



Evidence Amendment Act 2008

No. 135, 2008

**An Act to amend the law relating to evidence, and
for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	1
3	Schedule(s).....	2
Schedule 1—Uniform evidence amendments		3
Part 1—Amendments		3
<i>Evidence Act 1995</i>		3
Part 2—Transitional provisions		34
Schedule 2—Other evidence amendments		36
<i>Evidence Act 1995</i>		36
Schedule 3—Printed and electronic publication of Acts		38
Part 1—Main amendments		38
<i>Amendments Incorporation Act 1905</i>		38
Part 2—Consequential amendments		42
<i>Acts Interpretation Act 1901</i>		42
<i>Carriage of Goods by Sea Act 1991</i>		42
<i>Legislative Instruments Act 2003</i>		42
<i>Workplace Relations Act 1996</i>		43



Evidence Amendment Act 2008

No. 135, 2008

An Act to amend the law relating to evidence, and for other purposes

[Assented to 4 December 2008]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Evidence Amendment Act 2008*.

2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	4 December 2008
2. Schedules 1 and 2	The 28th day after the day on which this Act receives the Royal Assent.	1 January 2009
3. Schedule 3	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	4 December 2009

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

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

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

Part 1—Amendments

Evidence Act 1995

1 Subsection 4(1)

Omit “in relation”.

2 At the end of subsection 4(1)

Add:

Note 4: See section 79 of the *Judiciary Act 1903* for the application of this Act to proceedings in a State court exercising federal jurisdiction.

3 Section 13

Repeal the section, substitute:

13 Competence: lack of capacity

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.
- (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

- (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
 - (a) that it is important to tell the truth; and
 - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
 - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
- (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
- (8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

4 Paragraph 14(a)

Omit "be capable of hearing or understanding, or of communicating replies to, questions on that matter", substitute "have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter".

5 Subsection 18(2)

Omit "de facto spouse", substitute "de facto partner".

6 Paragraph 20(3)(a)

Omit "de facto spouse", substitute "de facto partner".

7 Subsection 20(4)

Omit “de facto spouse” (first occurring), substitute “de facto partner”.

8 Paragraphs 20(4)(b) and 20(5)(b)

Omit “de facto spouse”, substitute “de facto partner”.

9 Subsection 21(2)

Omit “subsection 13(2)”, substitute “section 13”.

10 Subsection 29(2)

Repeal the subsection, substitute:

- (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

11 Paragraph 33(2)(c)

Omit “lawyer”, substitute “Australian legal practitioner or legal counsel”.

12 Paragraph 37(1)(c)

Omit “a lawyer”, substitute “an Australian legal practitioner, legal counsel or prosecutor”.

13 Section 41

Repeal the section, substitute:

41 Improper questions

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a *disallowable question*):
- (a) is misleading or confusing; or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
- (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
 - (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
 - (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
 - (c) the context in which the question is put, including:
 - (i) the nature of the proceeding; and
 - (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and
 - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question merely because:
 - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section: see section 195.

14 Subsection 50(1)

Repeal the subsection, substitute:

