



Australian Security Intelligence Organisation Amendment Act 2023

No. 33, 2023

**An Act to amend the *Australian Security
Intelligence Organisation Act 1979*, and for related
purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedules.....	2
Schedule 1—Amendments		3
Part 1—Main amendments		3
Division 1—Amendments to the Australian Security Intelligence Organisation Act 1979		3
<i>Australian Security Intelligence Organisation Act 1979</i>		3
Division 2—Amendments to other Acts		34
<i>Administrative Appeals Tribunal Act 1975</i>		34
<i>Office of National Intelligence Act 2018</i>		48
Part 2—Other amendments		50
<i>Inspector-General of Intelligence and Security Act 1986</i>		50



Australian Security Intelligence Organisation Amendment Act 2023

No. 33, 2023

An Act to amend the *Australian Security Intelligence Organisation Act 1979*, and for related purposes

[Assented to 28 June 2023]

The Parliament of Australia enacts:

1 Short title

This Act is the *Australian Security Intelligence Organisation
Amendment Act 2023*.

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
Provisions	Commencement	Date/Details
1. The whole of this Act	1 July 2023.	1 July 2023

Note: This table relates only to the provisions of this Act as originally enacted.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

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

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Part 1—Main amendments

Division 1—Amendments to the Australian Security Intelligence Organisation Act 1979

Australian Security Intelligence Organisation Act 1979

1 Section 4 (after paragraph (a) of the definition of *authority of a State*)

Insert:

(aa) in Part IVA—has the meaning given by section 82A; and

2 Section 4

Insert:

Commonwealth agency means a Minister or an authority of the Commonwealth.

security clearance decision means a decision to do any of the following:

- (a) grant a security clearance to a person;
- (b) deny a security clearance in respect of a person;
- (c) impose, vary or remove conditions on a security clearance in respect of a person;
- (d) suspend a security clearance, or revoke a suspension of a security clearance, held by a person;
- (e) revoke a security clearance held by a person.

Note: See also subsection 82L(4) in relation to a decision of an internal reviewer (within the meaning of Part IVA).

security clearance suitability assessment means a statement in writing that:

- (a) is furnished by the Organisation; and
- (b) is about a person's suitability to hold a security clearance (with or without conditions imposed in respect of the security

- clearance) that has been, or may be, granted by another security vetting agency; and
- (c) expressly states that it is a security clearance suitability assessment for the purposes of paragraph 82C(1)(d).

3 Subsection 16(1) (note)

Omit “34AB”, substitute “34AA, 34AB”.

4 After subsection 16(1A)

Insert:

- (1B) Subject to subsection (1C), the Director-General may, by writing, delegate any or all of the Director-General’s powers and functions under subsection 82D(1) to a person who is an ASIO employee or an ASIO affiliate.

Note: Subsection 82D(1) provides that the Director-General may, on behalf of the Organisation, exercise the powers or perform the functions of the Organisation under Part IVA.

- (1C) The Director-General may delegate the power or function under subsection 82D(1) to:

- (a) make a security clearance decision under paragraph 82C(1)(b); or
- (b) furnish a security clearance suitability assessment under paragraph 82C(1)(d);

only to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than an Executive Level 1 position.

5 At the end of paragraphs 17(1)(a) and (b)

Add “and”.

6 Paragraph 17(1)(c)

Omit “responsibilities.”, substitute “responsibilities; and”.

7 After paragraph 17(1)(ca)

Insert:

and (cb) to undertake security vetting and security clearance related activities in accordance with Part IVA; and

8 At the end of subsection 17(1)

Add:

Note: The Organisation's function referred to in paragraph (cb) does not limit the capacity of any other authority of the Commonwealth to undertake the kinds of activities referred to in that paragraph.

9 Subsection 35(1) (definition of *Commonwealth agency*)

Repeal the definition.

10 At the end of Division 1 of Part IV

Add:

36A Part not to apply to security vetting and security clearance related activities

- (1) This Part (other than section 81) does not apply in relation to the exercise of a power or the performance of a function under Part IVA.
- (2) To avoid doubt:
 - (a) a communication made, including a security clearance suitability assessment furnished, by the Organisation in connection with the performance of its function under paragraph 17(1)(cb) is not a security assessment; and
 - (b) any decision made or not made, or action taken or not taken, by a Commonwealth agency, a State or an authority of a State, on the basis of a communication made by the Organisation in connection with the performance of its function under paragraph 17(1)(cb) is not prescribed administrative action within the meaning of paragraph (a) of the definition of *prescribed administrative action* in subsection 35(1).

11 Subsection 81(3)

After "this Part" (wherever occurring), insert "or Part IVA".

12 After Part IV

Insert:

Part IVA—Security vetting and security clearance related activities

Division 1—Preliminary

82 Purpose of this Part

- (1) This Part is made for the purposes of paragraph 17(1)(cb) (which specifies the Organisation’s function in relation to security vetting and security clearance related activities).

Note: Section 81 (secrecy) applies in relation to this Part.

- (2) To avoid doubt:
- (a) the Organisation’s performance of the function specified in paragraph 17(1)(cb) is not limited by the operation of subsection 17(2) (which specifies limits on the Organisation carrying out or enforcing measures for security within an authority of the Commonwealth); and
 - (b) paragraph 17(1)(cb) and this Part do not limit the capacity of any other authority of the Commonwealth to undertake the kinds of activities referred to in that paragraph.

82A Definitions

In this Part:

affected person:

- (a) in relation to an internally reviewable decision—has the meaning given by section 82H; and
- (b) in relation to an externally reviewable decision—has the meaning given by section 83; and
- (c) in relation to an independently reviewable decision—has the meaning given by section 83EA.

authority of a State includes the following:

- (a) a State Minister;
- (b) a Department of State, or a Department of the Public Service, of a State;
- (c) a Police Force of a State;

- (d) a body, whether incorporated or not, established for public purposes by or under a law of a State;
- (e) a body corporate in which a State or a body referred to in paragraph (d) has a controlling interest.

externally reviewable decision has the meaning given by section 83.

independently reviewable decision has the meaning given by section 83EA.

independent reviewer means a person engaged as an independent reviewer under section 83EF.

internally reviewable decision has the meaning given by section 82H.

internal reviewer has the meaning given by subsection 82L(1).

prejudicial security clearance suitability assessment means a security clearance suitability assessment in respect of a person that contains information that would or could be prejudicial to a security clearance decision in respect of the person.

security vetting agency means an authority of the Commonwealth, a State or an authority of a State, whose functions or activities include making security clearance decisions.

sponsoring agency, in relation to a security clearance, means the Commonwealth agency, State or authority of a State that sponsors the security clearance or would sponsor the security clearance if it were granted.

82B Simplified outline of this Part

This Part deals with the Organisation's function in relation to security vetting and security clearance related activities.

The function includes undertaking security vetting to assess a person's suitability to hold, or to continue to hold, a security clearance, making security clearance decisions in respect of a

person and furnishing security clearance suitability assessments in respect of a person.

The Director-General may, on behalf of the Organisation, exercise the powers and perform the functions of the Organisation under this Part, and may delegate those powers and functions under section 16.

There are some limitations on the actions certain persons or bodies can take on the basis of a communication from the Organisation under this Part that is not in the form of a security clearance suitability assessment. There are also some limitations on when the Organisation can make a communication under this Part to certain persons or bodies if the communication is not in the form of a security clearance suitability assessment.

