

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FOREIGN EVIDENCE AMENDMENT BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

FOREIGN EVIDENCE AMENDMENT BILL 2008

Outline

1. Part 3 of the *Foreign Evidence Act 1994* provides a means of adducing foreign material, obtained in response to a request by the Attorney-General to a foreign country, as evidence in proceedings in Australian courts. This includes material obtained in response to a request made under the *Mutual Assistance in Criminal Matters Act 1987*, as well as requests made by the Attorney-General, by virtue of the executive power, to seek assistance that is not governed by the Mutual Assistance Act.
2. The primary purpose of the Bill is to amend Part 3 of the Foreign Evidence Act to streamline the process for adducing foreign material that appears to consist of a business record. The Bill would provide that foreign material that appears to consist of a business record may be adduced unless the court considers the business record is not reliable, probative, or is privileged. The amendments would retain the current provisions for adducing foreign material that does not appear to consist of a business record.
3. The amendments in Schedule 1 of the Bill would also:
 - provide that testimony may also be taken under an obligation to tell the truth imposed, whether expressly or implied, by or under a law of the foreign country
 - create a presumption that the requirements as to the form of the testimony have been met, unless evidence sufficient to raise a doubt is adduced to the contrary
 - clarify the application of the Foreign Evidence Act to non-conviction based proceeds of crime matters
 - modernise references to audio and video tape
 - give the court discretion to limit the use that may be made of foreign evidence, where there is a danger that a particular use of the foreign evidence may prejudice a party, and
 - remove an anomaly whereby the Attorney-General, in certifying that material has been received in response to a mutual assistance request, must also certify that the material satisfies the requirements for testimony.
4. The amendments would apply to Commonwealth criminal proceedings, related civil proceedings, and all proceedings under the *Proceeds of Crime Act 2002* and the *Proceeds of Crime Act 1987*. The amendments could also apply, through regulations, to State and Territory criminal proceedings, related civil proceedings specified in regulations and proceeds of crime proceedings.

Financial impact statement

5. There is no direct financial impact on Government revenue from this Bill.

NOTES ON CLAUSES

Clause 1: Short title

6. Clause 1 provides for the Act to be cited as the *Foreign Evidence Amendment Act 2008*.

Clause 2: Commencement

7. This clause provides that the Act would commence on the day after it receives the Royal Assent.

Clause 3: Schedule(s)

8. This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Schedule 1 – Amendments

Part 1—Amendments

Foreign Evidence Act 1994

Item 1 – Subsection 3(1)

9. Item 1 would insert a definition of ‘business’ into subsection 3(1) of the Foreign Evidence Act. ‘Business’ is defined as having the same meaning as the definition of business in clause 1 of Part 2 of the Dictionary in the *Evidence Act 1995* (Cth). The definition of business is relevant to the proposed definition of ‘business record’ inserted by item 2 and the amendments to Part 3 of the Foreign Evidence Act made by item 11, which would provide different rules for adducing foreign material that appears to consist of a business record.

Item 2 – Subsection 3(1)

10. Item 2 would insert a definition of ‘business record’ into subsection 3(1) of the Foreign Evidence Act. A 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.

11. The definition of business record is relevant to the amendments to Part 3 of the Foreign Evidence Act made by item 11, which would provide different rules for adducing foreign material that appears to consist of a business record.

Item 3 – Subsection 3(1)

12. Item 3 would insert a definition of ‘proceeds of crime law’ into subsection 3(1) of the Foreign Evidence Act. ‘Proceeds of crime law’ is defined as the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*. The definition of ‘proceeds of crime law’ is relevant to the amendments to Part 3 of the Foreign Evidence Act made by items 4, 5 and 6.

Item 4 – Subsection 3(1) (paragraph (a) of the definition of related civil proceeding)

13. Item 4 would amend the definition of ‘related civil proceeding’ in subsection 3(1) as a consequence of the amendments made by item 3. ‘Related civil proceeding’ is currently defined as any civil proceeding arising from the same subject matter from which the criminal proceeding arose, and includes, among other things, a proceeding under the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*. Item 4 would amend the definition of related civil proceeding to omit the reference to ‘the *Proceeds of Crime Act 2002* and the *Proceeds of Crime Act 1987*’ and substitute the words ‘a proceeds of crime law’.

Item 5 – Paragraph 20(1)(c)

14. Item 5 would omit the reference in paragraph 20(1)(c) to ‘the *Proceeds of Crime Act 2002* in relation to a designated offence’ and substitute the term ‘a proceeds of crime law’. Item 3 would provide that ‘proceeds of crime law’ is defined as the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*.

15. Currently, subsection 20(1) provides that Part 3 of the Foreign Evidence Act applies to a proceeding, in any Australian court, that is:

- a criminal proceeding for an offence against the law of the Commonwealth
- a related civil proceeding, or
- a proceeding under the *Proceeds of Crime Act 2002* in relation to a designated offence.