- (1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

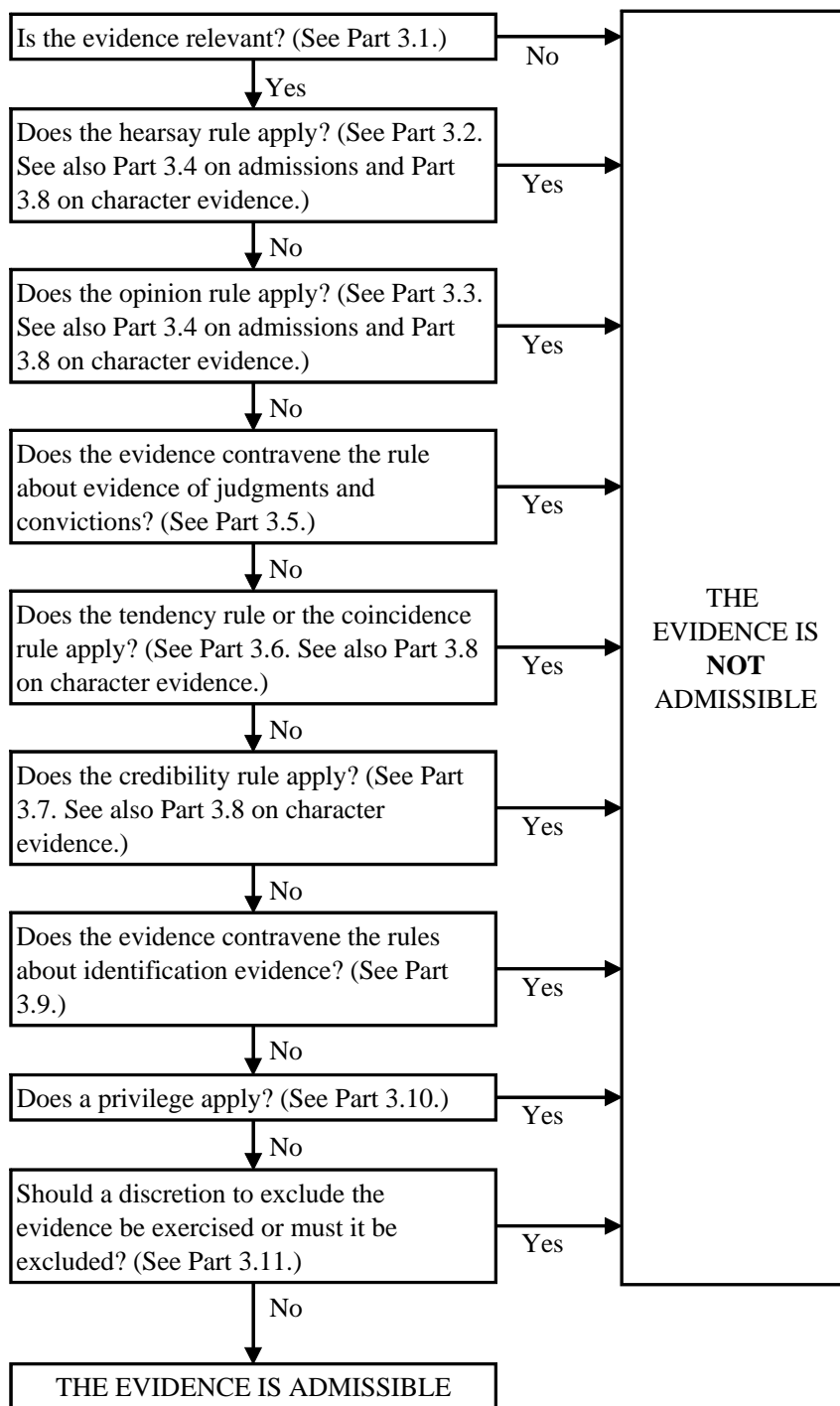
15 Chapter 3 (Introductory note)

Omit “Part 3.11 gives courts discretions to exclude evidence even if”, substitute “Part 3.11 provides for the discretionary and mandatory exclusion of evidence even if”.

16 Chapter 3 (Introductory note, diagram)

Repeal the diagram, substitute:

Schedule 1 Uniform evidence amendments
Part 1 Amendments



17 Subsection 59(1)

After “a fact that”, insert “it can reasonably be supposed that”.

18 After subsection 59(2)

Insert:

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R. v Hannes* (2000) 158 FLR 359.

19 Subsection 59(3) (note)

Omit:

- business records (section 69);
- tags and labels (section 70);
- telecommunications (section 71);
- contemporaneous statements about a person’s health etc. (section 72);

substitute:

- contemporaneous statements about a person’s health etc. (section 66A);
- business records (section 69);
- tags and labels (section 70);
- electronic communications (section 71);
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72);

20 Section 60

Before “The hearsay rule”, insert “(1)”.

21 Section 60

Omit “the fact intended to be asserted by the representation”, substitute “an asserted fact”.