Certain persons may apply to the Organisation for internal review of certain security clearance decisions. Certain persons may apply to the Administrative Appeals Tribunal for review of certain security clearance decisions made by an internal reviewer and prejudicial security clearance suitability assessments furnished by the Organisation to a security vetting agency. Certain persons may apply to an independent reviewer for review of certain security clearance decisions made by an internal reviewer.

Certain security clearance decisions and security clearance suitability assessments may be reviewed by the Administrative Appeals Tribunal if required by the Attorney-General.

Division 2—Security vetting and security clearance related decisions

82C Security vetting and security clearance related activities

- (1) For the purposes of the Organisation's function under paragraph 17(1)(cb), the Organisation may do any of the following:
 - (a) undertake security vetting to assess a person's suitability to hold a security clearance;
 - (b) make security clearance decisions;

- (c) undertake ongoing security vetting and assessment of a person's suitability to continue to hold a security clearance that has been granted, or is taken under paragraph (2)(a) of this section to have been granted, by the Organisation;
- (d) furnish a security clearance suitability assessment in respect of a person;
- (e) communicate with a sponsoring agency for a security clearance in relation to the ongoing suitability of a person to hold the security clearance;
- (f) assume responsibility for a security clearance that has been granted to a person by another security vetting agency;
- (g) do anything incidental to a thing mentioned in any of paragraphs (a) to (f) of this subsection.

Note: In respect of communications made by the Organisation under this Part, it is the Organisation's responsibility to determine a person's suitability on security grounds to hold a security clearance. In respect of a person employed, or proposed to be employed, by a Commonwealth agency or other body, it is the responsibility of that agency or body to determine the person's suitability on employment grounds to be employed by that agency or body.

- (2) If, at a time, the Organisation assumes responsibility for a security clearance under paragraph (1)(f):
 - (a) the security clearance is, after that time, taken to have been granted by the Organisation; and
 - (b) this Part applies in relation to a security clearance decision made after that time in respect of the security clearance.

Note: Internal review and review by the Administrative Appeals Tribunal, as provided for by this Part, do not apply to a security clearance decision made by a security vetting agency in respect of a security clearance before the Organisation assumes responsibility for the clearance.

- (3) To avoid doubt, nothing in this Act prevents the Organisation from making a security clearance decision to impose a condition, or vary a condition imposed, on a security clearance in respect of a person in the following circumstances:
 - (a) where the person is not required to agree to the condition, or the variation of the condition, in order for the security clearance to be granted or continued;
 - (b) where the sponsoring agency for the security clearance, or the employer of the person, must agree to the condition, or

the variation of the condition, in order for the security clearance to be granted to the person or continued in respect of the person.

82D Director-General's powers, functions and duties

- (1) The powers and functions of the Organisation under this Part may be exercised or performed on behalf of the Organisation by the Director-General.

Note: See section 16 for the Director-General's power to delegate powers and functions under this subsection.

- (2) The Director-General must ensure that the Organisation has policies and procedures in place in relation to the exercise of a power or the performance of a function under this Part, including policies and procedures for the following:
 - (a) undertaking security vetting of a person;
 - (b) making security clearance suitability assessments and security clearance decisions.
- (3) If a policy or procedure referred to in subsection (2) is in writing, the policy or procedure is not a legislative instrument.

82E Communications by Organisation to another Commonwealth security vetting agency

- (1) This section applies in relation to a communication by the Organisation to another security vetting agency that is an authority of the Commonwealth (a *Commonwealth security vetting agency*).
- (2) A Commonwealth security vetting agency must not make, refuse to make or refrain from making a security clearance decision in respect of a person on the basis of any communication in relation to the person made by the Organisation not amounting to a security clearance suitability assessment.
- (3) Subsection (2) does not prevent a Commonwealth security vetting agency from making a security clearance decision to temporarily:
 - (a) suspend a security clearance, or revoke a suspension of a security clearance, held by a person; or

- (b) impose a condition, or vary a condition imposed, on a security clearance in respect of a person;
in the circumstances referred to in subsection (4).
- (4) The circumstances are that:
 - (a) the Organisation makes a communication to the Commonwealth security vetting agency pending the furnishing of a security clearance suitability assessment in respect of the person; and
 - (b) the Commonwealth security vetting agency is satisfied, on the basis of that communication, that the requirements of security make it necessary as a matter of urgency to make the security clearance decision pending the furnishing of the security clearance suitability assessment.

82F Communications by Organisation to State security vetting agency

- (1) This section applies in relation to a communication (including a security clearance suitability assessment) by the Organisation to a security vetting agency that is a State or an authority of a State (a *State security vetting agency*).
- (2) Without limiting paragraph 82C(1)(d), the Organisation may furnish a security clearance suitability assessment in respect of a person to a State security vetting agency by:
 - (a) furnishing the assessment directly to the State security vetting agency; or
 - (b) furnishing the assessment to a Commonwealth agency for transmission to the State security vetting agency.
- (3) The Organisation must not furnish a communication concerning a person, other than in the form of a security clearance suitability assessment or in accordance with subsection (4), to:
 - (a) a State security vetting agency if the Organisation knows the communication is intended or likely to be used by the State security vetting agency in considering whether to make, refuse to make or refrain from making a security clearance decision in respect of the person; or

- (b) a Commonwealth agency if the Organisation knows that the Commonwealth agency intends to transmit the communication to a State security vetting agency for use in considering whether to make, refuse to make or refrain from making a security clearance decision in respect of the person.
- (4) The Organisation may make a communication, pending the furnishing by the Organisation of a security clearance suitability assessment in respect of a person, to:
 - (a) a State security vetting agency; or
 - (b) a Commonwealth agency for transmission to a State security vetting agency;if the Director-General, or a person authorised by the Director-General under subsection (6), is satisfied that the requirements of security make it necessary as a matter of urgency for the State security vetting agency to make a security clearance decision referred to in subsection (5) in respect of the person.
- (5) For the purposes of subsection (4), the security clearance decision is a decision to temporarily:
 - (a) suspend a security clearance, or revoke a suspension of a security clearance, held by the person; or
 - (b) impose a condition, or vary a condition imposed, on a security clearance in respect of the person.
- (6) The Director-General may, in writing, authorise a person for the purposes of subsection (4) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

82G Statement of grounds for prejudicial security clearance suitability assessments

- (1) The Organisation must prepare a statement of grounds for a prejudicial security clearance suitability assessment furnished in respect of a person.
- (2) The statement of grounds must contain all information that has been relied on by the Organisation in making the prejudicial security clearance suitability assessment, other than information

the inclusion of which would, in the opinion of the Director-General or a person authorised by the Director-General under subsection (4), be prejudicial to security.

- (3) For the purposes of this Part, the statement of grounds is taken to be part of the prejudicial security clearance suitability assessment.
- (4) The Director-General may, in writing, authorise a person for the purposes of subsection (2) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

Division 3—Review of certain security clearance decisions and prejudicial security clearance suitability assessments

Subdivision A—Internal review of certain security clearance decisions

82H Internally reviewable decisions

Internally reviewable decisions

- (1) For the purposes of this Division, each of the following security clearance decisions is an *internally reviewable decision*:
 - (a) a decision by the Organisation to deny a security clearance in respect of a person (the *affected person*);
 - (b) a decision by the Organisation to revoke a security clearance held by a person (the *affected person*);
 - (c) a decision by the Organisation to impose a condition, or vary a condition imposed, on a security clearance in respect of a person (the *affected person*) if:
 - (i) in the case of a security clearance that has not yet been granted—the affected person must agree to the condition before the security clearance will be granted; or
 - (ii) in the case of a security clearance that has already been granted—the affected person must agree to the

condition, or the variation of the condition, otherwise the security clearance will be revoked.

