

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2012 No. 281**

Issued by the authority of the Attorney-General

*Foreign Evidence Amendment Act 2010*

*Foreign Evidence (Application of Amendments) Amendment Regulation 2012 (No. 1)*

Subitem 19(3) of Schedule 1 to the *Foreign Evidence Amendment Act 2010* (the Amendment Act) provides that the Governor-General may make regulations to provide that the amendments made by Schedule 1 to the Amendment Act to Part 3 of the *Foreign Evidence Act 1994* (the Act) apply to a proceeding in a court of a particular State or Territory.

The Act enables evidence collected in overseas countries to be adduced in proceedings in an Australian court. It also provides for the collection of evidence in Australia for use in an overseas court. Part 3 of the Act provides a means of bringing forward or presenting foreign material, obtained in response to a request by the Attorney-General to a foreign country, as evidence in proceedings in Australian courts. This includes material obtained in response to a request made under the *Mutual Assistance in Criminal Matters Act 1987*.

The Amendment Act amended Part 3 of the Act to address issues around the admissibility of foreign evidence in Australian proceedings. In particular, the amendments streamline the evidentiary procedures for certain kinds of evidence, such as business records. The amendments provide that foreign material that appears to consist of a business record may be adduced as evidence unless the court considers the business record is not reliable, probative, or is privileged.

Amended Part 3 of the Act operates in relation to all criminal, and related civil, proceedings in Commonwealth courts. Amended Part 3 of the Act can also be extended to State and Territory proceedings through Commonwealth regulations with the consent of the relevant State or Territory. Where States and Territories have yet to decide, or have decided not to apply the amended provisions of Part 3 to their proceedings, the unamended Part 3 will continue to apply by way of a savings provision.

The *Foreign Evidence (Application of Amendments) Regulations 2011* (the Principal Regulations) currently extends the application of Part 3 of the Act to criminal proceedings, civil proceedings, and proceedings under a proceeds of crime law in Western Australia, South Australia, Tasmania and the Northern Territory.

In early 2012, the Australian Capital Territory opted to be included in the Principal Regulations. As such, the Regulation amends the Principal Regulations to include the Australian Capital Territory in the list of jurisdictions to which the amended Part 3 of the Act applies.

Consultation on the content of the Regulation was undertaken with the Australian Capital Territory by way of exchange of correspondence and discussion.

The Regulation commenced on the day after registration on the Federal Register of Legislative Instruments.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Detail of the Regulation follow:

#### Section 1 – Name of Regulation

This section specifies that the title of the Regulation is the *Foreign Evidence (Application of Amendments) Amendment Regulation 2012 (No. 1)*.

#### Section 2 – Commencement

This section specifies that the Regulation commences on the day after it is registered.

#### Section 3 – Amendment of *Foreign Evidence (Application of Amendments) Regulations 2011*

This section provides that the *Foreign Evidence (Application of Amendments) Regulations 2011* (the Principal Regulations) are amended as set out in Schedule 1.

#### Schedule 1 – Amendment

##### **Item [1] – Subparagraph 4 (1) (a) (iv)**

Item 1 includes the Australian Capital Territory in the list of jurisdictions in section 4 of the Principal Regulations to which the amended Part 3 of the *Foreign Evidence Act 1994* applies.

This item includes the Australian Capital Territory at subparagraph 4(1)(a)(iv) and renumbers the Northern Territory as new subparagraph 4(1)(a)(v). The reason for this change is due to current drafting policy which lists Australian jurisdictions in descending order of population.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*  
***Foreign Evidence (Application of Amendments) Amendment Regulation 2012 (No. 1)***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

Part 3 of the *Foreign Evidence Act 1994* (the Act) provides a means of adducing foreign material, obtained in response to a request by the Attorney-General to a foreign country, as evidence in proceedings in Australian courts. This includes material obtained in response to a request made under the *Mutual Assistance in Criminal Matters Act 1987*.

The *Foreign Evidence Amendment Act 2010* (the Amendment Act) amended Part 3 of the Act to address issues around the admissibility of foreign evidence in Australian proceedings. In particular, the amendments streamline the evidentiary procedures for certain kinds of evidence, such as business records. The amendments provide that foreign material that appears to consist of a business record may be adduced as evidence unless the court considers the business record is not reliable, probative, or is privileged.

Amended Part 3 of the Act operates in relation to all criminal, and related civil, proceedings in Commonwealth courts. Amended Part 3 of the Act can also be extended to State and Territory proceedings through Commonwealth regulations with the consent of the relevant State or Territory. Where States and Territories have yet to decide, or have decided not to apply the amended provisions of Part 3 to their proceedings, the unamended Part 3 will continue to apply, by way of a savings provision.

The *Foreign Evidence (Application of Amendments) Regulations 2011* (the Principal Regulations) extends amended Part 3 of the Act to criminal, and related civil, proceedings in those States and Territories that have consented (Western Australia, South Australia, Tasmania and the Northern Territory). The Australian Capital Territory (ACT) have also opted to be included in the Principal Regulations. As such, the purpose of this Regulation is to include the ACT in the list of States and Territories to which amended Part 3 of the Act applies.

### **Human Rights Implications**

The Regulation engages the right to a fair trial. The right to a fair trial is protected in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and is aimed at ensuring the proper administration of justice by upholding, among other things, the right to a fair hearing.

Article 14 of the ICCPR is based on the premise that all relevant evidence will be brought before a court in a trial, although this right is not absolute. In general, provided the decision to withhold evidence is a judicial one, and subject to review, then the right to a fair trial is not breached.

The amendments to Part 3 of the Act promote more responsive and flexible measures in adducing foreign evidence in court proceedings, while retaining key safeguards and judicial discretion. In particular, the court retains a broad discretion to prevent foreign material being adduced if it is in the interests of justice to do so. Accordingly, the right to a fair trial will not be prejudiced by the application of amended Part 3 of the Act in the ACT.

**Conclusion**

The Regulation does not impede the protection of human rights and to the extent that it engages with the right to a fair trial, those amendments are reasonable and proportionate.

**The Hon Nicola Roxon MP  
Attorney-General**