22 At the end of section 60

Add:

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).

Schedule 1 Uniform evidence amendments
Part 1 Amendments

Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

- (3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note: The admission might still be admissible under section 81 as an exception to the hearsay rule if it is “first-hand” hearsay: see section 82.

23 Subsection 61(1)

Repeal the subsection, substitute:

- (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of subsection 13(1).

24 Subsection 61(2) (note)

Omit “72”, substitute “66A”.

25 At the end of section 62

Add:

- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person’s health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

Note: The heading to section 62 is replaced by the heading “**Restriction to “first-hand” hearsay**”.

26 Paragraph 64(3)(b)

Omit “made;”, substitute “made.”.

27 Subsection 64(3)

Omit all the words from and including “if, when the representation”.

28 Subsection 65(2)

Omit “was” (first occurring).

29 Paragraphs 65(2)(a), (b) and (c)

Before “made”, insert “was”.

30 Paragraph 65(2)(d)

Repeal the paragraph, substitute:

- (d) was:
- (i) against the interests of the person who made it at the time it was made; and
 - (ii) made in circumstances that make it likely that the representation is reliable.

31 After subsection 66(2)

Insert:

- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
- (a) the nature of the event concerned; and
 - (b) the age and health of the person; and
 - (c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note: Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

32 After section 66

Insert:

66A Exception: contemporaneous statements about a person's health etc.

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

33 Section 71

Repeal the section, substitute:

71 Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

- (a) the identity of the person from whom or on whose behalf the communication was sent; or
- (b) the date on which or the time at which the communication was sent; or
- (c) the destination of the communication or the identity of the person to whom the communication was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about electronic communications.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

Note 3: *Electronic communication* is defined in the Dictionary.

34 Section 72

Repeal the section, substitute:

72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

35 Section 76 (note)

After:

- lay opinion (section 78);

Insert:

- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);

36 After section 78

Insert:

78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

37 Section 79

Before “If a person”, insert “(1)”.

38 At the end of section 79

Add:

- (2) To avoid doubt, and without limiting subsection (1):
- (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
 - (i) the development and behaviour of children generally;
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

39 At the end of section 82

Add:

Note: Section 60 does not apply in a criminal proceeding to evidence of an admission.

40 Subsection 85(1)

Repeal the subsection, substitute:

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
- (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or
 - (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note: Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.

41 Subsection 89(1)

Omit “in the course of official questioning”, substitute “by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence”.

42 Subsection 97(1)

Repeal the subsection, substitute:

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind unless:
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

43 Section 98

Repeal the section, substitute:

98 The coincidence rule

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by

the party seeking to adduce the evidence, have significant probative value.

Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Paragraph (1)(a) does not apply if:

- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

44 Section 102

Repeal the section.

45 Before section 103

Insert:

Division 1—Credibility evidence

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant:
 - (i) because it affects the assessment of the credibility of the witness or person; and
 - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Note 1: Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

Note 2: Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

Division 2—Credibility of witnesses

102 The credibility rule

Credibility evidence about a witness is not admissible.

Note 1: Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104);
- evidence in rebuttal of denials (section 106);
- evidence to re-establish credibility (section 108);
- evidence of persons with specialised knowledge (section 108C);
- character of accused persons (section 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Note 2: Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but who is not a witness.

46 Subsection 103(1)

Omit “has substantial probative value”, substitute “could substantially affect the assessment of the credibility of the witness”.

47 Subsection 103(2)

Omit “in deciding whether the evidence has substantial probative value”, substitute “for the purposes of subsection (1)”.

48 Subsection 104(1)

After “applies only”, insert “to credibility evidence”.

49 Subsection 104(2)

Omit “only because it is relevant to”, substitute “to the assessment of”.

50 Subsection 104(4)

Repeal the subsection, substitute:

(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:

- (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and
- (b) is relevant solely or mainly to the witness’s credibility.

51 Subsection 104(5)

Omit “paragraph (4)(b)”, substitute “subsection (4)”.

