

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 17

Subject: *Evidence Act 1995*

Evidence Amendment Regulations 2010 (No. 1)

The *Evidence Act 1995* (the Act) provides a statutory framework for the rules of evidence to be applied in federal and Australian Capital Territory (ACT) court proceedings. In July 2007, the Standing Committee of Attorneys-General endorsed reforms to the national model Uniform Evidence Bill which forms the basis of the Act. On 27 November 2008 the Parliament passed the *Evidence Amendment Act 2008* (the Amendment Act) which implemented the majority of these reforms. The Amendment Act received Royal Assent on 4 December 2008 and commenced on 1 January 2009.

Section 197 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Regulations allow the federal courts to give effect to certificates issued by Victorian courts preventing the use of self-incriminating evidence given in proceedings before the Victorian court. Self-incrimination certificates issued by New South Wales, Western Australian, Tasmanian and ACT courts may already be given effect by the federal courts.

The Regulations also prescribe a form of self-incrimination certificates issued under section 128A of the Act. A form for self-incrimination certificates issued under section 128 of the Act is already prescribed in Form 1 in the Schedule to the *Evidence Regulations 1995* (the Principal Regulations).

The Regulations remove an outdated reference to ‘related’ events in the *Evidence Regulations 1995*, in relation to notice of an intention to adduce evidence of coincidence.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

A Regulatory Impact Statement has not been prepared as the Regulations will not impact on business activity and will have no or low compliance cost or competition impact.

Officers from the Victorian Attorney-General's Department were consulted on the amendments to recognise self-incrimination certificates issued by Victorian courts. Relevant Commonwealth stakeholders including the federal courts were consulted on the amendments to prescribe a form of self-incrimination certificates issued under section 128A of the Act.

Details of the Regulations are as follows:

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Evidence Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of Schedule 1 of the Evidence Regulations 1995

This regulation provides that the *Evidence Regulations 1995* are amended as set out in Schedule 1.

Schedule 1 – Amendments

Item [1] – Paragraph 6(3)(a)

Section 98 of the Act requires a party intending to adduce evidence of coincidence to give reasonable notice in writing of this intention. Section 99 of the Act provides that such notice must be given in accordance with the Principal Regulations.

Subregulation 6(3) sets out the requirements for a notice relating to the coincidence rule in section 98 of the Act. Paragraph 6(3)(a) provides that the notice must state the substance of the evidence of the occurrence of 2 or more related events that the party giving the notice intends to adduce.'

However, as a result of changes made by the Amendment Act, the coincidence rule in section 98 of the Act no longer requires these events to be 'related'.

Item 1 will remove the outdated reference to 'related' events in the Principal Regulations.

Item [2] – Subregulation 7(1)

Section 128A of the Act clarifies that the privilege against self-incrimination applies to disclosure orders made by a federal or Australian Capital Territory (ACT) court, requiring a person to disclose information in connection with a freezing or search order.

The person subject to a disclosure order must prepare an affidavit containing the required information for which privilege is claimed (called a privilege affidavit), deliver it to the court in a sealed envelope and file and serve on each other party a separate affidavit setting out the basis of the objection.

If the court is satisfied the information may tend to prove that the person has committed an offence or is liable to a civil penalty under Australian law, but not under the law of a foreign country, and the interests of justice require the information to be disclosed, the court may require the whole or any part of the privilege affidavit to be filed and served on the parties.

In such cases, the court must give the person a certificate in respect of the information that is disclosed. The certificate protects the person against the use of evidence of that information and evidence of any information, document or thing obtained as a direct result or indirect consequence of the disclosure, in any proceeding in an Australian court other than a criminal proceeding in relation to the falsity of the evidence.

A similar certificate may be issued under section 128 of the Act. Subregulation 7(1) currently provides that the form of a certificate under section 128 of the Act may be in accordance with Form 1 in the Schedule to the Principal Regulations.

This amendment, in conjunction with item 4, provides that a certificate under section 128A of the Act may also be in accordance with Form 1.

Item [3] – Paragraphs 7A (a) and (b)

Section 128 of the Act outlines the procedure for a witness to claim privilege against self-incrimination and the circumstances in which a court must issue a certificate to a witness required to give self-incriminating evidence. The certificate protects the witness against the use of that evidence as well as any information, document or thing obtained as a consequence of the evidence being given, in any proceeding in an Australian court other than a criminal proceeding in relation to the falsity of the evidence.

Subsection 128(12) and paragraph 128(13)(b) of the Act allow federal courts to treat self-incrimination certificates issued by state or territory courts as if they had been issued under section 128 of the Act, providing that the relevant state or territory provision is prescribed in the Act or the *Evidence Regulations 1995*.

The *Evidence Act 2008* (VIC) (the Victorian Act) commenced on 1 January 2010 and implements the majority of the national model Uniform Evidence Bill. The Victorian Act includes provisions for granting self-incrimination certificates similar to section 128 of the Act.

This amendment is made under paragraph 128(13)(b) of the Act and prescribes section 128 of the Victorian Act for the purposes of section 128(12) of the Act.

This amendment enables federal courts to recognise self-incrimination certificates issued by Victorian courts, in addition to certificates issued by New South Wales, Western Australian, Tasmanian and Australian Capital Territory courts which are already prescribed under the Act and the Principal Regulations.

Item [4] – Schedule, Form 1

As outlined in relation to item 2 above, sections 128 and 128A of the Act include provisions for the issue of self-incrimination certificates. Currently, Form 1 in the Schedule to the Principal Regulations provides a form which may be used for certificates under section 128. This amendment will amend Form 1 so that it may also be used for certificates under section 128A.

This amendment closely follows the content of the corresponding form in the Evidence Regulations 1995 (NSW), as these form part of the Uniform Evidence Acts.