Australian Government
Attorney-General's Department

30 April 2021

Attorney-General's Department Submission

INSLM Review into the operation of section 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) as it applies in the 'Alan Johns' matter (a pseudonym)

Introduction

1. The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Independent National Security Legislation Monitor (INSLM) review into the operation of section 22 of the *National Security Information (Criminal and Civil Proceedings)* (Cth) *Act 2004* (NSI Act) as it applies in the 'Alan Johns' matter (a pseudonym).

2. The NSI Act, administered by the Attorney-General, is relied upon by the Commonwealth to ensure the protection of national security information in criminal and civil legal proceedings. The department is responsible for providing advice and assistance to the Attorney-General in administering and fulfilling the legal responsibilities under the NSI Act.

Overview of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

The context of the environment the NSI Act operates within

3. Australia has a range of criminal offences which may require national security information to be adduced in order to prove the elements of the offence. These can include, but are not limited to, offences relating to espionage, terrorism and the unauthorised disclosure or misuse of national security information. Since 2000, there have been numerous prosecutions for offences that have involved national security information that, if disclosed without appropriate protection, would be likely to prejudice Australia's national security. Historically, national security information was protected in court proceedings using public interest immunity claims.

4. In the early 2000s, the Australian Government identified that the existing rules of evidence and procedure in federal criminal proceedings did not provide adequate protection for information that relates to, or the disclosure of which may affect national security, where that information may be adduced or otherwise disclosed. For instance, in the 2001 prosecution of Simon Lappas, a former Defence Intelligence Organisation analyst, for passing classified information to an unauthorised person, the Commonwealth was faced with either accepting the damage resulting from the disclosure of information or preventing further disclosures of that information by abandoning the prosecution.[1]

5. Due to the sensitivity of the documents that Mr Lappas was alleged to have passed, the Commonwealth sought to use public interest immunity to provide significantly redacted copies of the documents with summaries, instead of the full documents. The court considered that allowing the redacted copies would not enable justice to be done to either the prosecution or the defendant, but accepted that public interest immunity should apply to protect the documents from being adduced into evidence. The consequential outcome of the successful public interest immunity claim was that one of the charges against Mr Lappas was stayed by the court as key documents that went to the core of the charge were not relied upon as evidence.[2]

6. The introduction of the NSI Act addressed the challenges of the Commonwealth being able to make public interest immunity claims in criminal proceedings by empowering courts to make more nuanced orders to protect national security information at any time throughout the proceedings without either excluding information entirely or disclosing it in open court.

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[1] *R v Lappas & Dowling* [2001] ACTSC 115.
[2] Ibid 27, 30.

7. The NSI Act creates a statutory scheme to enable the court to make orders to protect national security information in criminal and civil proceedings.[3] The NSI Act provides a framework for the court to balance the public interests in protecting national security, maintaining the accused's right to a fair trial, and the principle of open justice.

The history and background of the NSI Act

8. The National Security Information (Criminal Proceedings) Bill 2004 (Cth) (NSI Bill) was passed on 8 December 2004.[4] Its main provisions commenced on 11 January 2005.[5]

9. The NSI Bill was introduced to avoid the situation that arose in the *Lappas* case and also in response to the Australian Law Reform Commission's (ALRC's) inquiry: 'The Protection of Classified and Security Sensitive Information'.[6] This inquiry commenced in April 2003 and examined measures to safeguard classified and security sensitive information during court or tribunal proceedings.[7] Although the NSI Bill was introduced prior to the ALRC handing down its final report ('Keeping Secrets': The Protection of Classified and Security Sensitive Information),[8] it did arise as a result of the inquiry. The central recommendation of the inquiry was the introduction of a National Security Information Procedures Act to govern the use of classified and security sensitive information in criminal court proceedings.[9] The ALRC proposed that the legislation should allow for closing all or part of proceedings to the public, limiting the range of people given access to sensitive material, and hearing part of the proceedings in the absence of one of the parties in exceptional cases, subject to certain safeguards.[10]

10. In 2005, the NSI Act was amended by the *National Security Information Legislation Act 2005*.[11] This amendment, commencing on 3 August 2005, extended the application of the NSI Act to civil proceedings.[12] The NSI Act has since been amended periodically to improve its practical operation and ensure the appropriate protection and disclosure of national security information in criminal and civil proceedings.[13]