52 Section 106

Repeal the section, substitute:

106 Exception: rebutting denials by other evidence

- (1) The credibility rule does not apply to evidence that is relevant to a witness’s credibility and that is adduced otherwise than from the witness if:
 - (a) in cross-examination of the witness:
 - (i) the substance of the evidence was put to the witness; and
 - (ii) the witness denied, or did not admit or agree to, the substance of the evidence; and
 - (b) the court gives leave to adduce the evidence.
- (2) Leave under paragraph (1)(b) is not required if the evidence tends to prove that the witness:
 - (a) is biased or has a motive for being untruthful; or
 - (b) has been convicted of an offence, including an offence against the law of a foreign country; or
 - (c) has made a prior inconsistent statement; or
 - (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
 - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

53 After section 108

Insert:

Division 3—Credibility of persons who are not witnesses

54 Subsection 108A(1)

Repeal the subsection, substitute:

- (1) If:
 - (a) evidence of a previous representation has been admitted in a proceeding; and

(b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding; credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

55 Subsection 108A(2)

Omit "in deciding whether the evidence has substantial probative value", substitute "for the purposes of subsection (1)".

56 After section 108A

Insert:

108B Further protections: previous representations of an accused who is not a witness

- (1) This section applies only in a criminal proceeding and so applies in addition to section 108A.
- (2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.
- (3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:
 - (a) is biased or has a motive to be untruthful; or
 - (b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates; or
 - (c) has made a prior inconsistent statement.
- (4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:
 - (a) tends to prove that a witness called by the prosecution has a tendency to be untruthful; and
 - (b) is relevant solely or mainly to the witness's credibility.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:
 - (a) the events in relation to which the defendant is being prosecuted; or
 - (b) the investigation of the offence for which the defendant is being prosecuted.

- (6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

Division 4—Persons with specialised knowledge

108C Exception: evidence of persons with specialised knowledge

- (1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:
- (a) the person has specialised knowledge based on the person's training, study or experience; and
 - (b) the evidence is evidence of an opinion of the person that:
 - (i) is wholly or substantially based on that knowledge; and
 - (ii) could substantially affect the assessment of the credibility of a witness; and
 - (c) the court gives leave to adduce the evidence.
- (2) To avoid doubt, and without limiting subsection (1):
- (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse); and
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:
 - (i) the development and behaviour of children generally;
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

57 Section 112

Omit “is not to be”, substitute “must not be”.

58 Paragraphs 114(5)(a) and (b)

Omit “a lawyer”, substitute “an Australian legal practitioner or legal counsel”.

59 Subsection 117(1) (paragraph (a) of the definition of *client*)

Repeal the paragraph, substitute:

- (a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

60 Subsection 117(1) (definition of *lawyer*)

Repeal the definition, substitute:

lawyer means:

- (a) an Australian lawyer; and
- (b) an Australian-registered foreign lawyer; and
- (c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

61 Paragraph 118(c)

Omit “client or a lawyer”, substitute “client, lawyer or another person”.

62 Section 122

Repeal the section, substitute:

122 Loss of client legal privilege: consent and related matters

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.
- (3) Without limiting subsection (2), a client or party is taken to have so acted if:
 - (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

- (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.
- (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:
 - (a) the substance of the evidence has been disclosed:
 - (i) in the course of making a confidential communication or preparing a confidential document; or
 - (ii) as a result of duress or deception; or
 - (iii) under compulsion of law; or
 - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or
 - (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
 - (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

63 Section 128

Repeal the section, substitute:

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty.
- (2) The court must determine whether or not there are reasonable grounds for the objection.
- (3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:
 - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and
 - (b) that the court will give a certificate under this section if:
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
 - (ii) the witness gives the evidence after being required to do so under subsection (4); and
 - (c) of the effect of such a certificate.
- (4) The court may require the witness to give the evidence if the court is satisfied that:
 - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (b) the interests of justice require that the witness give the evidence.
- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.
- (6) The court is also to cause a witness to be given a certificate under this section if:
 - (a) the objection has been overruled; and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

- (7) In any proceeding in an Australian court:
- (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
- Note: Subsection 128(7) differs from subsection 128(7) of the NSW Act. The NSW provision refers to a NSW Court instead of an Australian Court.
- (8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.
- (9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.
- (10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
- (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.
- (11) A reference in this section to doing an act includes a reference to failing to act.
- (12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by the person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.
- (13) The following are prescribed State or Territory provisions for the purposes of subsection (12):
- (a) section 128 of the *Evidence Act 1995* of New South Wales;
 - (b) a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of subsection (12).

