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18 February 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal & Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan,

Re: Foreign Evidence Amendment Bill 2008

The Law Society represents over 22,000 solicitors across New South Wales. Our members work in both private practice and at all levels of Government.

The *Foreign Evidence Amendment Bill 2008* has been reviewed by the Law Society's Criminal Law Committee and its Business Law Committee (Committees).

The Committees' primary concern is proposed s 24 which substantially alters the law on admissibility of foreign business records in Commonwealth criminal proceedings and related civil proceedings. Further, as you have recorded in the information you released about your Inquiry, the amendment could also apply through regulation to State and Territory criminal proceedings and related civil proceedings. The amendment is significant in its application and its effect.

The Committees wish to bring to the Standing Committee's attention the following:

1. As the law currently stands the rules that apply to the admissibility of foreign business records are the same rules that are applicable to the admissibility of domestic business records. Further, there is no distinction in the application of those rules in Commonwealth criminal proceedings and in Commonwealth civil proceedings generally (which comprise by far the majority of Commonwealth civil proceedings).

   What is proposed by the new s 24 is a special rule which will allow for far more foreign business records to be admitted into evidence than would otherwise be admissible under the current rules, but only in Commonwealth criminal and related civil proceedings. The rules of evidence for admissibility of domestic business records in any type of Commonwealth proceedings criminal or civil is unchanged by the Bill.

Further, proposed s 24 does not alter the rules of evidence on admissibility of foreign business records in Commonwealth civil proceedings generally (other than those related to a criminal proceeding).

No satisfactory explanation has been made for these distinctions and why a special rule is needed only for foreign business records and only in Commonwealth criminal proceedings. No State or Territory of Australia has adopted these distinctions and nor are the Committees aware of any other country having done so.

2. It is an important rule of evidence in all Commonwealth proceedings, criminal and civil, that hearsay evidence is inadmissible. This rule is subject to several equally important exceptions, one of which is business records (domestic or foreign) that contain a statement relevant to an issue in the proceeding. However, for any business record (domestic or foreign) to override the hearsay rule a Commonwealth Court or Tribunal must as the law currently stands be satisfied that:

   (a) the document is in fact a business record (s69(1) *Evidence Act 1995* (Cth);

   (b) the relevant statement in the business record was made:
   - by a person who had or might reasonably be supposed to have had personal knowledge of the statement; 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 statement (s69(2) *Evidence Act 1995* (Cth)); and

   (c) the party tendering the business record has the onus of proving the above two matters to the Court's reasonable satisfaction (s48 *Evidence Act 1995* (Cth)).

   Proposed s 24 removes each of these important safeguards. Section 24(3) and (4) provides that a document need only to *appear* to *consist* of a business record.

   There is no requirement in proposed s 24 or anywhere else in the Bill that a Court has to be satisfied that a statement in the business record was made by a person who had or might reasonably be supposed to have personal knowledge of the statement.

   Section 25(4) places the onus on the party who is *not* seeking to tender the foreign business record to somehow show that the record is not reliable or probative, a task that will be difficult.

3. No substantial amendment to the laws of admissibility of evidence in Commonwealth criminal proceedings should be made without very careful and proper consideration and consultation. The *Evidence Act 1995* was adopted by the Commonwealth and New South Wales in 1995 (and has since been adopted by Tasmania) after considerable review and consultation including substantial reports by the Australian Law Reform Commission. The 2008 amendments to the *Evidence Act 1995*, which commenced on 1 January 2009, were the subject of a substantial report by the Law Reform Commission which commenced following a ten year review of the Act in 2005.

The Committees understand the *Foreign Evidence Amendment Bill 2008* has been prepared and put forward at the instigation of the Commonwealth Department of Public Prosecutions. There needs to be a balanced and objective consideration of the proposed amendments and that can only be done by the Australian Law Reform Commission under the guidance of Professor Les McCrimmon. The Senate's consideration of the Bill should be deferred until that report has been prepared and considered.

Yours sincerely,

Joe Catanzariti
President