16. A related civil proceeding is currently defined in subsection 3(1) as any civil proceeding arising from the same subject matter from which the criminal proceeding arose. This includes, for example, proceeds of crime proceedings and proceedings for the recovery of tax, where such proceedings arise from the same subject matter as a criminal proceeding.

17. Since 2002, it has been possible to take proceeds of crime action in the absence of a criminal proceeding. In such cases, it is unclear whether the proceeding will fall within the current definition of a ‘related civil proceeding’. Accordingly, it is uncertain whether Part 3 of the Foreign Evidence Act currently applies to all non-conviction based proceeds of crime proceedings, which are not related to a designated offence as defined in subsection 3(1).

18. It is appropriate that Part 3 of the Foreign Evidence Act apply to all proceeds of crime action, including all non-conviction based proceedings under the *Proceeds of Crime Act 2002*. Item 5 would amend paragraph 20(1)(c) to remove the requirement that the proceeding be in relation to a designated offence and to refer instead to all proceedings under a ‘proceeds of crime law’.

19. The effect of proposed paragraphs 20(1)(b) and (c) would be that Part 3 would apply to all proceedings under either the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*. Proceeds of crime action that is linked to a criminal proceeding would be captured by both paragraph 20(1)(b) and paragraph 20(1)(c).

20. Item 6 would make corresponding amendments with respect to State and Territory proceedings.

Item 6 – At the end of subsection 20(2)

21. Item 6 would add proposed paragraph 20(2)(c). Subsection 20(2) provides that Part 3 of the Foreign Evidence Act applies to criminal proceedings, as well as related civil proceedings of a kind specified in regulations, in a court of a State or Territory, where that State or Territory is specified in regulations. A related civil proceeding is defined in subsection 3(1) as any civil proceeding arising from the same subject matter from which the criminal proceeding arose. This includes, for example,

proceeds of crime proceedings and proceedings for the recovery of tax, where such proceedings arise from the same subject matter as a criminal proceeding.

22. It is also possible to take proceeds of crime action in the absence of criminal proceedings under State and Territory legislation. It is not clear whether Part 3 of the Foreign Evidence Act would currently apply to non-conviction based proceeds of crime, where the action is not related to a criminal proceeding.

23. Proposed paragraph 20(2)(c) would provide that Part 3 of the Foreign Evidence Act also applies to State and Territory proceedings that are proceedings under 'a law that is a corresponding law within the meaning of a proceeds of crime law'. Item 3 would define 'proceeds of crime law' as the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*. 'Corresponding law' is defined in both of these Acts as laws set out in the *Proceeds of Crime Regulations 1987* and the *Proceeds of Crime Regulations 2002* respectively. Regulation 3 of the *Proceeds of Crime Regulations 1987* and Regulation 4 of the *Proceeds of Crime Regulations 2002* set out the corresponding laws of the States and Territories. These laws include both conviction and non-conviction based proceeds of crime proceedings.

24. The effect of paragraphs 20(2)(b) and 20(2)(c) would be to apply Part 3 of the Foreign Evidence Act to all proceeds of crime proceedings, including non-conviction based proceeds of crime proceedings. Proceeds of crime action that is linked to a criminal proceeding would be captured by both paragraph 20(2)(b) and paragraph 20(2)(c).

25. Item 5 would make corresponding amendments with respect to Commonwealth proceedings.

Item 7 – After paragraph 22(1)(a)

26. Item 7 would insert proposed paragraph 22(1)(aa). Section 21 provides that Part 3 of the Foreign Evidence Act applies to 'testimony, and any exhibit annexed to such testimony ...'. Section 22 sets out the requirements for testimony for the purposes of Part 3 of the Foreign Evidence Act. Currently, testimony must have been taken on oath or affirmation, or under such caution or admonition as would be accepted, by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts.

27. Proposed 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. 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. This amendment would 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 Foreign Evidence Act, even though it may not comply with Australian formalities concerning the taking of evidence.

Item 8 – At the end of section 22

28. Item 8 would add proposed subsection 22(3). Section 21 provides that Part 3 of the Foreign Evidence Act applies to ‘testimony, and any exhibit annexed to such testimony ...’. Section 22 sets out the requirements for testimony for the purposes of Part 3 of the Foreign Evidence Act. These requirements include that the testimony be taken in a certain way, and that the testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country.

29. Proposed subsection 22(3) would create a presumption that these requirements have been met, unless evidence sufficient to raise doubt is adduced to the contrary. This amendment would ensure that the person seeking to adduce the 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. If sufficient evidence to raise a doubt is produced, the onus would be on the person adducing the foreign material to establish that the requirements in section 22 have been met.

