



DPP

Commonwealth Director of Public Prosecutions

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO FOREIGN EVIDENCE AMENDMENT BILL 2008

SUBMISSION FROM THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Introduction

1. The Commonwealth Director of Public Prosecutions (CDPP) is an independent Office established by the Commonwealth Parliament to prosecute alleged offences against the laws of the Commonwealth and to deprive offenders of the proceeds and benefit of such criminal activity.
2. Generally, the CDPP prosecutes Commonwealth offences in State and Territory courts and by virtue of the *Judiciary Act 1903*, the relevant State or Territory Evidence Act is applied to the particular prosecution so as to govern the admission of evidence in the proceedings.
3. The increasingly transnational nature of crime and the relative ease of moving the proceeds of crime from one jurisdiction to another has had the effect that Australia relies increasingly on mutual legal assistance from foreign countries to obtain relevant, admissible evidence for the purpose of criminal prosecutions and proceeds of crime action within Australia in respect of Commonwealth offences.
4. The matters investigated by Commonwealth investigative agencies are often complex and involve multiple alleged offenders. The consequence is that the material that Australia asks foreign countries to provide as potential evidence is also complex and often voluminous. Such material may also be required to be adduced into evidence in more than one Australian jurisdiction.
5. In its current form, Part 3 of the *Foreign Evidence Act 1994* (the FE Act) provides a mechanism by which the testimony and exhibits annexed to the testimony of a person obtained from a foreign country pursuant to a formal request for mutual legal assistance from the Australian Government may be admissible in criminal and related civil proceedings in Australia in the absence of an available witness to provide oral testimony.
6. The FE Act requires certain criteria to be met. The criteria include the requirement for the testimony to have been taken under oath or affirmation, for example, an affidavit, or provided under such caution or admonition that would be acceptable in that foreign country.
7. The FE Act also provides that the evidence must comply with the admissibility requirements in the relevant State or Territory Evidence Act in the jurisdiction in which the evidence is adduced.

Difficulties obtaining evidence in admissible form

8. In our experience, obtaining evidence in admissible form under the mutual assistance regime is often a lengthy process and one not always compatible with the timeframes set by the courts. We usually have only one or at most limited opportunities to obtain the material in admissible form from a foreign country.

9. In our experience, the majority of requests made under the mutual assistance regime for the matters we prosecute are for business records. Business records are generally, by nature, reliable, in that they are records kept by an organisation in the course of business.

10. As indicated by Hope JA in *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 548-9:

Any significant organisation in our society must depend for its efficient carrying on upon proper records made by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned. In the every-day carrying on of the activities of the business, people look to, and depend upon, those records, and use them on the basis that they are most probably accurate. ... No doubt mistakes may occur in the making of records, but I would think they occur no more, and probably less often, than in the recollection of persons trying to describe what happened at some time in the past. When what is recorded is the activity of a business in relation to a particular person amongst thousands of persons the records are likely to be a far more reliable source of truth than memory. They are often the only source of truth ... The purpose of Pt IIC is to bring into the court room a method of establishing the truth which is relied upon by our society outside the court room – to bring into the rules of evidence a reality which they otherwise lacked.

11. The various pieces of Commonwealth, State and Territory legislation governing the admission of business records into evidence, is remedial legislation intended to remove the difficulty or in some instances, impossibility, of proving certain business facts by admitting material which in common experience is likely to be accurate, and should be construed liberally and not pedantically (see *Cross on Evidence* (Australian Edition) at 35195).

12. However, the admissibility requirements under Commonwealth, State and Territory evidence laws, and which are incorporated under the current provisions of Part 3 of the FE Act, are usually more restrictive and complex than in many foreign countries from whom we request assistance, particularly in respect of business records. Many foreign countries are unwilling and sometimes unable to expend the resources necessary to comply with the often more restrictive admissibility requirements of Australian law. In some cases while foreign countries are willing to assist they are not willing to use compulsive means to obtain statements or evidence from the maker or possessor of the documents so as to facilitate admission into evidence of the business records under Australian law.

13. Further, because of the difference in the legal systems between Australia and other countries there is the difficulty of obtaining evidence in a particular format, for example under cover of an affidavit, or otherwise in the form of testimony, when no such requirement or concept may exist under the domestic law of that country.

