

# **FOREIGN EVIDENCE (APPLICATION OF AMENDMENTS) REGULATIONS 2021**

## **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

under sub-item 19(3), Schedule 1, of the *Foreign Evidence Amendment Act 2010*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The Foreign Evidence (Application of Amendments) Regulations 2021 (the Regulations) replace the Foreign Evidence (Application of Amendments) Regulations 2021 (the sunseting Regulations), which sunset on 1 October 2021.

The *Foreign Evidence Amendment Act 2010* (the Amendment Act) came into force on 4 June 2010 and made the amendments to the *Foreign Evidence Act 1994* (the Act) relating to requirements for testimony in legal proceedings. In particular, the amendments:

- clarified the application of the Act to non-conviction based proceeds of crime matters (s 20)
- provided that testimony may also be taken under an obligation to tell the truth imposed, whether expressly or implied, by or under a law of the foreign country (s 22)
- modernised references to audio and video tape (s 23)
- streamlined the process for adducing foreign material that is a business record by providing that foreign business records can be adduced where they contain hearsay evidence, provided the other evidentiary requirements in the particular jurisdiction are satisfied (s 24), and
- removed an anomaly whereby the Attorney-General, in certifying that material has been received in response to a request, must also certify that the material is ‘testimony’ (s 26; however, this provision has been subsequently replaced by further amending legislation which is applicable to all states and territories).

The Act enables evidence collection in overseas countries to be used in an Australian court. Part 3 of 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 certain proceedings in Australian courts.

Section 20(2) of the Act provides that Part 3 of the Act may apply to criminal proceedings, related civil proceedings, and proceeds of crime proceedings that take place under the jurisdiction of a court in any state or territory specified in regulations. Pursuant to regulation 6(1) of the Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018, each of the states and

territories and Norfolk Island are specified as a state or territory to which the provisions of Part 3 of the Act apply.

Sub-item 19(3) of Schedule 1 to the Amendment Act provides that the application of those amendments to a proceeding in a particular state or territory may be prescribed in regulations.

The sunseting Regulations gave effect to this item, with a sunset date of 1 October 2021. They listed the following states and territories: Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

The Regulations repeal the sunseting Regulations, and remake the instrument to re-list Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

The state and territory Attorneys-General were consulted in relation to opting in to the Regulations. The Attorneys-General of New South Wales, Victoria and Queensland indicated that their jurisdictions did not wish to be listed in the Regulations at this time.

Details of the Regulations are set out in the Attachment.

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

## **CONSULTATION**

The state and territory Attorneys-General were consulted in relation to opting in to the Regulations. No other consultation was undertaken outside of the Australian Government for the Regulations as it relates to international cooperation on criminal justice and law enforcement matters between Australia and foreign countries. The Regulations do not have a direct, or substantial indirect, effect on business, nor do they restrict competition.

## **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulations (OBPR) has advised that a Regulation Impact Statement is not required for the Regulations (OBPR Reference number 43024).

## **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) Regulations 2021

The Regulations are 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*

The Foreign Evidence Act (Application of Amendments) Regulations 2021 (the Regulations) remake the Foreign Evidence (Application of Amendments) Regulations 2011 (the sunseting Regulations) ahead of their sunset date of 1 October 2021. The Regulations prescribe the application of amendments made by the *Foreign Evidence Amendment Act 2010* (Amendment Act) to the *Foreign Evidence Act 1994* (the Act) to states and territories specified.

The Regulations give effect to item 19(3) of the Amendment Act by prescribing that the amendments it made to the Act apply to criminal proceedings, civil proceedings and related proceeds of crime actions in those states and territories that consented to its application, being Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

## ***Human rights implications***

### *Right to a fair trial*

The Regulations engage the rights to a fair trial and minimum guarantees in criminal and civil proceedings as prescribed in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 14 is aimed at ensuring the proper administration of justice by upholding, amongst other things, the right to a fair hearing and the right of a person to have a sentence or conviction reviewed by a higher court.

The Regulations engage the right to a fair trial in Article 14 by affecting the requirements for testimony in relevant legal proceedings. That is, they enable States and Territories to opt in to certain amendments intended to create efficiencies in relation to the requirements for testimony, including streamlining the process for adducing foreign material that are business records. For this reason, States and Territories opting in to these amendments arguably increase the prospects of a fair trial for litigants in relevant proceedings in those jurisdictions, for example, by streamlining the process for adducing foreign material that is a business record. The Regulations do not limit rights or otherwise alter Australia's laws or arrangements in relation to criminal procedure, nor create new criminal offences, and are instead intended to promote the right to fair trial.

## ***Conclusion***

The Regulations are 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* on the basis that they promote the right to a fair trial.

**NOTES ON SECTIONS**

**Part 1 - Introduction**

Section 1 – Name

This section provides that the title of the Regulations is the Foreign Evidence (Application of Amendments) Regulations 2021.

Section 2 – Commencement

This section provides that the Regulations commence on 1 October 2021.

Section 3 – Authority

This section specifies that the Regulations made under sub-item 19(3) of Schedule 1 to the Amendment Act.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms.

Section 5 – Definitions

This section provides that in the Regulations ‘Act’ means the Amendment Act.

**Part 2 – Application of amendments to state and territory court proceedings**

Section 6 – Application of amendments to state and territory court proceedings

This section provides that for the purposes of sub-item 19(2) of Schedule 1 to the Act, the amendments made by that Schedule apply to a proceeding (commencing on or after 1 October 2021) mentioned in sub-item 20(2) of the Act, in a court of any of the following states and territories:

- (a) Western Australia;
- (b) South Australia;
- (c) Tasmania;
- (d) the Australia Capital Territory;
- (e) the Northern Territory.

This means that the amendments to the Act made by the Amendment Act apply to criminal proceedings, related civil proceedings, and proceeds of crime proceedings in each of these jurisdictions commencing on or after 1 October 2021 as a result of their listing in the Regulations.

### **Schedule 1 – Repeals**

The Schedule repeals the whole of the Foreign Evidence (Application of Amendments) Regulations 2011.