Exceptions

- (2) A decision of an internal reviewer, on behalf of the Organisation, under subsection 82L(3) is not an ***internally reviewable decision*** for the purposes of this Division.
- (3) A security clearance decision in respect of a person is not an ***internally reviewable decision*** for the purposes of this Division if the person:
 - (a) is engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia; and
 - (b) is not an Australian citizen or is not normally resident in Australia.

82J Notification of internally reviewable decision

- (1) Within 14 days after the day on which an internally reviewable decision is made, the Organisation must give the affected person, and the sponsoring agency for the security clearance in relation to which the decision was made, notice in writing of the decision and reasons for the decision.
- (2) A notice given under subsection (1) must also contain prescribed information concerning the affected person's right to apply to the Organisation under this Subdivision for internal review of the decision.
- (3) Section 25D of the *Acts Interpretation Act 1901* does not apply in relation to the reasons notified under subsection (1).
- (4) Without limiting what the Organisation can choose to include or not include in the reasons notified under subsection (1), the Organisation may withhold any of the following from the reasons:
 - (a) any information relating to a standard relating to the Commonwealth's highest level of security clearance that was used to make the decision if the inclusion of the information would, in the opinion of the Director-General or a person authorised by the Director-General under subsection (5), be prejudicial to security;

- (b) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (5), would be contrary to the public interest:
 - (i) because it would prejudice security, the defence of the Commonwealth or the conduct of the Commonwealth's international affairs; or
 - (ii) because it would reveal information that has been disclosed to the Organisation in confidence; or
 - (iii) for a reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed;
 - (c) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (5), could reveal the methodology underlying a psychological assessment of the affected person.
- (5) The Director-General may, in writing, authorise a person for the purposes of subsection (4) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

82K Application for internal review of decision

- (1) An affected person may apply under this section for the review of an internally reviewable decision.
- (2) An application for review must be made, in writing, to the Organisation within:
 - (a) 30 days after the day the person is given notice of the decision under section 82J; or
 - (b) any further period that the Organisation allows.

82L Decision on internal review

Decision on internal review

- (1) If an application for review of an internally reviewable decision is made in accordance with section 82K, the Organisation must arrange for a person (the **internal reviewer**) to review the decision in as timely a manner as is possible.

- (2) The internal reviewer must not be the person who made the internally reviewable decision.
- (3) After reviewing the decision, the internal reviewer, on behalf of the Organisation:
 - (a) must make a decision to affirm, vary or set aside the internally reviewable decision; and
 - (b) if the internal reviewer sets aside the internally reviewable decision in respect of a person—may make another security clearance decision in respect of the person for the purposes of paragraph 82C(1)(b).
- (4) A decision of an internal reviewer under paragraph (3)(a) is also taken to be a security clearance decision made by the Organisation for the purposes of paragraph 82C(1)(b).

Notification of internal reviewer's decision

- (5) Within 14 days after the day on which the internal reviewer makes a decision under this section, the Organisation must give the affected person, and the sponsoring agency for the security clearance in relation to which the decision was made, notice in writing of the internal reviewer's decision and reasons for the decision.
- (6) If the internal reviewer's decision under subsection (3) is an externally reviewable decision under Subdivision B, the notice given under subsection (5) must also contain prescribed information concerning the affected person's right to apply to the Administrative Appeals Tribunal under that Subdivision for review of the decision.
- (6A) If the internal reviewer's decision under subsection (3) is an independently reviewable decision under Subdivision C, the notice given under subsection (5) must also contain prescribed information concerning the affected person's right to apply to an independent reviewer under that Subdivision for review of the decision.
- (7) Section 25D of the *Acts Interpretation Act 1901* does not apply in relation to the reasons notified under subsection (5).

- (8) Without limiting what the Organisation can choose to include or not include in the reasons notified under subsection (5) for a decision, the Organisation may withhold any of the following from the reasons:
- (a) any information relating to a standard relating to the Commonwealth's highest level of security clearance that was used to make the decision if the inclusion of the information would, in the opinion of the Director-General or a person authorised by the Director-General under subsection (9), be prejudicial to security;
 - (b) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (9), would be contrary to the public interest:
 - (i) because it would prejudice security, the defence of the Commonwealth or the conduct of the Commonwealth's international affairs; or
 - (ii) because it would reveal information that has been disclosed to the Organisation in confidence; or
 - (iii) for a reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed;
 - (c) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (9), could reveal the methodology underlying a psychological assessment of the affected person.
- (9) The Director-General may, in writing, authorise a person for the purposes of subsection (8) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

**Subdivision B—Review by the Administrative Appeals
Tribunal of certain security clearance decisions and
security clearance suitability assessments**

83 Externally reviewable decisions

- (1) For the purposes of this Division, each of the following security clearance decisions by an internal reviewer, on behalf of the Organisation, is an *externally reviewable decision*:
 - (a) a decision under paragraph 82L(3)(a) to affirm an internally reviewable decision in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, held a security clearance or was a Commonwealth employee;
 - (b) a decision under paragraph 82L(3)(a) to vary an internally reviewable decision in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, held a security clearance or was a Commonwealth employee;
 - (c) any of the following decisions under paragraph 82L(3)(b) in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, held a security clearance or was a Commonwealth employee:
 - (i) a decision to deny a security clearance in respect of the affected person;
 - (ii) a decision to revoke a security clearance in respect of the affected person;
 - (iii) a decision to impose a condition, or vary a condition imposed, on a security clearance in respect of the affected person and a circumstance in subparagraph 82H(1)(c)(i) or (ii) applies.
- (2) For the purposes of this Division, a prejudicial security clearance suitability assessment in respect of a person (the *affected person*) furnished by the Organisation to a security vetting agency is an *externally reviewable decision*.
- (3) However, a security clearance decision or a prejudicial security clearance suitability assessment in respect of a person is not an

externally reviewable decision for the purposes of this Division if the person:

- (a) is engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia; and
 - (b) is not an Australian citizen or is not normally resident in Australia.
- (4) For the purposes of this section:

Commonwealth employee means a person who:

- (a) is:
 - (i) an APS employee; or
 - (ii) employed under the *Members of Parliament (Staff) Act 1984*; or
 - (iii) a Parliamentary Service employee (within the meaning of the *Parliamentary Service Act 1999*); or
 - (iv) a member of the Defence Force; or
 - (v) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*) or a special member (within the meaning of that Act); or
 - (vi) an employee of an agency within the national intelligence community (within the meaning of the *Office of National Intelligence Act 2018*); and
- (b) has completed any period of probation that applies to the employment; and
- (c) is not employed in a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) or corporate Commonwealth entity (within the meaning of that Act).

Note: A person is not a Commonwealth employee if the person is engaged as a consultant, contractor or subcontractor.

83A Notification of prejudicial security clearance suitability assessment that is an externally reviewable decision

Notification of prejudicial security clearance suitability assessment

- (1) Within 14 days after the day on which the Organisation furnishes a prejudicial security clearance suitability assessment that is an externally reviewable decision to a security vetting agency, the

security vetting agency must give the affected person notice in writing of the assessment and a copy of the assessment (including a copy of the statement of grounds for the assessment).

Note: The statement of grounds for a security clearance suitability assessment is taken to be part of the assessment (see subsection 82G(3)).