11. Specifically in relation to the operation of section 22 of the NSI Act, in 2016 the *Counter-Terrorism Legislation Amendment Act (No.1) 2016*[14] further amended the NSI Act to: (i) allow a court to make an order that is inconsistent with regulations made under the NSI Act if the Attorney-General has applied for the order; and (ii) ensure the regulations continue to apply where an order is made under section 22 or section 38B of the NSI Act to the extent that the regulations relate to issues not included in the order. [15]

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[3] Comprehensive Review of the Legal Framework of the National Intelligence Community, *Accountability and Transparency; Annexes* (December 2019) vol 4, 95 [45.17].
[4] National Security Information (Criminal and Civil Proceedings) Bill 2004.
[5] Ibid.
[6] Commonwealth, *Parliamentary Debates,* Senate, 30 November 2004, 70-93.
[7] Australian Law Reform Commission, *Protection of Classified and Security Sensitive Information* (6 June 2004) Australian Law Reform Commission <https://www.alrc.gov.au/inquiry/protection-of-classified-and-security-sensitive-information/>.
[8] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (June 2004) Australian Law Reform Commission <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC-98.pdf>.
[9] Ibid refer Chapter 11.
[10] Ibid.
[11] *National Security Information Legislation Amendment Act 2005* (Cth).
[12] Ibid.
[13] Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth).
[14] *Counter-Terrorism Legislation Amendment Act (No.1) 2016* (Cth).
[15] Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No.1) 2016 (Cth). The *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (the NSI Regulation) prescribe requirements for accessing, storing, handling and destroying security classified documents and national security information as per sections 23(1) and

The object and purpose of the NSI Act

12. A key component of Australia's democratic society is our system of justice, which includes a range of safeguards to ensure the administration of justice. The administration of justice is a multifaceted concept, underpinned by the 'open justice' principle and the defendant's right to a fair hearing.

13. The principle of open justice is not absolute and its limits have been recognised in the Australian common law.[16] The administration of justice broadly acknowledges the need to balance the principle of open justice with the particular circumstances of a case.[17]

14. Recognising that there are circumstances where the open justice principle needs to be modified, the NSI Act provides a clear framework to the court and parties to the proceedings for how national security information can be disclosed and protected, while upholding the administration of justice.[18] This object of the NSI Act is specifically provided for in section 3:

> **Object of this Act**
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> 1. The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where such 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.

15. In seeking to meet its objective, the NSI Act recognises the importance of maintaining an independent judiciary and the accused's right to a fair trial, in considering what protections are appropriate to safeguard Australia's national security interests.[19] The legislation provides (i) different regimes of protective arrangements to accommodate the particular circumstances of a case; and (ii) holds that it is ultimately a matter for the court to determine what national security information protections are needed in a particular case. The balancing exercise, as set out in the object of the NSI Act, must form the basis of any information protections that a court may decide to make under the NSI Act, at the request of the parties (for consent orders, under section 22 of the NSI Act) or the Attorney-General (for a certificate, under section 26 of the NSI Act).

Overview of section 22 of the Act

16. Section 22 of the NSI Act provides that the court may make any such order it considers appropriate to give effect to an arrangement reached between the prosecutor, the defendant, and Attorney-General in a federal criminal proceeding about the disclosure, protection, storage, handling or destruction of national security information.[20]

38C(1) of the NSI Act. The Regulation does not apply in relation to a security classified document, or national security information, that is the subject of an order that is in force under section 22 or section 38B of the NSI Act.

[16] Australian Law Reform Commission, Traditional Rights and Freedoms Encroachments by Commonwealth Laws, Interim Report No 127 (2015) Australian Law Reform Commission <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf>.

[17] In *Hogan v Hinch* (2011) 243 CLR 506, 21, Chief Justice French held that ''where exceptional and compelling considerations going to national security require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified.' Similarly in *John Fairfax Group v Local Court* (1991) 26 NSWLR 131, 141, the court held that, '…if the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.'.

[18] 'National security', is defined in section 9 of the *National Security Information (Criminal and Civil) Proceeding Act* ('*NSI Act*') as 'Australia's defence, security, international relations or law enforcement interests'.

[19] Commonwealth, *Parliamentary Debates,* House of Representatives, 10 March 2005, (Philip Ruddock, Attorney-General).

