

**SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

INQUIRY INTO FOREIGN EVIDENCE AMENDMENT BILL 2008

SUBMISSION FROM THE ATTORNEY-GENERAL'S DEPARTMENT

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Introduction

1. The Foreign Evidence Amendment Bill 2008 would amend Part 3 of the Foreign Evidence Act to streamline the process for adducing foreign business records. The Bill would also make a number of other amendments to update and improve the workability of Part 3 of the Foreign Evidence Act. The Bill would apply only to criminal and related proceedings, where the particular evidence has been obtained in response to a formal mutual assistance request from the Australian Government.
2. There are inherent difficulties in obtaining evidence from a foreign country. The *Foreign Evidence Act 1994* was intended to overcome some of the difficulties associated with this process by providing that it is not necessary to have foreign witnesses attend proceedings in Australia to give evidence. However, some of the current provisions of the Foreign Evidence Act are outdated and do not adequately accommodate Australia's increasing reliance on certain forms of foreign evidence.
3. The Foreign Evidence Act has not been significantly amended since its commencement. Since 1994, the emergence of new technologies and the increasing sophistication of transnational criminal activity has made it increasingly common for the evidence of crimes committed in Australia to be located overseas. For example, Australia made approximately 225 requests for mutual assistance in criminal matters in the 2007-2008 financial year, as compared to 64 requests made in 1994-1995.
4. Requests relating to foreign business records comprise a significant proportion of mutual assistance requests made by Australia. This type of evidence is frequently used in prosecutions for serious crimes such as financial fraud, money laundering, child pornography and drug importation, as well as proceeds of crime matters. While business records are generally considered an accurate and reliable form of evidence, their admissibility in Australia is governed by detailed rules of evidence that vary between jurisdictions.
5. The requirements contained in these rules of evidence often exceed those required by the law of the requested country, making it onerous, and sometimes impossible, for the country to strictly comply with Australia's request. This is adversely impacting on Australia's ability to obtain foreign evidence in a timely manner or at all. Even where reliable evidence can be obtained from a foreign country, it may not be able to be admitted into evidence in Australian proceedings because it fails to meet particular requirements of the jurisdiction.
6. The Foreign Evidence Amendment Bill 2008 is designed to give effect to the Government's intention to promote more responsive and flexible measures in securing international crime cooperation, while retaining key safeguards and judicial discretion.
7. This submission outlines the key amendments contained in the Bill.

Changes to admissibility requirements for business records

8. The Bill would provide different admissibility requirements for foreign business records, while retaining the current admissibility provisions for other forms of foreign evidence.

Problems with the current provisions of the Foreign Evidence Act

9. Currently, foreign evidence may only be adduced under Part 3 if it would have complied with the specific admissibility requirements of the relevant jurisdiction, had the evidence been adduced from a person at the hearing (subsection 24(2)).

10. As stated above, the rules of evidence governing the admissibility of business records differ across Australian jurisdictions and are relatively technical and complex by comparison to evidence laws in foreign jurisdictions. Most Australian jurisdictions provide an exception to the hearsay rule for business records, but only where certain conditions are met. This often includes, for example, a requirement that the person providing the evidence must attest that the representation contained in the business record was made either:

- by a person who had, or might reasonably be supposed to have had, personal knowledge of the asserted fact, or
- on the basis of information directly or indirectly supplied by a person who had, or might reasonably be supposed to have had, personal knowledge of the asserted fact.

11. In addition, some Australian jurisdictions require evidence to be provided to attest to the reliability of a computer, where the evidence is produced by a computer.

12. Foreign countries are unfamiliar with these requirements and often have difficulty understanding their context. In some countries, particularly those with a civil law system, business records are often provided to the court under cover of a letter from the business. Witnesses in these countries can be reluctant to swear affidavits outlining all of the matters required to comply with Australian admissibility laws where they would not be required to attest to similar matters in court proceedings in their own country. The foreign witness may also be sympathetic to the defendant in the proceedings and unwilling to provide the material in admissible form.

