

## EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

*Foreign Evidence Act 1994*

*Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018*

Section 46 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed by carrying out or giving effect to the Act.

### ***The Foreign Evidence Act 1994 (the Act)***

Part 3 of the Act enables evidence obtained from other countries to be adduced in certain criminal proceedings, related civil proceedings and proceeds of crime proceedings in Australian courts. These Regulations enable Part 3 of the Act to apply to proceedings in courts in States and Territories.

The Attorney-General can request international assistance to gather foreign evidence from other countries for the purposes of domestic proceedings. For example, Australia can make requests to other countries under the *Mutual Assistance in Criminal Matters Act 1987* for evidence, such as business records or witness statements, during the course of an investigation into criminal conduct. Part 3 of the Act provides for the adducing of such evidence in certain Commonwealth, State and Territory proceedings. For example, it can allow foreign material to be adduced in proceedings where a witness is not available to give evidence in person, subject to key safeguards.

Section 20 of the Act identifies which proceedings in Commonwealth, State and Territory courts Part 3 of the Act will apply to. Subsection 20(1) enables the application of Part 3 to certain Commonwealth proceedings. Subsection 20(2) enables the application of Part 3 of the Act to proceedings in any court of a State or Territory by providing that regulations can specify the States and Territories to which Part 3 of the Act will apply. Paragraphs 20(2)(a), (b) and (c) identify the kinds of State and Territory proceedings to which Part 3 of the Act will apply, namely: criminal proceedings, related civil proceedings, and proceedings under certain proceeds of crime laws.

### ***The Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings 1994 (the former Regulations)***

The former Regulations sunset on 1 October 2018 under the *Legislation Act 2003*. The former Regulations did two things.

Firstly, they specified the States and Territories to which Part 3 applied for the purposes of subsection 20(2) of the Act. Section 4 of the former Regulations, specified each of the States and Territories. The effect of specifying each State and Territory for subsection 20(2) meant that foreign material gathered overseas pursuant to a request for assistance from the Attorney-General could be adduced in any State or Territory court in the following State or Territory proceedings:

- (a) Criminal proceedings for an offence against the law of that State or Territory, such as a prosecution of a person for murder.
- (b) Related civil proceedings of a kind specified in regulations in respect of that State or Territory. ‘Related civil proceedings’ is defined in section 3 of the Act as ‘any civil proceeding arising from the same subject matter from which the criminal proceeding arose.’

For example, evidence gathered overseas could be adduced in State or Territory court proceedings to confiscate proceeds of crime or recover tax or duties where there was a related criminal proceeding.

- (c) Proceeds of crime proceedings where they were not necessarily related criminal proceedings. For example, this could cover proceedings to confiscate the proceeds of crime where a person could not be prosecuted because they had died.

Secondly, the former Regulations identified kinds of State and Territory ‘related civil proceedings’ for the purposes of paragraph 20(2)(b) of the Act. Schedule 1 specified examples of such proceedings for all of the State and Territories. For example, for New South Wales, it specified:

A related civil proceeding of any kind, including, in particular:

- (a) a proceeding under the *Confiscation of Proceeds of Crime Act 1989* of the State of New South Wales; or
- (b) a proceeding under the *Drug Trafficking (Civil Proceedings) Act 1990* of that State.

Specifying the kinds of related civil proceedings for each State and Territory enabled evidence to be adduced in such proceedings.

### ***The Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018 (the new Regulations)***

The new Regulations repeal and replace the former Regulations. The effect of the new Regulations is to ensure that foreign material obtained pursuant to an Australian request for assistance can continue to be adduced in certain proceedings in the courts of States and Territories in the same way as the former Regulations.

The new Regulations commence on the day after registration on the Federal Register of Legislation.

Consultation was undertaken for the remake of the former Regulations during 2017 and 2018, which included whether the former regulations were still required and if they were fit-for-purpose. All stakeholders indicated support for the Regulations. At the federal level, the Department of Home Affairs, the Australian Federal Police, and the Commonwealth Director of Public Prosecutions were consulted. Relevant State and Territory justice departments all proposed the Regulations be remade, with some minor modifications to the Schedule to ensure that identified examples of State and Territory related civil proceedings were appropriate and up to date.