[20] Section 38B of the NSI Act provides a similar provision that allows for such orders in civil proceedings.

Development of section 22 of the NSI Act

17. The Explanatory Memorandum of the NSI Bill provided that section 22 of the NSI Act would allow for an efficient method of handling information in a federal criminal proceeding where there is consensus between the prosecutor and defendant – commonly referred to as "Consent Orders" or "section 22 orders".[21]

18. When the NSI Act was first introduced, section 22 read as follows:

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

19. The need for a mechanism that encouraged consent between the parties was envisaged by legal commentators and the ALRC, described as 'confidential undertakings' in the ALRC's Keeping Secrets Report.[22] In its recommendation, the ALRC held that there was a need for these undertakings to be based on the agreement of the parties and would contain express undertakings in relation to documents which are found to contain NSI. This recommendation received support from legal circles as an effective mechanism to protect classified and security sensitive information.[23]

20. The NSI Act was subsequently amended in 2010 to its current form: [24]

> **Arrangements for federal criminal proceedings about disclosures etc. of national security information**
>
> 1. At any time during a federal criminal proceeding:
>   a. the Attorney-General, on the Commonwealth's behalf; and
>   b. the prosecutor; and
>   c. the defendant, or the defendant's legal representative on the defendant's behalf;
>
>   may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.
> 2. The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

21. Significantly, this amendment established a role for the Attorney-General (acting on behalf of the Commonwealth) as an additional party to the arrangements to: (i) ensure that the interests of the Government in protecting national security are effectively represented; and (ii) provide an additional safeguard to protect open justice where parties are operating by consent.[25] This amendment provided a more rigorous and comprehensive framework to encourage parties, where possible, to enter into a section 22 arrangement compared to the more unilateral certificate regime that requires a contested hearing before a court, which can be both costly and lengthy.[26]

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[21] Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth).

[22] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report No 98, June 2004) 302 [8.115-8.116].

[23] Ibid.

[24] *National Security Legislation Amendment Act 2010* (Cth). The 2010 amendment to section 22 is reflected in subsequent amendments to the NSI Act.

[25] The amendments also recognised the broader range of issues that may arise in a federal criminal proceeding, the provision was also broadened in scope to allow arrangements to allow for the protection, storage, handling or destruction of NSI (along with disclosure): see Explanatory Memorandum, National Security Legislation Amendment Bill 2020 (Cth) 53, 63.

[26] Ibid, page 54. Under section 26 of the NSI Act, this regime requires a contested section 27 hearing before orders are ultimately made by the court under section 31 of the NSI Act.

The purpose of section 22 orders

22. Section 22 orders allow parties to negotiate the most appropriate mechanism for the disclosure, protection, storage, handling or destruction of NSI, based on the specific circumstances of the case.

23. The Comprehensive Review of the Legal Framework of the National Intelligence Community considered that the section 22 mechanism for consent orders balances competing interests by creating the "statutory foundation to allow material to be dealt with in a way that is consistent with the requirements of security by agreement. It gives flexibility whilst preserving the court's discretion to manage proceedings."[27]

24. Without the flexibility provided for with section 22 orders, parties can face challenges in complying with legislatively imposed deadlines. These challenges may be due to delays arising from the mandatory adjournment of proceedings that is a fixed consequence of the giving of notices of expected disclosure of national security information under section 24 of the NSI Act.[28] It provides a mechanism by which the parties and the Attorney-General can formulate a regime that best suits the exigencies of the particular case, and aids in the administration of justice by streamlining the hearing process, and potentially limiting the period of time an accused may need to spend on remand.[29] Section 22 orders further reflect that it may also be in the interests of the accused to have arrangements in place surrounding the disclosure, protection, storage, handling or destruction of national security information in the proceedings.

25. Commonwealth departments and agencies advise the Attorney-General on the risks and sensitivities of information that they seek to protect under the NSI Act, and how the disclosure of this information is likely to prejudice national security. The protections sought by Commonwealth departments and agencies form the basis of the development of draft orders under section 22 of the NSI Act to appropriately govern the arrangements for the disclosure, protection, storage, handling or destruction of national security information. The draft section 22 orders are shared with the parties as a basis for negotiation.

