

# CHAPTER 2

## SUMMARY OF PROVISIONS

### Definitions

2.1 The Foreign Evidence Amendment Bill 2008 (Bill) inserts a number of new definitions into subsection 3(1). 'Business' is defined to have the same meaning as it does in the *Evidence Act 1995*, while 'business record' is defined as a document that is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business. It also includes a document that at any time was or formed part of such a record. 'Proceeds of crime law' is defined to have the same meaning as in the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*, and the Bill amends the definition of 'related civil proceeding' as a consequence.

### Application

2.2 Item 5 would clarify that the *Foreign Evidence Act 1994* (the Act) applies in respect of a proceeds of crime law even in the absence of criminal proceedings, as opposed to non-conviction based proceedings. Item 6 would make corresponding amendments to proceedings in respect of a state/territory.

### Formalities concerning the taking of evidence

2.3 Section 22 of the Act provides that testimony must be taken on oath or affirmation, or under such caution or admonition as would be accepted by courts in the foreign country for the purposes of giving testimony in proceedings before those courts.

2.4 New paragraph 22(1)(aa) would provide that testimony may also be taken where the person is under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned. The explanation given in the Explanatory Memorandum for this amendment is that some civil law countries do not require evidence to be taken under oath, affirmation or under caution or admonition, but may impose an obligation to tell the truth in some other way. The amendment purports to recognise that it may be appropriate that evidence taken in accordance with the procedures in a foreign country's legal system be considered as testimony for the purpose of the Act, even though it may not comply with Australian formalities concerning the taking of evidence.<sup>1</sup>

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1 Explanatory Memorandum, p. 5.

2.5 New subsection 22(3) would sit at the end of the section and create a presumption that the requirements contained in the first two subsections have been met, unless evidence sufficient to raise doubt is adduced to the contrary. This amendment would provide that the person seeking to adduce foreign material need only produce proof that the testimony requirements have been met where another party to the proceeding has produced evidence sufficient to raise a doubt to the contrary. According to the Explanatory Memorandum, if sufficient evidence to raise a doubt is produced, the onus would revert to the person adducing the foreign material to establish that the requirements in section 22 have been met.<sup>2</sup>

### **Methods of recording testimony**

2.6 An amendment to subsection 23(1) would update the Act so as to recognise modern methods of recording evidence, such as a disk or other device. The Act currently refers only to an audio or video tape.

### **Adducing foreign evidence**

2.7 The Bill amends section 24 so as to omit current subsection 24(2) and replace it with new subsections 24(2) - 24(6).

2.8 New subsection 24(2) would provide that foreign material is not to be adduced if it appears at the hearing of the proceeding that the person who gave the testimony is in Australia and is able to attend the hearing, regardless of whether or not it is a business record.

2.9 New subsection 24(3) would provide that if foreign material does not appear to consist of a business record, the foreign material is not to be adduced as evidence if the evidence would not have been admissible had it been adduced from the person who gave the testimony concerned at the hearing of the proceeding. Currently, the requirement is contained in paragraph 24(2)(b) and applies to material even where it is a business record. According to the Explanatory Memorandum, the new subsection is designed to overcome the requirement for a person to give evidence in person in proceedings by providing that the foreign material is admissible, provided it would have been admissible had the person given the evidence in person at the proceedings.<sup>3</sup>

2.10 New subsection 24(3) provides that if foreign material appears to consist of a business record, the business record is not to be adduced as evidence if the court considers the business record is not reliable or probative, or the business record is privileged from production in the proceedings. The Explanatory Memorandum claims that:

...current provisions are not always adequate to meet the special evidentiary problems associated with obtaining and using evidence in

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2 Explanatory Memorandum, p. 6.

3 Explanatory Memorandum, p. 7.

Australian proceedings which has been obtained from foreign countries with differing systems of criminal investigation and procedural law. This amendment would ensure that foreign material that appears to consist of a business record need not comply with the admissibility requirements of the relevant Australian jurisdiction hearing the proceedings but rather can be adduced provided the records are reliable and probative and are not privileged.<sup>4</sup>

2.11 New subsection 24(5) provides that evidence which accords with the requirements set out in Division 3 of the Act, which contains section 24, will be admissible in a court proceeding.

2.12 New subsection 24(6) would provide that proposed subsection 24(5) would have effect, despite any other laws about evidence. The effect of subsections (5) and (6) would be that evidence that complies with subsections 24(1) to (4) may be adduced and would be admissible as evidence, regardless of whether the evidence complies with other Commonwealth, State or Territory laws about evidence.

### **Discretion to limit use of material**

2.13 New section 24A would provide that the court may limit the use to be made of foreign material if there is a danger that a particular use of the foreign material might be unfairly prejudicial to a party to the proceeding. A similar discretion is contained in the *Evidence Act 1995*.

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4 Explanatory Memorandum, p. 7.