The Regulations do not have direct or substantial indirect effects on business, nor do they restrict competition.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required for the Regulations (OBPR ID: 22614).

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

Details of the Regulations are set out in the [Attachment](#).

Authority: Section 46 of the *Foreign Evidence Act 1994*

**Details of the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018***

**Part 1 – Preliminary**

**Section 1 – Name**

This section provides that the title of the Regulations is the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018*.

**Section 2 – Commencement**

This section provides that the Regulations commence the day after they are registered.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Foreign Evidence Act 1994*.

**Section 4 – Schedule 2**

This section provides that any changes to other regulations specified in the Regulations are found in Schedule 2 of the Regulations.

**Section 5 – Definitions**

This section provides that the word ‘Act’ in the Regulations means the *Foreign Evidence Act 1994*.

**Part 2 – Use of foreign material in proceedings in a court of a State or Territory**

**Section 6 – Application of Part 3 of the Act to proceedings in a court of a State or Territory**

*Specifying States and Territories*

Subsection 6(1) specifies the States and Territories for the purposes of subsection 20(2) of the Act. Subsection 20(2) of the Act facilitates the application of Part 3 of the Act to certain State and Territory court based proceedings. New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory, and the Northern Territory are specified. This means that Part 3 of the Act applies to the proceedings in the courts of those States and Territories which are identified as being the kinds of proceedings set out in paragraphs 20(2)(a), (b) and (c) of the Act.

Specifying all States and Territories means that, for paragraph 20(2)(a), foreign material gathered overseas pursuant to a request from the Attorney-General could be adduced in State and Territory based criminal proceedings. For example, a statement from an overseas witness who was unable to travel to Australia could be adduced in a homicide prosecution under a State or Territory based law.

Specifying all States and Territories means that, for paragraph 20(2)(b), foreign material gathered overseas pursuant to a request from the Attorney-General could be adduced in ‘related civil proceedings’ as defined in section 3 of the Act. For example, a document located overseas could be adduced in civil proceedings to recover tax or proceeds of crime which were connected with criminal proceedings.

Specifying all States and Territories means that, for paragraph 20(2)(c), foreign material gathered overseas pursuant to a request from the Attorney-General could be adduced in State and Territory proceeds of crime proceedings, including non-conviction based proceeds of crime proceedings. For example, an overseas bank record could be adduced in State and Territory courts subject to their proceeds of crime legislation, even if there were no related criminal proceedings on foot.

### *Specifying related civil proceedings*

Subsection 6(2) provides that for the purposes of paragraph 20(2)(b) of the Act, Schedule 1 specifies kinds of related civil proceedings for each specified State and Territory. The effect of this is to facilitate the adducing of foreign evidence in ‘related civil proceedings.’ The note to this section flags that the definition of ‘related civil proceedings’ is that in section 3 of the Act. Section 3 provides that a ‘related civil proceeding,’ in relation to a criminal proceeding means ‘any civil proceeding arising from the same subject matter from which the criminal proceeding arose.’ For example, this would include proceedings to confiscate proceeds of crime or recover compensation where there is a related criminal prosecution on foot.

## **Schedule 1 – Related Civil Proceedings for a State or Territory**

### **Clause 1 – Related civil proceedings for a State or Territory**

This clause identifies examples of ‘related civil proceedings’ of a kind for each State and Territory for the purposes of paragraph 20(2)(b) of the Act, pursuant to subsection 6(2) of these Regulations.

Column 1 specifies the State or Territory that the ‘related civil proceedings’ identified in column 2 apply to. Column 2 identifies ‘related civil proceedings’ for each specified State or Territory in column 1. Column 2 also lists, as examples, proceedings under particular specified Acts that are related civil proceedings for this purpose. To the extent that the table includes previously repealed legislation, it has done so to ensure that Part 3 of the Act applies to related civil proceedings for historical offences and proceedings.

