prosecutor may advise the court of the fact; and
7 (b) the court may:
8 (i) advise the defendant of the consequences of engaging a
9 legal representative who has not been given a security
10 clearance by the Department at the level considered
11 appropriate by the Secretary in relation to the
12 information; and
13 (ii) recommend that the defendant engage a legal
14 representative who has been given, or is prepared to
15 apply for, such a security clearance.

Part 5—Offences

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

Disclosure where notice given to Attorney-General under section 22

(1) If:

- (a) the prosecutor or defendant gives notice to the Attorney-General under subsection 22(1) about the disclosure of information in a federal criminal proceeding by the prosecutor or defendant or another person; and
 - (b) section 36 does not apply; and
 - (c) the following person:
 - (i) if the disclosure is by the prosecutor or defendant—the prosecutor or defendant, as the case may be; or
 - (ii) if the disclosure is by a person other than the prosecutor or defendant—the prosecutor or the defendant, as the case may be, or the other person;
 discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 24(2) or (3) or advice under subsection 24(5) 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 23

(2) If:

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- 1 (a) the prosecutor gives notice to the Attorney-General under
2 subsection 23(6) that the prosecutor knows or believes that an
3 answer by a witness in a hearing in relation to a federal
4 criminal proceeding will disclose information; and
5 (b) section 36 does not apply; and
6 (c) the prosecutor or the witness discloses the information
7 (whether in the proceeding or otherwise) at any time before
8 the Attorney-General gives the prosecutor or the witness a
9 certificate under subsection 24(2) or (3) or advice under
10 subsection 24(5) in relation to the disclosure of the
11 information; and
12 (d) the disclosure does not take place in permitted circumstances;
13 and
14 (e) the disclosure is likely to prejudice national security;
15 the prosecutor or the witness commits an offence.

16 Penalty: Imprisonment for 2 years.

36 Offence to disclose information before Attorney-General gives witness exclusion certificate etc.

19 If:

- 20 (a) the prosecutor or defendant notifies the Attorney-General
21 under section 22 that the prosecutor or defendant knows or
22 believes that a person whom the prosecutor or defendant
23 intends to call as a witness in a federal criminal proceeding
24 will disclose information by his or her mere presence; and
25 (b) the prosecutor or the defendant calls the person as a witness
26 in the federal criminal proceeding at any time before the
27 Attorney-General gives the prosecutor or defendant a
28 certificate under subsection 26(2) or advice under subsection
29 26(6) in relation to the calling of the witness; and
30 (c) the disclosure of the information by the mere presence of the
31 person is likely to prejudice national security;
32 the prosecutor or the defendant commits an offence.

33 Penalty: Imprisonment for 2 years.

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

A person commits an offence if:

- (a) the person intentionally contravenes subsection 22(1) or (2) or 23(2) or (6); and
- (b) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

38 Offence to disclose information contrary to Attorney-General's non-disclosure certificate

If:

- (a) a person is given a certificate under subsection 24(2) or (3) in relation to the disclosure of information; and
- (b) the person discloses the information in contravention of the certificate; and
- (c) if the court, after conducting a hearing mentioned in subsection 25(3) or (4) in relation to the disclosure of the information, orders under subsection 29(5) that the information may be disclosed—the contravention does not take place after the court so orders;

the person commits an offence.

Penalty: Imprisonment for 2 years.

39 Offence to call witness contrary to Attorney-General's witness exclusion certificate

If:

- (a) a person is given a certificate under subsection 26(2) in relation to the calling of a witness; and
- (b) the person calls the witness in contravention of the certificate; and
- (c) if the court, after conducting a hearing mentioned in subsection 26(4) in relation to the calling of the witness, orders under paragraph 29(7)(b) that the witness may be

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1 called—the contravention does not take place after the court
2 so orders;
3 the person commits an offence.

4 Penalty: Imprisonment for 2 years.

5 **40 Offence to contravene court order**

6 If:

- 7 (a) the court makes an order under this Act; and
8 (b) a person intentionally contravenes the order;
9 the person commits an offence.

10 Penalty: Imprisonment for 2 years.

11 **41 Offence to disclose information to certain persons without**
12 **security clearance etc.**

13 A person commits an offence if:

- 14 (a) for the purposes of a federal criminal proceeding, the person
15 discloses, other than in giving evidence in that proceeding or
16 in permitted circumstances, information to:
17 (i) a legal representative of the defendant; or
18 (ii) a person assisting a legal representative of the
19 defendant; and
20 (b) the disclosure is likely to prejudice national security; and
21 (c) none of the following subparagraphs apply:
22 (i) the Attorney-General's Department has given the legal
23 representative or person mentioned in
24 subparagraph (a)(ii) a security clearance at the level
25 considered appropriate by the Secretary in relation to
26 the information;
27 (ii) the disclosure has been approved by the Secretary;
28 (iii) the disclosure takes place in compliance with conditions
29 approved by the Secretary.

30 Penalty: Imprisonment for 2 years.

1
2 **Part 6—Miscellaneous**
3

4 **42 Report to Parliament on certificates given by Attorney-General**
5 **etc.**

6 As soon as practicable after 30 June in each year, the
7 Attorney-General must cause to be laid before each House of the
8 Parliament a report that:

- 9 (a) states the number of certificates given by the
10 Attorney-General under sections 24 and 26 during the year;
11 and
12 (b) identifies the criminal proceedings to which the certificates
13 relate.

14 **43 Rules of court**

15 The power to make rules of court extends to making rules, not
16 inconsistent with this Act or the regulations, prescribing matters:

- 17 (a) required or permitted by this Act to be prescribed; or
18 (b) necessary or convenient to be prescribed for carrying out or
19 giving effect to this Act.

20 **44 Regulations**

21 The Governor-General may make regulations prescribing matters:

- 22 (a) required or permitted by this Act to be prescribed; or
23 (b) necessary or convenient to be prescribed for carrying out or
24 giving effect to this Act.