- (2) A notice given under subsection (1) must also contain prescribed information concerning the affected person's right to apply to the Administrative Appeals Tribunal under this Subdivision for review of the externally reviewable decision.
- (3) However:
- (a) subsections (1) and (2) do not apply if the Minister gives a certificate in accordance with paragraph (4)(a) in respect of the notice for the prejudicial security clearance suitability assessment; and
 - (b) if the Minister gives a certificate in accordance with paragraph (4)(b) in respect of the statement of grounds for the prejudicial security clearance suitability assessment, the copy of the statement of grounds, or that part of the statement to which the certificate applies, must not be given to the affected person.

Certificate to withhold notice or statement of grounds

- (4) The Minister may, by writing signed by the Minister and given to the Director-General, certify that the Minister is satisfied that:
- (a) the withholding of notice of the prejudicial security clearance suitability assessment in respect of the affected person is essential to the security of the nation; or
 - (b) the disclosure to an affected person of the statement of grounds for the prejudicial security clearance suitability assessment in respect of the affected person, or a particular part of that statement, would be prejudicial to the interests of security.
- (5) If the Minister gives a certificate under subsection (4), the Minister must cause a copy of the certificate to be given to the following:
- (a) the security vetting agency to which the prejudicial security clearance suitability assessment was furnished;

- (b) the sponsoring agency for the security clearance in relation to which the prejudicial security clearance suitability assessment was furnished.
- (6) Before the end of the following periods, the Minister must consider whether to revoke a certificate given under paragraph (4)(a) (if the certificate remains in force):
 - (a) 12 months after it was given;
 - (b) each 12 month period after the Minister last considered whether to revoke it.

Delegation

- (7) The Minister may, in writing, delegate the Minister's powers and functions under paragraph (4)(b) to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.
- (8) In performing a function or exercising a power under a delegation under subsection (7), the delegate must comply with any written directions of the Minister.

83B Applications to Administrative Appeals Tribunal

- (1) Applications may be made to the Administrative Appeals Tribunal for review of security clearance decisions, or security clearance suitability assessments, that are externally reviewable decisions.

Note: See section 27AA of the *Administrative Appeals Tribunal Act 1975* for who can apply for a review under this section.

- (2) At any time after the completion of a review by the Administrative Appeals Tribunal of the security clearance decision or security clearance suitability assessment, an application may be made to the Tribunal for review of the findings of the Tribunal on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review.

83C Statement of grounds for security clearance decision

- (1) This section applies if the Director-General is notified under Part IV of the *Administrative Appeals Tribunal Act 1975* of an

application to the Administrative Appeals Tribunal for the review of a security clearance decision that is an externally reviewable decision.

Statement of grounds

- (2) As soon as practicable after the Director-General receives notice of the application, the Organisation must:
- (a) prepare a statement of grounds for the security clearance decision; and
 - (b) subject to subsections (5) and (7), give a copy of the statement of grounds to the affected person.

Note: The Director-General must also lodge a copy of the statement of grounds with the Administrative Appeals Tribunal (see subsection 38A(1B) of the *Administrative Appeals Tribunal Act 1975*).

- (3) The statement of grounds must contain all information that has been relied on by the Organisation in making the security clearance decision.
- (4) For the purposes of this Part, the statement of grounds is taken to be part of the security clearance decision.

Information to be excluded from copy given to affected person

- (5) If the security clearance decision is in respect of the Commonwealth's highest level of security clearance, the copy of the statement of grounds given to the affected person must not include the following:
- (a) any information relating to a standard relating to the Commonwealth's highest level of security clearance that was used to make the decision if the inclusion of the information would, in the opinion of the Director-General or a person authorised by the Director-General under subsection (8), be prejudicial to security;
 - (b) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (8), would be contrary to the public interest:

- (i) because it would prejudice security, the defence of the Commonwealth or the conduct of the Commonwealth's international affairs; or
 - (ii) because it would reveal information that has been disclosed to the Organisation in confidence; or
 - (iii) for a reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed;
- (c) any information that, in the opinion of the Director-General or a person authorised by the Director-General under subsection (8), could reveal the methodology underlying a psychological assessment of the affected person.

Certificate to withhold statement of grounds

- (6) The Minister may, by writing signed by the Minister and given to the Director-General, certify that the Minister is satisfied that the disclosure to an affected person of the statement of grounds for the security clearance decision in respect of the affected person, or a particular part of that statement, would be prejudicial to the interests of security.
- (7) If the Minister gives a certificate in accordance with subsection (6) in respect of the statement of grounds for the security clearance decision, the copy of the statement of grounds, or that part of the statement to which the certificate applies, must not be given to the affected person.

Delegations and authorisations

- (8) The Director-General may, in writing, authorise a person for the purposes of subsection (5) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.
- (9) The Minister may, in writing, delegate the Minister's powers and functions under subsection (6) to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

- (10) In performing a function or exercising a power under a delegation under subsection (9), the delegate must comply with any written directions of the Minister.

83D Effect of findings

- (1) If a security clearance decision, or security clearance suitability assessment, that is an externally reviewable decision has been reviewed by the Administrative Appeals Tribunal:
- (a) every Commonwealth agency, State or authority of a State for which the security clearance decision or security clearance suitability assessment is relevant; and
 - (b) any tribunal, person or authority having power to hear appeals from, or to review, a decision with respect to the security clearance decision or security clearance suitability assessment;
- must treat the findings of the Administrative Appeals Tribunal, to the extent that they do not affirm the security clearance decision or security clearance suitability assessment, as superseding that decision or assessment.
- (2) If the Administrative Appeals Tribunal has made findings upon a review of a security clearance decision, or security clearance suitability assessment, that is an externally reviewable decision, the Organisation must not make a further security clearance decision or security clearance suitability assessment in respect of the affected person that is not in accordance with those findings except on the basis of matters occurring after the review or of which evidence was not available at the time of the review.

83E Conclusive certificates

- (1) The Minister may, in exceptional circumstances, issue a conclusive certificate in relation to a security clearance decision, or security clearance suitability assessment, that is an externally reviewable decision if the Minister believes that:
- (a) it would be prejudicial to security to change the decision or assessment; or
 - (b) it would be prejudicial to security for the decision or assessment to be reviewed.

- (2) The Administrative Appeals Tribunal must not review, or continue to review, a security clearance decision or security clearance suitability assessment in relation to which the Minister has issued a conclusive certificate under subsection (1).

Subdivision C—Review by an independent reviewer

83EA Independently reviewable decisions

- (1) For the purposes of this Division, each of the following security clearance decisions by an internal reviewer, on behalf of the Organisation, is an *independently reviewable decision*:
- (a) a decision under paragraph 82L(3)(a) to affirm an internally reviewable decision in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, neither held a security clearance nor was a Commonwealth employee;
 - (b) a decision under paragraph 82L(3)(a) to vary an internally reviewable decision in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, neither held a security clearance nor was a Commonwealth employee;
 - (c) any of the following decisions under paragraph 82L(3)(b) in respect of a person (the *affected person*) who, immediately before the internally reviewable decision was made, neither held a security clearance nor was a Commonwealth employee:
 - (i) a decision to deny a security clearance in respect of the affected person;
 - (ii) a decision to revoke a security clearance in respect of the affected person;
 - (iii) a decision to impose a condition, or vary a condition imposed, on a security clearance in respect of the affected person and a circumstance in subparagraph 82H(1)(c)(i) or (ii) applies.
- (2) However, a security clearance decision in respect of a person is not an *independently reviewable decision* for the purposes of this Division if the person:

- (a) is engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia; and
- (b) is not an Australian citizen or is not normally resident in Australia.