For example, for New South Wales, the specified proceedings are:

A related civil proceeding of any kind, including:

- (a) a proceeding under the *Confiscation of Proceeds of Crime Act 1989* (NSW); and
- (b) a proceeding under the *Criminal Assets Recovery Act 1990* (NSW); and
- (c) a proceeding under the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW); and
- (d) a proceeding under the *Victims Rights and Support Act 2013* (NSW); and
- (e) a proceeding under a law of New South Wales for the recovery of compensation in relation to an offence committed against a law of the State.

The effect of specifying these proceedings is to enable foreign evidence to be adduced in these kinds of proceedings under Part 3 of the Act.

## **Schedule 2 – Repeals**

### **Clause 1 – The whole of the instrument**

This item repeals the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 1994*.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018***

The *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018* (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 of the disallowable legislative instrument**

The *Foreign Evidence Act 1994* (the Act) facilitates the use of evidence obtained from other countries in Australian courts. Part 3 of the Act provides for the adducing of foreign material received pursuant to a request to a foreign country made by the Attorney-General.

The Regulations are made for the purposes of Part 3 of the Act and facilitate the adducing of foreign material, including things such as documents and witness statements, in certain State and Territory proceedings. This includes where a witness is unable to give evidence in person (for example where they cannot travel to Australia due to ill health).

Section 20 of the Act identifies the relevant proceedings to which Part 3 will apply.

Paragraphs 20(2)(a), (b) and (c) of the Act apply Part 3 of the Act to proceedings in State and Territory courts for certain criminal proceedings, related civil proceedings and proceeds of crime proceedings respectively. The *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 1994* (the former Regulations) specified all States and Territories and provided examples of the kinds of ‘related civil proceedings’ for the purposes of Part 3 of the Act. The Regulations repeal and replace the former Regulations. The effect of the Regulations is to ensure that foreign material can continue to be adduced under the Act in certain criminal proceedings, related civil proceedings, and proceeds of crime proceedings.

Adducing evidence means presenting it to the court for its consideration. The relevant evidentiary rules applicable in that jurisdiction regarding admissibility continue to apply to such evidence (other than the hearsay rule for business records in some jurisdictions as per subsection 24(3) of the Act). For example, if a witness statement that is adduced under section 24 of the Act in proceedings in ACT courts contains material that is not relevant the court could find that that material is not admissible under subsection 56(2) of the *Evidence Act 2011* (ACT).

#### **Human rights implications**

The relevant rights with which the Regulations engage with and promote are the right to a fair trial and a fair hearing and minimum guarantees in criminal proceedings under Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). The Regulations do this by allowing both parties to adduce foreign material in proceedings in courts of States and Territories which may otherwise not be able to be adduced, thereby facilitating trials. However, if such evidence is adduced it may not be able to be challenged (by either party) and therefore these rights may also be limited.

### *Article 14(1) Right to a fair trial in civil and criminal proceedings*

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts. This provides a general guarantee of equality before courts for both criminal and civil proceedings. It also provides the right to a fair hearing for civil proceedings and a fair trial for criminal proceedings.

The Regulations uphold these rights. Part 3 of the Act provides a framework that allows relevant foreign material to be adduced in State and Territory courts for certain criminal proceedings, related civil proceedings, and proceeds of crime proceedings. This includes things such as documents and witness statements. Adducing evidence means presenting it to the court for its consideration. This evidence, however, is subject to the relevant evidentiary rules applicable in that jurisdiction regarding admissibility (other than the hearsay rule for business records in some jurisdictions as per subsection 24(3) of the Act). This framework facilitates the consistent adducing of foreign material throughout Australia and helps ensure a fair hearing by allowing foreign material to be considered by a court.

Adducing foreign material assists in a fair trial by ensuring that all relevant material can be considered by the court and ensures that parties are not disadvantaged if key evidence is located overseas. In addition, having a consistent framework for adducing foreign material across Australia ensures that parties are not disadvantaged in adducing foreign evidence depending on their location in Australia.

The right to fair trial is promoted for criminal proceedings in State and Territory courts under paragraph 20(2)(a) of the Act. The *Mutual Assistance in Criminal Matters Act 1987* enables foreign material to be requested by the Attorney-General on behalf of the prosecution and the defence. Both the defendant and the prosecutor would have the opportunity to adduce material obtained from a foreign country.