13. These problems are exacerbated when evidence is required to be used in proceedings in more than one jurisdiction. The uniform Evidence Act is currently only in force in four jurisdictions – the Commonwealth, New South Wales, Tasmania and the Australian Capital Territory. Laws governing the admissibility of evidence vary considerably between uniform and non-uniform jurisdictions. It can be difficult, and sometimes impossible, for foreign countries to obtain and produce material in a format that complies with the different requirements of each jurisdiction.

14. Further, prosecutors in Australian criminal proceedings may not be required to satisfy the strict admissibility requirements for Australian business records where the records are admitted by consent. If Australian business records are challenged, it is open to the adducing party to compel relevant witnesses to attend proceedings to give evidence in person. It may be neither possible nor practicable to compel foreign witnesses to attend court proceedings in Australia for this purpose. As a result, foreign countries may be asked to meet a higher evidentiary standard when they obtain business records on behalf of Australia than in practice may be required for domestic business records adduced in Australian proceedings.

15. The Bill would amend section 24 to provide that foreign business records may be adduced as evidence, but cannot be adduced where the court considers that the records are not reliable or probative, or are privileged. The current provisions of the Foreign Evidence Act would be preserved for foreign evidence other than business records. The court would retain a broad discretion to prevent foreign material (including business records) being adduced if it is in the

interests of justice to do so. The court would also be given a new discretion to limit the use of foreign material where there is a danger it may be unfairly prejudicial to a party to the proceeding.

Foreign material to be presumed admissible

16. The Bill retains the current presumption in Part 3 of the Foreign Evidence Act that foreign material may be adduced, provided certain conditions are satisfied.

17. The party seeking to adduce the evidence would be required to satisfy the court that the foreign material appears to meet the definition of a business record. If the court is satisfied that this requirement is met, the court would then consider whether the material is to be adduced. If the court considers that the records are not reliable, probative or are privileged, the material must not be adduced (proposed subsection 24(4)).

18. The factors which go to establishing that a document is a business record, particularly the requirement that the document form part of the records of the business, may assist the court in determining whether the document is reliable. The court could also have regard to the fact that the records have been obtained through formal government-to-government processes. In determining whether the records are reliable, probative and not privileged, the court could take into account the nature of the document itself and any surrounding material provided to the court.

19. It will be open to all parties to the proceeding to challenge the admissibility of the business records and parties will be able to lead evidence on this issue. The court must determine whether the foreign business records may be adduced based on the material before it. Parties to the proceeding are not required to say anything nor lead any evidence concerning the reliability or probity of the records.

20. The amendments to Part 3 of the Foreign Evidence Act relate to a threshold question of whether evidence is to be admitted into proceedings. Should the court determine that evidence is admissible, it would separately need to consider the weight to be given to that evidence.

Foreign material that 'appears to consist of' a business record

21. Proposed subsection 24(4) would apply to foreign material that *appears to consist of* a business record.

22. The definition of a 'business record' in the Bill mirrors section 1(a) of the business record exception to the hearsay rule in section 69 of the Commonwealth *Evidence Act 1995*. The definition may be more complex than foreign evidence laws provide. Witnesses in foreign countries may be reluctant to provide testimony to strictly prove that relevant records meet this definition, particularly where they are not required to attest to such matters in their own country.

23. While the party adducing the evidence will still be required to satisfy the court that the foreign material appears to consist of a business record, the Bill would remove the requirement for testimony to be provided on this issue.

Applicability of other rules of evidence

24. Proposed subsections 24(5) and (6) operate to ensure that, where foreign material has been *adduced* in accordance with the requirements of Division 3 of Part 3, the evidence will be *admissible*, despite any other Commonwealth, State or Territory rules of evidence.

25. This provision preserves the current situation in respect of foreign material other than business records. The relevant rules of evidence about admissibility will be considered by the court in determining whether the foreign material would have been admissible had it been adduced by the person at the hearing.