- (14) Subsection (12) applies to:
- (a) a proceeding in relation to which this Act applies because of section 4; and
 - (b) a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth, other than a proceeding referred to in paragraph (a).

- (15) Until the day fixed under subsection 4(6), subsection (12) applies to a proceeding for an offence against a law of the Australian Capital Territory or for the recovery of a civil penalty under such a law, other than a proceeding referred to in paragraph (14)(a).

Note 1: Bodies corporate cannot claim this privilege: see section 187.

Note 2: Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

Note 3: The NSW Act does not contain provisions corresponding to subsections (12) to (15).

Note 4: Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12 (22 March 2007).

128A Privilege in respect of self-incrimination—exception for certain orders etc

- (1) In this section:

disclosure order means an order made by a federal court or an ACT court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order, but does not include an order made by a court under the *Proceeds of Crime Act 2002*.

relevant person means a person to whom a disclosure order is directed.

- (2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:
- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty;
- the person must:

- (c) disclose so much of the information required to be disclosed to which no objection is taken; and
 - (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the *privilege affidavit*) and deliver it to the court in a sealed envelope; and
 - (e) file and serve on each other party a separate affidavit setting out the basis of the objection.
- (3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.
- (4) The court must determine whether or not there are reasonable grounds for the objection.
- (5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.
- (6) If the court is satisfied that:
- (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
 - (b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (c) the interests of justice require the information to be disclosed; the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.
- (7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information as referred to in paragraph (6)(a).
- (8) In any proceeding in an Australian court:

- (a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and
 - (b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information;
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.
- (9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document:
 - (a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order; and
 - (b) that was in existence before the order was made.
 - (10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

64 Part 3.11 (heading)

Repeal the heading, substitute:

Part 3.11—Discretionary and mandatory exclusions

65 Subsection 139(2)

Omit “official questioning”, substitute “questioning”.

66 Section 148

Omit “lawyer” (first occurring), substitute “Australian lawyer”.

67 Paragraph 148(a)

Omit “a lawyer”, substitute “an Australian lawyer”.

68 Section 161

Repeal the section, substitute:

161 Electronic communications

- (1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:
- (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and
 - (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and
 - (c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and
 - (d) was received at the destination to which it appears from the document to have been sent; and
 - (e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.
- (2) A provision of subsection (1) does not apply if:
- (a) the proceeding relates to a contract; and
 - (b) all the parties to the proceeding are parties to the contract; and
 - (c) the provision is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

69 Part 4.5 (heading)

Repeal the heading, substitute:

Part 4.5—Warnings and information

70 Paragraph 165(1)(f)

Omit “official questioning”, substitute “questioning by an investigating official”.

71 At the end of section 165

Add:

- (6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with subsections 165A(2) and (3).

72 At the end of Part 4.5

Add:

165A Warnings in relation to children's evidence

- (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
- (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;
 - (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
 - (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child;
 - (d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.
- (2) Subsection (1) does not prevent the judge, at the request of a party, from:
- (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and
 - (b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;
- if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.
- (3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

165B Delay in prosecution

- (1) This section applies in a criminal proceeding in which there is a jury.
- (2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.
- (5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.
- (6) For the purposes of this section:
 - (a) delay includes delay between the alleged offence and its being reported; and
 - (b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

73 Section 184

Before “In or before”, insert “(1)”.

74 Section 184

Omit “, if advised to do so by his or her lawyer”.