The regulations may also limit this right because the effect of allowing evidence to be adduced (by either party) is that it may not be able to be challenged (by the other party). This is because, for example, if a witness is not present in Australia, their witness statement may instead be adduced however neither party will have the opportunity to question that person.

The justification for any such limitation, including how it achieves a legitimate objective, the rational connection between the limitation and objective and the limitation being reasonable, necessary and proportionate is set out below.

### *Article 14(3) Minimum guarantees in criminal proceedings*

Article 14(3) contains minimum guarantees for persons charged with criminal offences. Relevantly, Article 14(3)(e) protects the accused's right to cross-examine witnesses and to obtain the attendance and examination of witnesses on behalf of the accused on the same conditions as the prosecution.

The Regulations engage Article 14(3)(e) because Part 3 of the Act facilitates the adducing, by either the prosecution or the accused, of foreign material in criminal proceedings (by paragraph 20(2)(a)) where the witness is not present in Australia, such as through witness statements. Although this could potentially limit a party's ability to examine and/or cross-examine witnesses as the Act allows for adducing their written witness statement instead (subject to the court's discretion), this applies equally

to the prosecution and the accused and therefore is consistent with the ‘equality of arms’ principle under Article 14(3)(e).<sup>1</sup>

*Justification for limiting Article 14(1) and Article 14(3)(e) rights*

To the extent that there is any limitation on a party’s ability to examine a witness which might be contrary to Article 14(1) or 14(3)(e), this is a reasonable and necessary and proportionate measure to address practicalities in adducing testimony from overseas witnesses in civil and criminal proceedings.

The measures are in pursuit of a legitimate objective, which is to facilitate the trial process in Australia in circumstances where evidence is located in a foreign country, given the difficulties associated with securing such evidence. There is a rational connection between the objective and the limitation; although a witness cannot be examined, a witness statement can still be considered by the court, subject to the below safeguards, which can facilitate a fair trial by allowing the court to take into account all relevant evidence regardless of its location.

The measures are necessary due to the fact that not all relevant evidence will always be available in Australia. Practical issues can include where there is substantial delay or significant expense if the witness is required to attend court in Australia, the witness is unwilling or unable to travel to Australia (e.g. for health reasons) and/or it is not possible for the witness’s evidence to be taken by video link (e.g. the foreign law does not allow for video link, or video link facilities are not available). In the event that evidence is located overseas and a witness is unable to give evidence in person, the Regulations provide a process by which a court can consider whether to allow a party to adduce the evidence.

The measures are reasonable and proportionate due to the following safeguards contained in the Act.

Firstly, sections 24 and 25 of the Act provide safeguards for adducing foreign material to ensure that the court can take into account any potential limitations on the right to a fair trial or fair hearing (including the right to examine witnesses). Section 24 of the Act provides that foreign material cannot be adduced if the person who gave the testimony is in Australia or able to attend or, the evidence would not have been admissible had it been adduced from the person at the hearing. Subsection 25(1) provides that a court can direct foreign material to not be adduced if having regard to the interests of the parties to the proceedings, justice would be better served if the foreign material were not adduced as evidence. In particular, paragraph 25(2)(c) provides that a matter which could be considered by the court in exercising this discretion to allow the evidence to be adduced is the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them.

Secondly, the testimony must be taken under oath, affirmation, or obligation or under such caution or admonition as would be accepted by courts in the relevant foreign country.

Finally, the relevant evidentiary rules applicable in the jurisdiction of the court proceeding regarding admissibility continue to apply to such evidence. For example, if a witness statement is adduced under section 24 of the Act in proceedings in a court in NSW and contain material that is not relevant, the court could find that the material is not admissible under subsection 56(2) of the *Evidence Act 1995* (NSW).

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<sup>1</sup> Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007.

### **Conclusion on this instrument and human rights implications**

The Regulations are compatible with human rights because, to the extent that it may limit human rights, those limitations are to achieve a legitimate objective and are reasonable, necessary and proportionate.