

Arnold Bloch Leibler

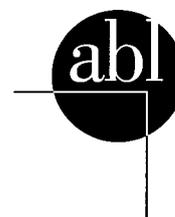
Lawyers and Advisers

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The Committee Secretary
Senate Standing Committee on Legal &
Constitutional Affairs
Department of the Senate
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Dear Sir/Madam

Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the *Foreign Evidence Amendment Bill 2008*

We are writing regarding the *Foreign Evidence Amendment Bill 2008 (the Bill)*. Arnold Bloch Leibler (**ABL**) is concerned that the Bill will seriously and unfairly disadvantage persons (presumed by the law to be innocent until proven guilty) accused of criminal offences.

- 1 ABL has a history of advising corporations and individuals involving issues of corporate governance, taxation and securities. ABL has also acted in numerous corporate collapses in which it has been intimately involved in the investigative processes. The observations made in this submission are drawn from those experiences.
- 2 ABL believes that the Bill if enacted will set a dangerous precedent. The Bill is reactive legislation, proposed to be enacted as a result of concerns by prosecutorial authorities about the admissibility of evidence. They apprehend that the current law may preclude such evidence being admitted by Superior Court judges. Of course, the prosecutorial authorities' views on such matters are not ever balanced. By contrast, the current laws of evidence developed over 100's of years of the common law, and codified (in part) by the *Uniform Evidence Acts*, and are balanced. They are also given effect by the independent judiciary. There is no logical reason why the particular class of evidence the subject of the Bill should be treated any differently from any other evidence.
- 3 The Bill seeks to lower the hurdle for the technical form in which foreign documents are obtained from foreign countries. Another effect will be to dispense with many legal safeguards presently available in criminal trials. Those safeguards are intended to protect accused persons from abuses of power by prosecutors. The Australian evidence laws underpin the right to a fair trial. Without adequate protection, defendants will be at risk of erroneous conviction. The removal of specific and focussed safeguards and protections, and their replacement with a general judicial discretion does not pay sufficient attention to the reasons why those specific safeguards were put in place.

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- 4 Furthermore, any attempt to remove evidential safeguards in relation to particular types of evidence or particular kinds of cases, should be examined cautiously. Such attempts may lead to parliaments gradually legislating away safeguards. The Bill is the "thin edge of the wedge": once Parliament has decided to remove general safeguards for the purpose of particular court proceedings or investigations, such as Operation Wickenby, there will be less reason in the future to resist further attempts by the Attorney-General's Department and the Commonwealth DPP to amend those laws which are causing "difficulties" for particular prosecutions.
- 5 It is a primary concern of the criminal justice system and of those who administer it, to minimise the risk of wrongful conviction. Accordingly, a stringent approach to the admission of evidence must be observed. Each time special exceptions are created to the ordinarily rules of evidence, the potential for injustice is increased. It is not acceptable for the Commonwealth DPP (or any other prosecutor) to seek to amend the laws to make evidence more easily admissible without comprehensively reviewing the effects such amendments will have on the rights of suspects and accused persons. In the present case, no such review appears to have been carried out in relation to the Bill.
- 6 ABL also believes that the Bill, if passed, will introduce a high level of uncertainty into the judicial treatment of foreign business records. This uncertainty will prejudice defendants and may lead to cases of serious injustice.

We are happy to discuss this submission with the Committee, at your convenience.

Yours sincerely



Leon Zwier
Partner