26. Once the parties have agreed to an arrangement for the disclosure, protection, storage, handling or destruction of NSI, the Attorney-General must then consider approving those arrangements. Once this agreement has been reached, only then can the court be approached to make orders it considers appropriate to give effect to that arrangement. Accordingly, while parties, and the Attorney-General, may agree to an arrangement, section 22 legislates that the court is the final decision maker and has the discretion to either: (i) make the orders; (ii) refuse to make the orders; or (iii) modify the orders, as it considers appropriate.

27. For the court to make section 22 orders, requested by the parties to the proceedings and approved by the Attorney-General, there is a precondition, and a broad test. The precondition is that there must be an arrangement of the relevant kind that has been reached. The broader test is that the court be satisfied that the orders it makes are 'appropriate' to give effect to the arrangement, taking into account the object of the Act.

28. Under section 22, parties are able to agree from the onset of proceedings to "an arrangement about the disclosure, protection, storage and handling or destruction, in the proceeding, of national security information". Practically, this has allowed parties to agree to, for example: (i) closed court arrangements (this does not mean the court will necessarily be closed for the entire proceedings); (ii) protection of sensitive information from public

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[27] Comprehensive Review of the Legal Framework of the National Intelligence Community, *Accountability and Transparency; Annexes* (December 2019) vol 4, 99 [45.29]. This principle was also expounded in *R v Khazaal* (2006) 167 A Crim R 565; [2006] NSWSC 1353, where the court held that section 22 orders 'avoid the need for the Court to undertake the more cumbersome proceedings necessary where agreement has not been reached in relation to the disclosure and protection of national security information'.

[28] NSI Act s 24(5).

[29] This can include, for example, by excusing the parties from the notice requirement under subparagraph 24(1A)(b)(ii).

disclosure; (iii) protection of identities by using pseudonyms; and (iv) practical arrangements to ensure parties, and the court, have appropriate measures in place to protect, store, handle or destroy national security information. [30]

29. Accordingly, the practical effect of these orders will depend on the arrangement agreed in each individual case, but typically these effects will involve some moderation or balancing of open justice to the extent the court views necessary to protect sensitive national security information. However, the starting point for a court will always be that proceedings should be held in open court, consistent with the principle of open justice.

Safeguards within the process of making a section 22 order

30. The court must always have regard to the object of the NSI Act in exercising its powers and functions under the NSI Act, including in making any section 22 orders that have been agreed to by the parties and the Attorney-General.[31]

Section 22 orders must be 'appropriate'

31. The key safeguard to open justice under section 22 of the NSI Act is that the court must be satisfied that the orders it makes are 'appropriate' to give effect to the arrangement as agreed between the parties and approved by the Attorney-General. The satisfaction of the precondition, described above, does not mean that the court is bound to make orders. The test of 'appropriateness' has real work to do and it has been tested before the courts.

32. In *R v Scerba*, the ACT Supreme Court provided reasoning as to how it considers whether section 22 orders are 'appropriate' in the circumstances. The Judge expressly noted:

> *28. The test under section 22(2) is that the court may make such order as it considers appropriate to give effect to the arrangements. The question then for the court is whether the orders are appropriate.*
>
> *29. Having read the confidential affidavit, having read the proposed orders in careful form, having made some suggested amendments to them and having heard the consent of the Parties, it is my view that the disclosure of the sensitive information may cause prejudice, in some instances very serious prejudice, to Australian national security and that the means proposed by the orders that are asked to be made by consent will be an appropriate limited, but effective, means of protecting that information.*
>
> *30. They secure the protections necessary for security but do not prevent the Parties or the Court from having appropriate access to the information. They address the national security protections comprehensively and it is appropriate that they do so at the outset of the proceedings. [Emphasis added]*[32]

33. The INSLM is considering in particular whether section 22 of the NSI Act is 'proportionate to threats to national security.' In response to that question, the department makes three observations.

34. Firstly, section 22 of the NSI Act properly identifies the breadth of actions which, if improperly managed, could risk prejudice to national security. Each of improper disclosure, insufficient protection, insecure storage, insecure handling and insecure destruction of information can risk making the information available to those who would

[30] See, e.g., *R v Scerba* (2015) 299 FLR 221 [30] (Refshauge J) ('*R v Scerba'*).
[31] NSI Act s 3(2). See also *R v Lodhi* [2006] NSWSC 596 [107].
[32] Ibid.

wish to harm Australia's national interests. In that sense, section 22 of the NSI Act appropriately covers the range of risks that the protections seek to mitigate in litigation involving national security matters.