75 At the end of section 184

Add:

- (2) A defendant's admission or consent is not effective for the purposes of subsection (1) unless:
- (a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel; or
 - (b) the court is satisfied that the defendant understands the consequences of making the admission or giving the consent.

76 Paragraph 190(2)(a)

Omit "lawyer", substitute "Australian legal practitioner or legal counsel".

77 Paragraph 191(3)(a)

Omit "lawyers", substitute "Australian legal practitioners, legal counsel or prosecutors".

78 After section 192

Insert:

192A Advance rulings and findings

Where a question arises in any proceedings, being a question about:

- (a) the admissibility or use of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or
- (c) the giving of leave, permission or direction under section 192;

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

79 Part 1 of the Dictionary

Insert:

Australian lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory under a law of a State or Territory specified in the regulations.

80 Part 1 of the Dictionary

Insert:

Australian legal practitioner means an Australian lawyer who holds a practising certificate under a law of a State or Territory specified in the regulations.

81 Part 1 of the Dictionary

Insert:

Australian practising certificate means a practising certificate granted under a law of a State or Territory specified in the regulations.

82 Part 1 of the Dictionary

Insert:

Australian-registered foreign lawyer means a person who is registered as a foreign lawyer under a law of a State or Territory specified in the regulations.

83 Part 1 of the Dictionary

Insert:

credibility evidence is defined in section 101A.

84 Part 1 of the Dictionary

Insert:

de facto partner is defined in clause 11 of Part 2 of this Dictionary.

85 Part 1 of the Dictionary (definition of *de facto spouse*)

Repeal the definition.

86 Part 1 of the Dictionary

Insert:

electronic communication has the same meaning as it has in the *Electronic Transactions Act 1999*.

87 Part 1 of the Dictionary (definition of *lawyer*)

Repeal the definition.

88 Part 1 of the Dictionary

Insert:

legal counsel means an Australian lawyer employed in or by a government agency or other body who by law is exempted from holding an Australian practising certificate, or who does not require an Australian practising certificate, to engage in legal practice in the course of that employment.

Note: Examples of legal counsel are in-house counsel and government solicitors.

89 Part 1 of the Dictionary (definition of *official questioning*)

Repeal the definition.

90 Part 1 of the Dictionary

Insert:

overseas-registered foreign lawyer means a natural person who is properly registered to engage in legal practice in a foreign country by an entity in the country having the function, conferred by the law of the country, of registering persons to engage in legal practice in the country.

91 Part 1 of the Dictionary

Insert:

prosecutor means a person who institutes or is responsible for the conduct of a prosecution.

92 Part 1 of the Dictionary

Insert:

registered, in relation to legal practice in a foreign country, means having all necessary licences, approvals, admissions, certificates or other forms of authorisation (including practising certificates) required by or under legislation for engaging in legal practice in that country.

93 Part 1 of the Dictionary

Insert:

traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

94 At the end of Part 2 of the Dictionary

Add:

11 References to de facto partners

- (1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.
- (2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.
- (3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
 - (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (d) the ownership, use and acquisition of their property;
 - (e) the degree of mutual commitment to a shared life;
 - (f) the care and support of children;
 - (g) the reputation and public aspects of the relationship.
- (4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.
- (5) For the purposes of subclause (3), the following matters are irrelevant:
 - (a) whether the persons are different sexes or the same sex;
 - (b) whether either of the persons is legally married to someone else or in another de facto relationship.

Part 2—Transitional provisions

95 Proceedings already begun

- (1) Subject to this Part, the amendments made by this Schedule do not apply in relation to proceedings the hearing of which began before the commencement of this Schedule.
- (2) The *Evidence Act 1995*, as in force immediately before that commencement, continues to apply in relation to proceedings the hearing of which began before that commencement.

96 Admissions

- (1) The amendment made by this Schedule to section 85 of the *Evidence Act 1995* does not apply in relation to admissions made before the commencement of this Schedule.
- (2) That section, as in force immediately before that commencement, continues to apply in relation to admissions made before that commencement.