(3) For the purposes of this section:

Commonwealth employee means a person who:

- (a) is:
 - (i) an APS employee; or
 - (ii) employed under the *Members of Parliament (Staff) Act 1984*; or
 - (iii) a Parliamentary Service employee (within the meaning of the *Parliamentary Service Act 1999*); or
 - (iv) a member of the Defence Force; or
 - (v) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*) or a special member (within the meaning of that Act); or
 - (vi) an employee of an agency within the national intelligence community (within the meaning of the *Office of National Intelligence Act 2018*); and
- (b) has completed any period of probation that applies to the employment; and
- (c) is not employed in a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) or corporate Commonwealth entity (within the meaning of that Act).

Note: A person is not a Commonwealth employee if the person is engaged as a consultant, contractor or subcontractor.

83EB Application for independent review of decision

- (1) An affected person may apply under this section for review of an independently reviewable decision.
- (2) An application for review must be made, in writing, to an independent reviewer within:
 - (a) 30 days after the day the person is given notice of the decision under section 82L(5); or
 - (b) any further period that an independent reviewer allows.

Note: The notice given to the affected person of the independently reviewable decision must contain prescribed information concerning the person's right to apply to an independent reviewer for review of the decision (see subsection 82L(6A)).

- (3) As soon as practicable after receiving an application made in accordance with subsection (2), the independent reviewer must:
 - (a) decide whether to review the independently reviewable decision; and
 - (b) give the affected person, the Director-General and the sponsoring agency for the security clearance in relation to which the independently reviewable decision was made notice in writing of the independent reviewer's decision under paragraph (a).

83EC Director-General to provide information to independent reviewer

- (1) If the Director-General receives notice under paragraph 83EB(3)(b) that the independent reviewer has decided to review the independently reviewable decision, the Director-General must, in as timely a manner as is possible, provide to the independent reviewer all information that was relied upon by the internal reviewer in making the independently reviewable decision.
- (2) Without limiting subsection (1), the Director-General may provide to the independent reviewer a copy of any standard (or part thereof) certified in writing by the Director-General as a standard relating to the Commonwealth's highest level of security clearance that was used to make the independently reviewable decision.

Note: A standard relating to the Commonwealth's highest level of security clearance is part of the Australian Government's framework of protective security policy.

- (3) The independent reviewer may, in writing, request the Director-General to seek information from the affected person for the purposes of the independent review.
- (4) If the Director-General receives a request under subsection (3), the Director-General must use the Director-General's best endeavours

to seek the information from the affected person and provide the information to the independent reviewer.

- (5) The independent reviewer must:
- (a) comply with any reasonable directions of the Director-General in relation to the protection or handling of information provided to the independent reviewer under this section; and
 - (b) do all things necessary to ensure that any information provided to the independent reviewer (including any copy of a standard provided to the independent reviewer under subsection (2)) is not disclosed to the affected person.

Delegation

- (6) The Director-General may, in writing, delegate the Director-General's powers and functions under subsection (1) to an ASIO employee, or an ASIO affiliate.
- (7) The Director-General may, in writing, delegate the Director-General's powers and functions under paragraph (5)(a) to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.
- (8) In performing a function or exercising a power under a delegation under subsection (6) or (7), the delegate must comply with any written directions of the Director-General.

83ED Independent review of decision

Consideration of decision

- (1) This section applies if the independent reviewer decides under subsection 83EB(3) to review the independently reviewable decision.
- (2) The independent reviewer must review the decision in as timely a manner as is possible.
- (3) In reviewing the decision the independent reviewer must:

- (a) consider all the information provided to the independent reviewer by the Director-General under section 83EC; and
- (b) if the Director-General provided a certified copy of a standard (or part thereof) under subsection 83EC(2)—the independent reviewer must apply the standard (or part thereof).

Opinion in relation to decision

- (4) After reviewing the decision, the independent reviewer must give the Director-General, in writing, the independent reviewer's opinion as to whether the independently reviewable decision was reasonably open to have been made by the internal reviewer who made the decision.
- (5) The independent reviewer must also give a copy of the opinion to the Inspector-General of Intelligence and Security.
- (6) Within 14 days after the day on which the independent reviewer gives the Director-General the opinion under subsection (4), the independent reviewer must give the affected person, and the sponsoring agency for the security clearance in relation to which the independently reviewable decision was made, notice that the opinion has been given.
- (7) The independent reviewer must not give the opinion to the affected person or the sponsoring agency for the security clearance in relation to which the independently reviewable decision was made.

83EE Director-General's consideration of independent reviewer's opinion

- (1) If the independent reviewer has, under subsection 83ED(4), given the Director-General an opinion in relation to the independently reviewable decision, the Director-General must, in as timely a manner as is possible, consider the opinion and decide whether to take any action.

Note: An action may include causing the making, by the Organisation, of a new security clearance decision in respect of the affected person under Division 2.

- (2) The Director-General must, as soon as practicable after deciding whether to take any action, give the affected person, the Inspector-General of Intelligence and Security and the sponsoring agency for the security clearance in relation to which the independently reviewable decision was made notice in writing of the Director-General's decision.
- (3) If an action the Director-General decides to take is to cause the Organisation to make a new security clearance decision in respect of the affected person under Division 2, the Director-General must ensure that the new decision is not made by either of the following:
 - (a) the internal reviewer who made the independently reviewable decision;
 - (b) the person who made the internally reviewable decision in respect of which the internal reviewer made the independently reviewable decision.

Delegation

- (4) The Director-General may, in writing, delegate the Director-General's powers and functions under subsection (1) to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.
- (5) In performing a function or exercising a power under a delegation under subsection (4), the delegate must comply with any written directions of the Director-General.

83EF Attorney-General may engage independent reviewers

- (1) The Attorney-General may, on behalf of the Commonwealth, engage one or more individuals, as contractors, to be independent reviewers for the purposes of this Subdivision.
- (2) The engagement must be by written agreement.
- (3) The Attorney-General must not engage a person to be an independent reviewer unless the Attorney-General is satisfied that:
 - (a) the person has appropriate skills or qualifications to perform the role; and

- (b) the person holds a security clearance that is the Commonwealth's highest level of security clearance.
- (4) A person must not be engaged as an independent reviewer if the person is a current, or former, ASIO employee or ASIO affiliate.

Division 4—Other matters relating to review by the Administrative Appeals Tribunal

83F Reference of certain matters to Administrative Appeals Tribunal by Attorney-General

- (1) This section applies if:
 - (a) the Organisation has furnished to a security vetting agency a security clearance suitability assessment in respect of a person other than a security clearance suitability assessment of which a copy has been given to that person in accordance with this Part; or
 - (b) the Organisation has made a security clearance decision in respect of a person other than a security clearance decision that is an internally reviewable decision or an externally reviewable decision.
- (2) The Attorney-General may, if satisfied that it is desirable to do so by reason of special circumstances, require the Administrative Appeals Tribunal to:
 - (a) inquire and report to the Attorney-General and the Minister upon any question concerning the furnishing of the security clearance suitability assessment or the making of the security clearance decision; or
 - (b) review the security clearance suitability assessment or security clearance decision and any information or matter on which the assessment or decision was based.
- (3) If the Attorney-General makes a requirement of the Administrative Appeals Tribunal under subsection (2), the Tribunal must comply with the requirement and report its findings to the Attorney-General and the Minister.
- (4) For the purposes of determining whether it is desirable to make a requirement of the Administrative Appeals Tribunal under

subsection (2) in relation to a matter, the Attorney-General may request the Inspector-General of Intelligence and Security to:

- (a) inquire into the matter or into a specified aspect of the matter; and
 - (b) report to the Attorney-General and the Minister the results of the inquiry.
- (5) If the Attorney-General makes a request of the Inspector-General under subsection (4), the Inspector-General must comply with the request.
- (6) The constitution and procedure of the Administrative Appeals Tribunal under this section must be as determined by the President.
- (7) The following provisions do not apply in relation to a review under this section:
- (a) subsection 83D(1) of this Act (which is about the effect of findings);
 - (b) sections 43 and 43AAB of the *Administrative Appeals Tribunal Act 1975* (which are about the Tribunal's decision on review and the Tribunal's findings).
- (8) However, if the Administrative Appeals Tribunal has made findings under this section, the Attorney-General must, subject to the requirements of security, take or cause to be taken such action in relation to those findings, by way of communication or publication of the findings or alteration of records, as the Attorney-General considers appropriate in the interests of justice.