35. Secondly, within that sphere of operation, section 22 of the NSI Act does not dictate the content of any order the court may make. As noted above, the threshold of 'appropriateness' provides the court with an opportunity – and a duty – to weigh competing considerations of protecting national security and the administration of justice which present in a particular case and to be satisfied that the orders giving effect to an agreed arrangement are fit for purpose.

36. Finally, because of the custom nature of the orders that are made in each case, the overall operation and effectiveness of section 22 of the NSI Act cannot be assessed through the lens of any one case. That is particularly so in the 'Alan Johns' case, where the orders were tailored to meet specific identified risks.

The role of the court to conduct the criminal proceedings

37. As a starting premise, it is important to note, that courts generally have both inherent and implied jurisdiction to make orders to limit the disclosure of information in criminal proceedings and/or close the court, for a range of reasons, not limited to national security.[33] In providing that the court must consider whether section 22 orders are 'appropriate', the NSI Act appropriately preserves the discretion of the court to determine how best to conduct its proceedings. In various instances, courts have decided: (i) that it is not 'appropriate' to make section 22 orders; (ii) to amend the parties' requested section 22 orders to ensure they are 'appropriate'; or (iii) to appoint a special counsel or advocate to represent the accused's interests. A number of illustrative cases are considered below.

38. In the case of *Director of Public Prosecutions (Cth) v Thomas (Ruling No 7)* [2006] VSC 18 (*CDPP v Thomas*), the Victorian Supreme Court made orders, including under part 3 of the NSI Act for the pre-trial proceedings to protect national security information. When the Attorney-General sought to have those orders continued for the purposes of the jury trial (including filing evidence in support of the making of section 22 orders that would allow for closure of the court and suppression of particular information), the Judge decided that the requested orders under section 22 of the NSI Act were not appropriate in the circumstances. The Judge held that the risk of prejudice to national security could be instead mitigated through the use of the court's inherent power to make protective orders as necessary.[34]

39. In *R v Scerba*, the Judge declined to make the orders initially by the parties, and instead made orders subject to amendments that were considered appropriate to give effect to the arrangements.[35] This included, for instance, the Court deciding to provide a mechanism to allow persons (other than the authorised persons under the orders) to request access to the Court file by writing to the Registrar. The process further allowed objections from the Commonwealth to disclosure.[36]

40. In the department's view, section 22 of the NSI Act contains the appropriate safeguards necessary to ensure that orders to protect national security information are appropriate and proportionate to threats to national security. It would need to give further consideration to the effectiveness and efficiency of introducing further safeguards into section 22 of the NSI Act, including mandating a contradictor. Mandating a contradictor role in every instance where section 22 orders are sought may lead to unnecessary additional pre-trial litigation, complexity, costs and delay, which would be contrary to the efficient administration of justice.

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[33] See, e.g., *Federal Court of Australia Act 1976* (Cth); *Criminal Code Act 1995* (Cth); *Open Courts Act 2013* (Vic); *Evidence (Miscellaneous Provisions) Act 1991* (ACT); *Court Suppression and Non-publication Orders Act 2010* (NSW).
[34] *DPP (Cth) v Thomas (Ruling No 7)* [2006] VSC 18, paras [17-19].
[35] R v Scerba (n 31) 221 [29] (Refshauge J).
[36] Ibid 221 [16-17] (Refshauge J).

41. While it remains an area of some uncertainty, it is likely that courts enjoy an inherent power and discretion to appoint a contradictor to assist it to determine the appropriateness of section 22 orders. It has been held previously that the court has an inherent or implied power to ensure it is properly informed, particularly so in instances where those matters affect the interest of the community generally.[37] This power includes the appointment of an *amicus curiae* to act as an alternate voice, and a de facto contradictor on issues of law.[38]

42. The department is not aware of this procedure being previously adopted in relation to proposed section 22 orders. However, the courts have relied upon its implied or inherent powers to appoint a third party to ensure the proper administration of justice in matters involving the protection of national security information. For instance, in *R v Lodhi* [2006] NSWSC 586, the Judge held that the NSW Supreme Court had an inherent power to appoint a special counsel or advocate to represent the accused's interests in relation to information that the NSI Act prohibited from being disclosed to the accused.[39]

Section 22 orders in the 'Alan Johns' matter

43. The circumstances of the 'Alan Johns' matter were unique, and the department is not aware of any other similar cases.[40] In circumstances where there are limitations on the disclosure of national security information, such as the 'Alan Johns' matter, it is incumbent on the Attorney-General as the First Law Officer of Australia, to endeavour to take all reasonable steps to advocate for as much information from a case to be made publicly available. As indicated below, the Attorney-General did make submissions to the court, as provided for in the section 22 orders, to allow for some information to be made publicly available, where appropriate.