97 Failure or refusal to answer questions etc.

- (1) The amendment made by this Schedule to section 89 of the *Evidence Act 1995* does not apply in relation to any failure or refusal, before the commencement of this Schedule:
 - (a) to answer one or more questions; or
 - (b) to respond to a representation.
- (2) That section, as in force immediately before that commencement, continues to apply in relation to any such failure or refusal before that commencement.

98 Prior operation of notice provisions

If, before the commencement of this Schedule, a notice in writing of a kind referred to in section 97 or 98 of the *Evidence Act 1995* is given:

- (a) in the circumstances provided for in that section; and
- (b) in accordance with such requirements (if any) as would apply to the giving of the notice under that section after that commencement;

the notice is taken to have been given under that section as in force after that commencement.

99 Disclosure orders

Section 128A of the *Evidence Act 1995* as inserted by this Schedule does not apply in relation to any disclosure order made before the commencement of this Schedule.

Schedule 2—Other evidence amendments

Evidence Act 1995

1 Subsections 4(5), (5A) and (6)

Omit “in relation”.

2 Section 5

Omit “in relation”.

3 Paragraph 19(a)

Omit “Part III or IIIA”, substitute “Part 2, 2A, 3, 4 or 5”.

4 Paragraph 19(b)

Repeal the paragraph, substitute:

- (b) an offence against section 374, 375, 376 or 389 of the *Children and Young People Act 1999* of the Australian Capital Territory;

5 Paragraph 19(c)

Repeal the paragraph, substitute:

- (c) an offence that is a domestic violence offence within the meaning of the *Domestic Violence and Protection Orders Act 2001* of the Australian Capital Territory.

6 Section 25

Repeal the section (including the note).

7 Section 105

Repeal the section (including the note).

8 Subsection 108(2)

Repeal the subsection.

9 Subsection 110(4)

Repeal the subsection (including the note).

10 Subsection 182(1) (table)

Omit “telecommunications”, substitute “electronic communications”.

11 Subsection 182(1) (table)

Omit “Telexes”, substitute “Electronic communications”.

12 Subsection 186(1)

Omit “lawyer”, substitute “Australian lawyer”.

13 Application of amendments

The amendments made by this Schedule do not apply in relation to proceedings the hearing of which began before the commencement of this item.

Schedule 3—Printed and electronic publication of Acts

Part 1—Main amendments

Amendments Incorporation Act 1905

1 Title

Repeal the title, substitute:

An Act relating to the publication of Acts in printed and electronic form

2 Section 1

Repeal the section, substitute:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Acts Publication Act 1905*.

1A Definitions

In this Act:

Acts database means an electronic database declared under section 4.

compilation, of an Act that has been amended (whether by another Act or by a legislative instrument) with effect from a particular day, means the Act as so amended and in force on that day.

legislative instrument has the same meaning as in the *Legislative Instruments Act 2003*.

Secretary means the Secretary of the Department.

Part 2—Printed publication of Acts

Note: This item amends the short title of the Act. If another amendment of the Act is described by reference to the Act's previous short title, that other amendment has effect after the commencement of this item as an amendment of the Act under its amended short title (see section 10 of the *Acts Interpretation Act 1901*).

3 Subsection 2(2)

After "enactment", insert "(or legislative instrument)".

4 Section 3

After "every Act", insert "(and legislative instrument, if any)".

5 Section 4

Repeal the section, substitute:

Part 3—Electronic publication of Acts

4 Acts database

- (1) The Secretary may cause to be maintained an electronic database of:
 - (a) Acts as assented to; and
 - (b) compilations of Acts.
- (2) The Secretary may, in writing, declare a database maintained under this section to be an Acts database for the purposes of this Act.
- (3) The Secretary must cause steps to be taken to ensure that Acts and compilations of Acts in an Acts database are available to the public.
- (4) A declaration made under subsection (2):
 - (a) is not a legislative instrument; and
 - (b) must be published in the *Gazette*.

5 Effect of inclusion in an Acts database

- (1) An Act in an Acts database is presumed, unless the contrary is proved, to be a complete and accurate record of the Act as assented to.