13 Application provisions

- (1) Paragraph 82C(1)(a) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division, applies in relation to security vetting undertaken on or after the commencement of this item, other than security vetting undertaken for the purposes of:
- (a) a security clearance decision that was under consideration immediately before the commencement of this item; or
 - (b) a security assessment commenced under Part IV of that Act before the commencement of this item that had not been furnished before that commencement.

- (2) Paragraph 82C(1)(b) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division:
- (a) applies in relation to a security clearance decision made on or after the commencement of this item in respect of a security clearance, whether the security clearance was granted before, on or after the commencement of this item; but
 - (b) does not apply in relation to a security clearance decision that was under consideration immediately before the commencement of this item.
- (3) Paragraph 82C(1)(c) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division, applies in relation to the ongoing security vetting and assessment, after the commencement of this item, in respect of a security clearance whether the security clearance was granted before, on or after the commencement of this item.
- (4) Paragraph 82C(1)(d) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division, applies in relation to a security clearance suitability assessment furnished on or after the commencement of this item in respect of a person, whether or not the person held a security clearance before the commencement of this item.
- (5) Paragraph 82C(1)(e) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division, applies in relation to a communication, on or after the commencement of this item, in respect of a security clearance whether the security clearance was granted before, on or after the commencement of this item.
- (6) Paragraph 82C(1)(f) of the *Australian Security Intelligence Organisation Act 1979*, as inserted by this Division, applies in relation to a security clearance for which the Organisation assumes responsibility on or after the commencement of this item, whether the security clearance was granted before, on or after the commencement of this item.
- (7) To avoid doubt, the *Australian Security Intelligence Organisation Act 1979*, as in force immediately before the commencement of this item, continues to apply in relation to the following:
- (a) a security assessment commenced under Part IV of that Act before the commencement of this item that had not been furnished before that commencement;
-

- (b) a security assessment furnished under that Part before the commencement of this item;
 - (c) any communication made pending the furnishing of a security assessment mentioned in paragraph (a) or (b), whether the communication was made before, on or after the commencement of this item.
- (8) To avoid doubt, nothing in this Division affects the capacity of a security vetting agency other than the Organisation to make a security clearance decision on the basis of a security assessment mentioned in paragraph (7)(a) or (b).

Division 2—Amendments to other Acts

Administrative Appeals Tribunal Act 1975

14 Subsection 3(1)

Insert:

security clearance decision has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

security clearance suitability assessment has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

security vetting agency has the meaning given by section 82A of the *Australian Security Intelligence Organisation Act 1979*.

sponsoring agency, in relation to a security clearance, has the meaning given by section 82A of the *Australian Security Intelligence Organisation Act 1979*.

15 Paragraph 17B(2)(a)

After “section 54”, insert “or 83B”.

16 Subsection 19E(1)

Omit “subsection 65(2)”, substitute “subsections 65(2) and 83F(6)”.

17 Before subsection 27AA(1)

Insert:

*Applications under Part IV of the Australian Security Intelligence
Organisation Act 1979*

18 At the end of section 27AA

Add:

*Applications under Part IVA of the Australian Security Intelligence
Organisation Act 1979*

- (4) An application under subsection 83B(1) of the *Australian Security Intelligence Organisation Act 1979* for review of a security clearance decision or security clearance suitability assessment may be made by a person in respect of whom the decision or suitability assessment was made and who has, in accordance with Part IVA of that Act, been given notice of the decision or suitability assessment.
- (5) An application under subsection 83B(2) of the *Australian Security Intelligence Organisation Act 1979* for review of the findings of the Tribunal on a review of a security clearance decision or security clearance suitability assessment may be made by the person who applied for the review in which the findings were made.
- (6) If the Tribunal is satisfied that an application referred to in subsection (5) is justified, it may review its previous findings, and this Act applies in relation to such a review and the findings in such a review as if it were the review of a security clearance decision or security clearance suitability assessment.

19 Paragraph 29(1)(ca)

After “subsection 54(1)”, insert “or 83B(1)”.

20 Paragraph 29(1)(ca)

After “security assessment”, insert “or a security clearance suitability assessment”.

21 Subparagraphs 29(1)(ca)(i) and (ii)

After “assessment”, insert “or suitability assessment”.

22 Paragraph 29(1)(cb)

After “subsection 54(2)”, insert “or 83B(2)”.

23 Section 29B (heading)

Omit “—review of security assessment”, substitute “**under Australian Security Intelligence Organisation Act**”.

24 Section 29B

Before “If an application”, insert “(1)”.

25 At the end of section 29B

Add:

- (2) If an application is made to the Tribunal for a review of a security clearance decision or security clearance suitability assessment, the Registrar must give a copy of the application, and a copy of the statement lodged with the application, to:
 - (a) the Director-General of Security; and
 - (b) for an application for review of a security clearance decision—the sponsoring agency for the security clearance in relation to which the security clearance decision was made; and
 - (c) for an application for review of a security clearance suitability assessment—the security vetting agency to which the suitability assessment was given.
- (3) If subsection (2) applies, the Registrar must also give the applicant written notice of receipt of the application.

26 After subsection 38A(1)

Insert:

- (1A) If an application for review of a security clearance suitability assessment is made in a case in which the ASIO Minister has given a certificate certifying in accordance with paragraph 83A(4)(b) of the *Australian Security Intelligence Organisation Act 1979*, the Director-General of Security must, as soon as practicable after receiving notice of the application, lodge with the Tribunal:
 - (a) a copy of the certificate; and

- (b) a copy of the whole of the suitability assessment (including a copy of the statement of grounds prepared for the security clearance suitability assessment under section 82G of that Act).

Note: The statement of grounds for a security clearance suitability assessment is taken to be part of the assessment (see subsection 82G(3) of the *Australian Security Intelligence Organisation Act 1979*).

- (1B) If an application for review of a security clearance decision is made, the Director-General of Security must, as soon as practicable after receiving notice of the application, lodge with the Tribunal:
 - (a) a copy of the statement of grounds prepared for the security clearance decision under section 83C of the *Australian Security Intelligence Organisation Act 1979*; and
 - (b) in a case in which the ASIO Minister has given a certificate certifying in accordance with subsection 83C(6) of that Act—a copy of the certificate.

27 Subsection 38A(2)

After “subsection (1)”, insert “, (1A) or (1B)”.

28 After section 39A

Insert:

39BA Procedure in Security Division review of security clearance decision or security clearance suitability assessment

Review of security clearance decision or security clearance suitability assessment

- (1) If an application for a review of a security clearance decision or security clearance suitability assessment is made to the Tribunal, the Tribunal is to review the decision or suitability assessment in accordance with this section.