26. For foreign business records, these provisions would ensure that evidence adduced in accordance with the new provisions will be admissible. In order to be adduced in accordance with the Division, business record evidence must satisfy subsections 24(1), (2) and (4), which provide that foreign business records may be adduced, unless:

- the person giving the evidence is in Australia, or
- the court considers the evidence is not reliable or probative, or is privileged.

27. The court would also have a broad discretion to prevent the foreign business records being adduced where justice would be better served by the material not being adduced.

28. These provisions are designed to provide the court with appropriate flexibility to admit reliable business records, notwithstanding that they may not fully comply with a particular admissibility requirement in the relevant jurisdiction.

29. In determining whether the records are reliable and probative, the court would not be required to be satisfied that the evidence complies with the laws of evidence in the jurisdiction. However, the court could draw on existing jurisprudence about reliability and probity to inform its consideration of this issue.

Discretions to prevent foreign material being adduced and to limit the use that is made of foreign material

30. The Bill would retain the existing broad discretion in the Foreign Evidence Act to prevent foreign material being adduced (section 25), and would provide the court with an additional discretion to limit the use that may be made of foreign material (proposed section 24A).

31. These discretions are very broad and would provide scope for the court to consider all relevant issues. For example, the discretion in section 25 provides that the court may prevent foreign material being adduced if it is satisfied that justice will be better served by the foreign material not being adduced. The Explanatory Memorandum to the Foreign Evidence Bill 1993 noted the breadth of the discretion in section 25, stating:

The court is given a wide discretion to refuse admission of foreign material if the court is satisfied that justice will be better served by the foreign material not being adduced. The court is not limited in the matters it can take into account in exercising this discretion.

32. In determining whether to exercise its discretion in section 25, the court can make a case by case assessment of all relevant factors. While subsection 25(2) sets out a number of matters which the court must have regard to in determining whether to exercise its discretion, it is clearly open to the court to consider a range of other factors, including, for example, the manner in which the foreign material was obtained in the foreign country. The court could also consider issues relevant to statutory and common law discretions, such as the matters referred to in sections 135, 137 and 138 of the Evidence Act (Cth).

33. The Bill provides the court with an additional discretion to limit the use that may be made of foreign material. Proposed section 24A is similar to the discretion available to the courts in section 136 of the Evidence Act (Cth).

Testimony requirements

34. The requirements for testimony in the current provisions of the Foreign Evidence Act can be confusing for officials in foreign countries. Many of Australia's mutual assistance partners, particularly in civil law countries, are not familiar with the common law requirements for testimony and do not require that evidence be taken on oath, affirmation, or under caution or admonition. However, they may impose an obligation to tell the truth in some other way.

35. The Bill would provide for evidence that is taken under an express or implied legal obligation to tell the truth to also be considered testimony for the purposes of Part 3 of the Foreign Evidence Act.

Application to related civil proceedings

36. Currently, Part 3 of the Foreign Evidence Act applies to civil proceedings which are related to criminal proceedings. This applies to, for example, proceeds of crime matters and tax matters where they are linked to criminal proceedings.

37. The Bill would make clear that Part 3 of the Foreign Evidence Act applies to all proceeds of crime proceedings, including those taken prior to, or in the absence of, criminal proceedings. While the Bill would clarify the application of the Foreign Evidence Act to non-conviction based proceeds of crime proceedings, these provisions would continue to be confined for use in proceedings taken by the Commonwealth, or relevant State or Territory.

38. Part 3 of the Foreign Evidence Act only applies to proceeds of crime matters and to civil proceedings which are related to criminal proceedings. It does not apply to private civil litigation.

Application provisions

39. The amendments in the Bill would initially apply to Commonwealth proceedings, including those conducted in State or Territory courts. There is provision in the Bill to apply the amendments to State and Territory proceedings through Regulations. The Attorney-General has indicated such Regulations would only be made with the agreement of the relevant States and Territories.

40. The amendments in the Bill would only apply to evidence that is adduced after the commencement of the amendments.