44. In the case of 'Alan Johns', the Attorney-General was advised by the relevant agency about the risks, sensitivities and potential catastrophic harm that could result from the disclosure of information. The Attorney-General was advised that the national security information was of a kind that could endanger the lives or safety of others, and Australia's national security interests.[41] Accordingly, NSI Act protections were sought over the information in this case and the highly sensitive national security information was protected from public disclosure under five sets of orders made under section 22 of the NSI Act.[42]

45. These orders, and the arrangements contained therein, were: (i) agreed to between the parties (the defendant and the CDPP); (ii) approved by the Attorney-General; and (iii) made by the Court, as it considered appropriate, to give effect to the agreed arrangement. These orders in the 'Alan Johns' case did not prevent the defendant and his legal representative from receiving appropriate access to the sensitive national security information in the proceedings, nor was the defendant prevented from defending the allegations against him.[43]

46. The section 22 orders that were made by the court in the 'Alan Johns' matter did, however, provide that the defendant may disclose the fact of his conviction and terms of his sentence and that the nature of his offending involved 'mishandling classified information'. The defendant could not otherwise disclose sensitive information including information that reveals the nature of his offending or the provisions against which the defendant was charged or convicted.

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[37] *United States Tobacco Co v Minister for Consumer Affairs* [1988] FCA 213; (1988) 20 FCR 520, 534.

[38] See, e.g., *Re Canavan* (2017) 263 CLR 284 [7]. The High Court in that case did not draw a distinction between the role of 'amicus' and 'contradictor', however other cases have held that a contradictor has the status similar to an intervener, with all the rights and powers of a party to the dispute, whereas an amicus' role is often constrained to explaining material and making submissions. See also *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [78], [97]-[122].

[39] See also *New South Wales v Public Transport Ticketing Corp (No 3)* (2011) 81 NSWLR 394.

[40] See answer to Question on Notice No. 957 (Senator Rex Patrick) asked on 25 November 2019.

[41] Ibid.

[42] These orders were provided on the INSLM website and the website states that these were all of the orders made pursuant to section 22 of the NSI Act in relation to the Alan Johns matter, see <https://www.inslm.gov.au/current-review-work>.

[43] See answer to Question on Notice No. 957 (Senator Rex Patrick) asked on 25 November 2019.

47. The section 22 orders required the Attorney-General to periodically review the orders and advise the court, six months from when the judgment was delivered to the Commonwealth, which parts of the reasons required protection, to assist the Court to prepare a set of open reasons for publication.[44] The Attorney-General made submissions on two occasions following the sentencing decision in the 'Alan Johns' matter. The second submission acknowledged that further information had been released in the public domain in respect of this proceeding and so the court was further advised of additional information that a public judgment could contain.[45] Specifically, the Attorney-General provided advice that any public judgement could contain the following information about the nature and gravity of the offending:

    a. the offender communicated confidential information contrary to a lawful obligation not to do so;
    b. the offender pleaded guilty to the offences;
    c. it was contrary to the public interest that this information be disclosed and the information disclosed was of the kind that could endanger the lives or safety of others;
    d. the offender was sentenced to a term of imprisonment for the offences;
    e. the term of imprisonment imposed was 2 years and 7 months, imposed across an aggregate of 5 charges;
    f. the offender was known under the pseudonym of 'Alan Johns';
    g. the NSI Act was invoked to manage the protection of the national security information in the proceedings; and
    h. this was Supreme Court proceeding number SCC 248 of 2018.[46]

48. In providing the court with this guidance the Attorney-General submitted:

> *It is a matter for his Honour to determine whether it is appropriate and desirable to prepare a public judgment in this proceeding, having regard to the above concerns and advice. The Attorney-General is very conscious of the desirability of achieving open justice wherever this is possible, and that national security interests must be balanced against this important principles. Nevertheless, the concerns which supported the invocation of the NSI ACT and the strict non-publication regime which governed the proceeding continue to matters of very real and continuing concern.*[47]