Parties

- (2) The parties to the proceeding are the Director-General of Security and the applicant, but each of the following bodies (the **relevant body**) is entitled to adduce evidence and make submissions:

- (a) for a review of a security clearance decision—the sponsoring agency for the security clearance in relation to which the security clearance decision was made;
- (b) for a review of a security clearance suitability assessment—the following:
 - (i) the security vetting agency to which the suitability assessment was given;
 - (ii) the sponsoring agency for the security clearance in relation to which the suitability assessment was given, if that agency was also given the suitability assessment by the Australian Security Intelligence Organisation.

Director-General of Security must present all relevant information

- (3) It is the duty of the Director-General of Security to present to the Tribunal all information available to the Director-General (whether favourable or unfavourable to the applicant) that is relevant to the findings made in the statement of grounds for the security clearance decision or security clearance suitability assessment.
 - (4) Without limiting subsection (3), the Director-General of Security may present to the Tribunal:
 - (a) a copy of any standard (or part thereof) certified in writing by the Director-General as a standard relating to the Commonwealth's highest level of security clearance that was used to make the security clearance decision or security clearance suitability assessment; or
 - (b) a copy of any standard (or part thereof) certified in writing by the Director-General as a current standard relating to the Commonwealth's highest level of security clearance.
- Note: A standard relating to the Commonwealth's highest level of security clearance is part of the Australian Government's framework of protective security policy.
- (5) To avoid doubt, the Director-General of Security may present to the Tribunal both copies of a standard (or part thereof) referred to in paragraphs (4)(a) and (b).

Member may require parties to attend etc.

- (6) A member who is to participate, or who is participating, in the hearing may, at any time, require either or both of the parties to attend or be represented before the member for the purpose of conferring with the member concerning the conduct of the review with a view to identifying the matters in issue or otherwise facilitating the conduct of the proceedings.

Proceedings to be in private

- (7) The proceedings are to be in private and, subject to this section, the Tribunal is to determine which people may be present at any time.

Right of parties etc. to be present

- (8) Subject to subsections (9) and (12), the applicant and a person representing the applicant may be present when the Tribunal is hearing submissions made or evidence adduced by the Director-General of Security or the relevant body.
- (9) The applicant and any person representing the applicant must not be present when the Tribunal is hearing submissions made or evidence adduced in relation to any part of a copy of any standard presented to the Tribunal under subsection (4) that has not already been disclosed to the applicant.
- (10) The Director-General of Security or a person representing the Director-General, and a person representing the relevant body, may be present when the Tribunal is hearing submissions made or evidence adduced by the applicant.

Security or defence certificate

- (11) The ASIO Minister may, by signed writing, certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General of Security or the relevant body are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia.
- (12) If such a certificate is given:

- (a) the applicant must not be present when the evidence is adduced or the submissions are made; and
 - (b) a person representing the applicant must not be present when the evidence is adduced or the submissions are made unless the ASIO Minister consents.
- (13) A person representing the applicant commits an offence if:
- (a) the person is present when evidence to which a certificate given under subsection (11) relates is adduced or submissions to which such a certificate relates are made; and
 - (b) the person discloses any such evidence or submission to the applicant or to any other person.

Note: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

Penalty: Imprisonment for 2 years.

Protection of identity of person giving evidence

- (14) If the Director-General of Security so requests, the Tribunal must do all things necessary to ensure that the identity of a person giving evidence on behalf of the Director-General of Security is not revealed.

Evidence and submissions

- (15) The Tribunal must first hear evidence adduced, and submissions made, by or on behalf of the Director-General of Security and any evidence or submissions that the relevant body may wish to adduce or make.
- (16) The Tribunal must next permit the applicant, if the applicant so desires, to adduce evidence before, and make submissions to, the Tribunal.
- (17) The Tribunal may, on its own initiative and at any stage of the proceeding, invite a person to give evidence or cause a person to be summoned to give evidence.
- (18) If a person invited or summoned to give evidence under subsection (17) is:
- (a) an ASIO employee or ASIO affiliate; or

(b) an officer or employee of the relevant body;
subsection (11) applies as if any evidence to be given by the person were evidence proposed to be adduced by or on behalf of the Director-General of Security or the relevant body, as the case may be.

- (19) If:
- (a) a party presents the party's case to the Tribunal; and
 - (b) after that case has been presented, the other party adduces evidence; and
 - (c) the Tribunal thinks that, because of evidence adduced by the other party, the first-mentioned party should be further heard; the Tribunal must give the first-mentioned party an opportunity of adducing further evidence and submissions related to that further evidence, but must not give to the applicant any particulars of any evidence to which a certificate given under subsection (11) relates.
- (20) A member of the Tribunal may ask questions of a witness before the Tribunal and the presiding member may require a witness to answer any such question.

Dismissal of application

- (21) If the applicant fails within a reasonable time:
- (a) to proceed with the application; or
 - (b) to comply with a direction by the Tribunal in relation to the application;
- the President or an authorised member may dismiss the application without proceeding to review the security clearance decision or security clearance suitability assessment.

Delegation

- (22) The ASIO Minister may, by signed writing, delegate the ASIO Minister's power under subsection (11) to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Australian Security Intelligence Organisation that is equivalent to or higher than a position occupied by an SES employee.

- (23) In exercising a power under a delegation under subsection (22), the delegate must comply with any written directions of the ASIO Minister.

29 Section 39B (heading)

Omit “Security Division review of security assessment”, substitute “certain Security Division reviews”.

30 Subsection 39B(10) (heading)

Omit “*subsection 38A(1)*”, substitute “*section 38A*”.

31 Subsection 39B(10)

After “subsection 38A(1)”, insert “, (1A) or (1B)”.

32 Subsection 39B(10)

After “subsection 38(2)”, insert “, 83A(4) or 83C(6)”.

33 Subsection 39B(10)

After “taken to be a certificate”, insert “under subsection (2) of this section”.

34 At the end of section 39B

Add:

- (12) The ASIO Minister may, by signed writing, delegate the ASIO Minister’s power under subsection (2), to the extent it applies in relation to review of a security clearance decision or security clearance suitability assessment, to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Australian Security Intelligence Organisation that is equivalent to or higher than a position occupied by an SES employee.
- (13) In exercising a power under a delegation under subsection (12), the delegate must comply with any written directions of the ASIO Minister.

35 At the end of Division 4 of Part IV

Add:

39C Review of security clearance decisions and security clearance suitability assessments—consideration and disclosure of certain documents and information

- (1) This section applies to a proceeding in the Security Division for a review of a security clearance decision or a security clearance suitability assessment in respect of the Commonwealth's highest level of security clearance.

Application of standard relating to highest security clearance

- (2) If the Director-General of Security presents to the Tribunal a certified copy of a standard (or part thereof) under subsection 39BA(4):
- (a) if the Director-General has presented one certified copy of a standard (or part thereof)—the Tribunal must apply the standard (or part thereof) in its review of the decision or suitability assessment; or
 - (b) if the Director-General has presented more than one certified copy of a standard (or part thereof)—the Tribunal must, in its review of the decision or suitability assessment, apply the standard (or part thereof) certified by the Director-General as being a current standard.