14. In our experience, a foreign country may gather the material requested, but return it to Australia without the affidavit or other form of testimony required under Australian law. The consequent delay in going back to the foreign country and asking that the material be provided in conformity with the admissibility requirements under one or more of the Commonwealth and State or Territory Evidence Acts in Australia may result in prosecutions not going ahead in the

event the material is not provided in admissible form, or a lesser number of offences being prosecuted and the full extent of the criminality involved not being presented to the court.

15. We have also experienced the situation that material received from a foreign country that would meet the admissibility requirements in one jurisdiction, for example, Queensland, will not meet the requirements in another jurisdiction.

16. In our experience it is often the case that domestic business records are tendered by consent, without the prosecutor being required to strictly establish the admissibility of those business records. This is on the basis that the business records are reliable and probative and if there are deficiencies in the evidence to prove the business records this can be readily addressed, for example, by calling the witness who produced the business records or other witnesses to provide direct evidence in court.

17. In the case of foreign business records that are perceived to be reliable and probative but which do not strictly comply with the admissibility requirements it is usually either not possible or practical to have the person who produced the record called as a witness.

18. In many cases we are left in the position of having documents that we have every reason to believe are reliable business records but without any means of obtaining oral evidence about the documents that will satisfy the admissibility requirements of the relevant Evidence Act.

Proposed amendments to the FE Act

19. The CDPD supports the proposed amendments to the FE Act in respect of the admissibility requirements for foreign business records.

20. The effect of the proposed amendments will be that a record that appears to be a foreign business record may be adduced into evidence but is not to be adduced as evidence if the court considers that the business record is not reliable or probative or is privileged from production in the proceedings.

21. The adducing party (most commonly the prosecutor) will be required to satisfy the court that the material sought to be adduced "appears to be a business record". The prosecutor will still need to establish to the court's satisfaction that the document appears to satisfy the definition of a "business record" in section 3(1). This will involve establishing to the court's satisfaction that it appears the document is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purpose of a business, or at any time formed part of such a record.

22. The party adducing the record will have to demonstrate that the document appears to meet the definition (for example, it is a copy/draft document /kept in a certain manner/is an accounting record) and that the document has been systematically maintained as part of a process to record the activities and the conduct of the business. This will necessitate the party adducing the document to demonstrate certain prerequisites that go to the reliability of the document. If the court is of the opinion that the business record is not reliable or probative it must not be adduced as evidence.

23. The non adducing party is not required to say anything nor lead evidence as to the reliability of the document. The court is still required to consider the issue and reach a conclusion on the material before it. If the court is not of the opinion that the business record is not reliable or probative then the business record may be adduced as evidence. The adducing party has still satisfied an onus but not the same onus as if the business record was not a foreign record.

24. Some business records will appear from the face of the documents to be reliable and probative, for example, bank statements or account records. Other records may not on their face appear to be reliable or probative. We would expect that all material from the foreign country that attests to the reliability and probative value of the material will be adduced. For example, if an investigating magistrate has produced a certifying document and that certificate has been returned as part of the mutual assistance request it will be produced to the court to assist in its consideration. We anticipate that in each case the court will carefully consider whether it is satisfied that the business records are not reliable and probative. We would also expect that there may be cases where the court is satisfied having regard to the nature of the record itself or the surrounding material that the business record is not reliable or probative.

25. The court retains the existing general discretion to exclude evidence if justice would be better served by doing so (section 25). No doubt in considering the exercise of that discretion the court will consider matters that may be relevant to the exercise of other discretions to exclude evidence that are available under the relevant Evidence Act of the jurisdiction. Further the court will be afforded a new discretion to limit the use of foreign material if there is a danger that a particular use of the material might be unfairly prejudicial to a party (proposed section 24A).

Conclusion

26. The changing nature of crime and its increasingly transnational dimensions mean that investigators and prosecutors increasingly rely on business records from overseas to prove the case against defendants. The public rightly expect that where such crime is detected it will be vigorously pursued and that the existence of international boundaries and different legal systems will not provide safe havens for those accused of serious crimes.

27. In our view, it is appropriate to recognise the difficulties presented by different legal regimes so as to facilitate the admission into evidence of foreign business records that may not strictly comply with domestic requirements. This necessitates having a different admissibility regime for foreign business records than domestic business records given the practical difficulties associated with obtaining evidence from foreign countries and in respect of the differences between legal systems. It is important to note that rendering any material admissible does no more and no less than placing evidence in the appropriate forum for assessment by the tribunal of fact.

28. The proposed amendments will provide increased certainty in adducing foreign business records in criminal and related civil proceedings in Australia while maintaining appropriate safeguards so as to protect a defendant's rights.