49. In addition, on 25 November 2019, the Senator the Hon Marise Payne, representing the Attorney-General in the Senate, provided the information which could be made publicly available about the 'Alan Johns' matter.[48]

Conclusion

50. The provision currently under review, section 22 of the NSI Act (as it relates to the 'Alan Johns' matter), balances open justice with the need to protect national security information. It provides a flexible framework for parties and the Attorney-General to reach consensus on arrangements for the disclosure, protection, storage, handling or destruction of national security information, which are ultimately subject to consideration and confirmation by a court in its role in the administration of justice. The consensual basis of the section 22 orders has also

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[44] Paragraph 9 of Order E of the section 22 orders published on the INSLM's website.
See <https://www.inslm.gov.au/current-review-work>.
[45] The first submission was provided to the court on 23 August 2019. The second submission was provided on 3 December 2019.
[46] SCC 248/2018, Attachment A, Submission of the Attorney-General to the ACT Supreme Court, 3 December 2019, paras 3-4.
[47] SCC 248/2018, Attachment A, Submission of the Attorney-General to the ACT Supreme Court, 3 December 2019.
[48] See answer to Question on Notice No. 957 (Senator Rex Patrick) asked on 25 November 2019.

obviated the need for protracted, less efficient alternative protective arrangements under the NSI Act (such as the certificate regime).

51. As we have seen, even in the unique circumstances of the Johns matter, the section 22 orders that were made reflect the safeguards and principles behind the intent of the underlying provision in the NSI Act. This included ensuring that as much information, as is appropriate, in the proceedings could be made publicly available.

IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

No SCC 248/2018

R

v

Alan Johns

Attorney-General's advice regarding any public judgment to be prepared by the Honourable Justice Burns in this proceeding

1. We refer to the submission provided to his Honour on 28 August 2019 (dated 23 August 2019) outlining the Attorney-General's advice regarding the appropriate parameters for any public judgment to be published by his Honour in relation to this proceeding. Since providing the initial submission, further information about this proceeding has been released into the public domain, which impacts upon the advice provided to the Court.

2. This updated submission is provided in accordance with order 9 of the orders made by his Honour pursuant to s 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) on 19 February 2019, and for the purpose of assisting his Honour to prepare a public judgment if he considers it appropriate and desirable to do so.

3. At paragraph 27 of the Attorney-General's previous submission, we advised that any public judgment could contain the following information about the nature and gravity of the offending:

   a. the offender communicated confidential information contrary to a lawful obligation not to do so;

   b. the offender pleaded guilty to the offences;

   c. it was contrary to the public interest that this information be disclosed and the information disclosed was of a kind that could endanger the lives or safety of others;

   d. the offender was sentenced to a term of imprisonment for the offences; and

   e. the term of imprisonment imposed was 2 years and 7 months, imposed across an aggregate of 5 charges.

Filed on behalf of the Commonwealth Attorney-General by:

The Australian Government Solicitor
4 National Circuit
Barton ACT 2600

4. Having regard to further information released into the public domain in respect of this proceeding, we now advise that any public judgment could also contain the following information:

   a. the offender was known under the pseudonym of Mr Alan Johns;

   b. the NSI Act was invoked to manage the protection of the national security information in the proceedings; and

   c. this was Supreme Court proceeding number SCC 248 of 2018.

5. We reiterate the concluding observations of our 23 August 2019 submission:

6. It is a matter for his Honour to determine whether it is appropriate and desirable to prepare a public judgment in this proceeding, having regard to the above concerns and advice. The Attorney-General is very conscious of the desirability of achieving open justice wherever this is possible, and that national security interests must be balanced against this important principle. Nevertheless, the concerns which supported the invocation of the NSI Act and the strict non-publication regime which governed the proceeding continue to be matters of very real and continuing concern.

7. In the event his Honour decides to prepare a public judgment in this proceeding, the Attorney-General respectfully requests a brief opportunity to review the judgment once it has been prepared but before it is published to provide advice to his Honour as to any specific content that might particularly cause a concern regarding risks to national security.

3 December 2019

Australian Government Solicitor
for the Attorney-General