Disclosure of documents or information

- (3) The Tribunal must, subject to this section and section 46, do all things necessary to ensure that a copy of any standard (or part thereof) presented to the Tribunal under subsection 39BA(4), or any information contained in it, is not disclosed to the applicant or any person other than:
- (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
 - (b) the Director-General of Security or the Director-General's representative.
- (4) Subsection (5) applies if the Tribunal is provided with a document containing information (the ***sensitive information***) certified in writing by the Director-General of Security as being information that, in the opinion of the Director General or a person authorised by the Director-General under subsection (9):

- (a) would be contrary to the public interest:
 - (i) because it would prejudice security, the defence of the Commonwealth or the conduct of the Commonwealth's international affairs; or
 - (ii) because it would reveal information that has been disclosed to the Australian Security Intelligence Organisation in confidence; or
 - (iii) for a reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed; or
 - (b) could reveal the methodology underlying a psychological assessment of the applicant.
- (5) The Tribunal must, subject to this section and section 46, do all things necessary to ensure that the sensitive information provided to the Tribunal is not disclosed to the applicant or any person other than:
- (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
 - (b) the Director-General of Security or the Director-General's representative.
- (6) However, subsections (3) and (5) do not apply in relation to disclosure to the applicant or a person representing the applicant to the extent that the information:
- (a) has already been lawfully disclosed to the applicant; or
 - (b) is disclosed to the applicant with the consent of the Director-General of Security.
- (7) This section does not prevent the disclosure of a copy of any standard (or part thereof) presented to the Tribunal under subsection 39BA(4), any information contained in it, or any sensitive information referred to in subsection (4) of this section to a member of the Tribunal's staff in the course of the performance of the staff member's duties.
- (8) This section excludes the operation, apart from this section, of any rules of law relating to the public interest that would otherwise apply in relation to the disclosure in a proceeding of a copy of any standard (or part thereof) presented to the Tribunal under

subsection 39BA(4), any information contained in it, or any sensitive information referred to in subsection (4) of this section.

- (9) The Director-General of Security may, in writing, authorise a person for the purposes of subsection (4) if the person is an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Australian Security Intelligence Organisation that is equivalent to or higher than a position occupied by an SES employee.

36 Subsection 43(1A)

Omit “section 43AAA and to subsection 65(3)”, substitute “sections 43AAA and 43AAB and subsections 65(3) and 83F(7)”.

37 After subsection 43(1)

Insert:

- (1AA) However, if the decision being reviewed is a security clearance decision, the only decisions that the Tribunal may make under subsection (1) are the following:
- (a) to affirm the decision under review;
 - (b) to set aside the decision under review and remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

38 At the end of subsection 43AAA(1)

Add “of a security assessment”.

39 After section 43AAA

Insert:

43AAB Findings of Tribunal in Security Division review of security clearance decision or security clearance suitability assessment

Scope

- (1) This section applies to a review in the Security Division of a security clearance decision or security clearance suitability assessment.

Findings

- (2) Upon the conclusion of a review, the Tribunal must make and record its findings in relation to the security clearance decision or security clearance suitability assessment, and those findings may state the opinion of the Tribunal as to the correctness of, or justification for any recommendation, opinion, advice or information contained in the decision or suitability assessment.
- (3) The Tribunal must not make findings in relation to a security clearance decision or security clearance suitability assessment that would, under subsection 83D(1) of the *Australian Security Intelligence Organisation Act 1979*, have the effect of superseding any information that is, under section 82G or 83C of that Act, taken to be part of the decision or suitability assessment unless those findings state that, in the Tribunal's opinion, the information is incorrect, is incorrectly represented or could not reasonably be relevant to the requirements of security.

Copies of findings to be given to parties etc.

- (4) Subject to subsection (5), the Tribunal must cause copies of its findings to be given to the applicant, the Director-General of Security, the ASIO Minister and the following body (the **relevant body**):
 - (a) for findings in relation to a security clearance decision—the sponsoring agency for the security clearance in relation to which the security clearance decision was made;
 - (b) for findings in relation to a security clearance suitability assessment—the security vetting agency to which the suitability assessment was given.
- (5) The Tribunal may direct that the whole or a particular part of its findings, so far as they relate to a matter that has not already been disclosed to the applicant, is not to be given to the applicant or is not to be given to the relevant body.

Applicant may publish findings

- (6) Subject to any direction by the Tribunal, the applicant is entitled to publish, in any manner that the applicant thinks fit, the findings of the Tribunal so far as they have been given to the applicant.

Tribunal may attach comments to findings

- (7) The Tribunal may attach to a copy of findings to be given to the Director-General under this section any comments the Tribunal wishes to make on matters relating to procedures or practices of the Australian Security Intelligence Organisation that have come to the Tribunal's attention as a result of a review.
- (8) The Tribunal must give the Minister a copy of any comments attached as mentioned in subsection (7).

40 At the end of subsection 46(2)

Add:

Note: Subsection 39B(10) of this Act deems certain certificates referred to in that subsection to be certificates under subsection 39B(2).

41 After subsection 46(3)

Insert:

- (3A) If the Federal Court of Australia or the Federal Circuit and Family Court of Australia (Division 2) is sent:
 - (a) a copy of any standard (or part thereof) referred to in subsection 39C(2) of this Act; or
 - (b) a document containing any sensitive information referred to in subsection 39C(4);the relevant court must, subject to this section, do all things necessary to ensure that the copy of any standard (or part thereof) or any information contained in it, or the sensitive information, is not disclosed to any person other than:
 - (a) a member of the court as constituted for the purposes of the proceeding; or
 - (b) the Director-General of Security or the Director-General's representative.
- (3B) However, subsection (3A) does not apply in relation to disclosure to the person who was the applicant, or a person representing the person who was the applicant, in the proceedings before the Tribunal to the extent that the information:
 - (a) has already been lawfully disclosed to the person; or

- (b) is disclosed to the person with the consent of the Director-General of Security.

42 Section 69B (heading)

Omit “Security Division review of security assessment”, substitute “certain Security Division reviews”.

43 Paragraph 69B(1)(a)

Repeal the paragraph, substitute:

- (a) a person makes an application under section 54 or 83B of the *Australian Security Intelligence Organisation Act 1979* to the Tribunal for a review of a security assessment, security clearance decision or security clearance suitability assessment in respect of the person; and

44 Amendments of listed provisions—section 39BA

Omit “section 39A” and substitute “section 39A or 39BA” in the following provisions:

- (a) subsections 30(1AA), 30A(1AA), 31(2) and 33A(2);
(b) section 34;
(c) subsections 35(6), 35AA(1), 36(1AA), 36A(1AA), 36B(1AA), 36C(1AA), 36D(1AA), 37(1AAA) and 38(2);
(d) paragraph 39(2)(a);
(e) subsection 39B(1).

Office of National Intelligence Act 2018

45 Section 3

After “carrying out evaluations,”, insert “providing quality assurance and advice in relation to the Commonwealth’s highest level of security clearances,”.

46 After paragraph 7(1)(b)

Insert:

- (ba) to:
(i) provide quality assurance, reporting and advice to support the consistency and transferability of the highest

level of security clearances issued by the Commonwealth; and

- (ii) assist the Commonwealth authorities that sponsor those security clearances to establish and maintain those authorities' capability to prevent and detect insider threats;

47 After subsection 10(2)

Insert:

- (2A) Paragraphs (2)(b) and (d) do not prevent ONI from performing its function under paragraph 7(1)(ba).

48 At the end of section 39

Add:

- (3) For the purpose of ONI performing its function under paragraph 7(1)(ba), any Commonwealth authority may provide to ONI information, documents or things that relate, or may relate, to that function, even if doing so would not otherwise fall within the Commonwealth authority's statutory functions.

Part 2—Other amendments

Inspector-General of Intelligence and Security Act 1986

49 Subparagraph 8(1)(c)(i)

Omit “Part IV of”.

*[Minister’s second reading speech made in—
House of Representatives on 29 March 2023
Senate on 16 June 2023]*

(49/23)