- (2) A compilation of an Act in an Acts database is presumed, unless the contrary is proved, to be a complete and accurate record of the Act as amended and in force on the day specified in the compilation.
- (3) In any proceedings, proof is not required about the provisions and coming into operation (in whole or in part) of an Act as it appears in an Acts database.
- (4) A court or tribunal may inform itself about those matters in any way it thinks fit.

6 Documents in an Acts database

A document that purports to be an extract from an Acts database is presumed, unless the contrary is proved, to be what it purports to be.

7 How an Acts database must be kept

- (1) The regulations may prescribe matters relating to how an Acts database must be kept, including the following:
 - (a) the way information may be recorded in an Acts database;
 - (b) the way information recorded in an Acts database may be altered;
 - (c) a system of unique identifiers for each Act and compilation in an Acts database, and the way in which they are to be recorded in Acts and compilations.
- (2) A compilation in an Acts database of an Act (the *principal Act*) must include the following information:
 - (a) a reference to the amending legislation by which each amendment was made to the principal Act;
 - (b) the amending history of each provision in the principal Act as amended by all amending legislation covered by the compilation;
 - (c) the day the compilation was prepared;
 - (d) any other information required by the regulations.

8 Rectification of an Acts database

- (1) The Secretary must arrange for an Acts database to be altered to rectify an error as soon as possible after the Secretary becomes aware of the error, if the Secretary is satisfied that the error has the result that:
 - (a) for an error concerning an Act—the electronic text of the Act as it appears in the database does not represent the text of the Act as assented to; or
 - (b) for an error concerning a compilation of an Act—the electronic text of the compilation as it appears in the database does not represent the state of the law that the text purports to represent.
- (2) The Secretary must arrange for the Acts database (as rectified) to be annotated to explain:
 - (a) the nature, day and time of the rectification; and
 - (b) the reason for the rectification.
- (3) An alteration of an Acts database under this section:
 - (a) does not affect any right or privilege that was acquired, or that accrued, because of reliance on the content of the database before the alteration was made; and
 - (b) does not impose or increase any obligation or liability that was incurred before the alteration was made.

Part 4—Miscellaneous

9 Regulations

The Governor-General may make regulations prescribing matters:

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

Part 2—Consequential amendments

Acts Interpretation Act 1901

6 At the end of section 40

Add:

- (4) For the purposes of subsection (3), a reference in relation to a Commonwealth Act may also be made according to a copy of the Act, or a compilation of the Act, as it appears in an Acts database declared under section 4 of the *Acts Publication Act 1905*.

Carriage of Goods by Sea Act 1991

7 Subsection 7(5)

Repeal the subsection.

Legislative Instruments Act 2003

8 At the end of Division 5 of Part 4

Add:

35A Incorporation of amendments in reprints of legislative instruments

- (1) If the Government Printer reprints a legislative instrument that has been amended at any time, the instrument must be reprinted as amended by:
 - (a) any repeal or omission of words or figures; and
 - (b) any substitution of words or figures for any repealed or omitted words or figures; and
 - (c) any insertion of words or figures.
- (2) If a legislative instrument prescribes a method of citing another legislative instrument (the *amended instrument*), the amended instrument is taken to be amended by omitting the citation of the amended instrument and substituting the prescribed method of citation.

(3) A reprint of an amended legislative instrument must include a reference to the amending legislative instrument or Act. The reference must be set out in the margin of, or in a footnote or endnote to, the reprint.

(4) In this section:

words includes Part, Division, Subdivision, heading, regulation, clause, subregulation, subclause, paragraph, subparagraph, sub-subparagraph and Schedule.

Workplace Relations Act 1996

9 Subclause 5(1) of Schedule 2

Omit “(1)”.

10 Subclause 5(2) of Schedule 2

Repeal the subclause (including the note).

*[Minister’s second reading speech made in—
House of Representatives on 28 May 2008
Senate on 19 June 2008]*

(114/08)