Item 9 – Subsection 23(1)

30. Item 9 would amend subsection 23(1). Subsection 23(1) currently provides that testimony may be reduced to writing or be recorded on an audio or video tape. Item 9 would amend this subsection to provide that testimony may be reduced to writing or be recorded on a tape, disk or other device capable of reproducing sounds or images. The amendment would modernise the provision to reflect changes in technology and ensure that future technological developments would also be captured.

Item 10 – Subsection 24(1)

31. Item 10 would amend subsection 24(1) to omit the words ‘subsection (2)’ and substitute ‘this section’. Section 24 sets out when foreign material may be adduced as evidence. Currently, subsection 24(1) provides that foreign material may be adduced as evidence, subject to subsection 24(2). Item 11 would repeal subsection 24(2) and add proposed subsections 24(2) to 24(6). This item makes an amendment as a consequence of item 11.

Item 11 – Subsection 24(2)

32. Item 11 would repeal subsection 24(2) and add proposed subsections 24(2) to 24(6). Section 24 sets out when foreign material may be adduced as evidence. Subsection 24(1), as amended by item 10, would provide that foreign material may be adduced as evidence, subject to subsections 24(2) to 24(6).

Proposed subsection 24(2)

33. Proposed subsection (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. This requirement is currently set out in paragraph 24(2)(a). This requirement would apply to all types of foreign material.

Proposed subsection 24(3)

34. Proposed subsection (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.

35. This requirement is currently set out in paragraph 24(2)(b) and currently applies to all types of foreign material. Item 11 would limit this requirement to foreign material that does not appear to consist of a business record. Separate requirements for business records are set out in proposed subsection 24(4).

36. Proposed subsection 24(3) 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.

Proposed subsection 24(4)

37. Proposed subsection (4) would set out more streamlined requirements for adducing foreign material that appears to consist of a business record. Item 2 would insert a definition of 'business record' into subsection 3(1) of the Foreign Evidence Act.

38. Subsection 24(4) would provide 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. Foreign material for the purpose of Part 3 comprises testimony and any exhibit annexed to such testimony. In the case of business records, the foreign material will generally consist of testimony of the person who produced the business record in the foreign country, and the business record annexed as an exhibit to the testimony.

39. Business records are generally considered an accurate and reliable form of evidence. However, the current provisions are not always adequate to meet the special evidentiary problems associated with obtaining and using evidence in 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.

40. Under paragraph 24(4)(b), the laws of the relevant jurisdiction with respect to privilege continue to apply to business records. Privilege can only be claimed by the person entitled to the privilege under the relevant law. If the person so entitled makes a claim of privilege, it will be a matter for the court to determine if a claim of privilege exists over the business record.

41. Claims of privilege would, for proceedings to which Commonwealth evidence law applies, include those privileges set out in Part 3.10 of the *Evidence Act 1995*

(Cth) and, for proceedings to which State and Territory evidence law applies, relevant privileges under the law of the State or Territory.

42. The court would retain its general discretion in sections 25 and 25A to prevent the foreign material from being adduced.

Proposed subsection 24(5)

43. Proposed subsection (5) would make clear that if foreign material is adduced in a proceeding in accordance with Division 3 of Part 3 of the Foreign Evidence Act, the foreign material is admissible in the proceeding. That is, if the requirements of the Division are met, the court would not be required to consider any other rules of evidence under Commonwealth, State or Territory law in relation to the material. The requirements of the Division would include the requirements in section 24, as well as the court's discretion to limit the use that is made of foreign material (proposed section 24A) or to prevent foreign material being adduced (sections 25 and 25A).

44. This provision would confirm the effect of current provisions in relation to foreign material that is not a business record. It would also make clear that, with respect to foreign material that is a business record, the provisions of the Foreign Evidence Act would override other rules about adducing and admitting foreign material.

Proposed subsection 24(6)

45. Proposed subsection (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.

46. Section 24 is subject to the court's discretion to prevent foreign material being adduced set out in sections 25 and 25A.

Item 12 – After section 24

47. Item 12 would insert proposed section 24A. 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* (Cth).

Item 13 – Subsection 26(1)

48. Item 13 would amend subsection 26(1) to omit the words 'specified foreign material was' and insert 'specified documents or things were'. Section 26 provides that the Attorney-General or an authorised officer may certify that foreign material was obtained as a result of a request made to a foreign country. Foreign material is defined in subsection 3(1) for the purpose of Part 3 as 'the testimony of a person ...'. Section 22, as amended by item 7, sets out requirements relating to testimony, including that the testimony be taken on oath or affirmation, caution or admonition, or

under a legal obligation to tell the truth, and that the testimony be signed or certified by a judge, magistrate or officer in or of the foreign country.

49. Section 26 is intended to avoid requiring the Attorney-General to testify in court that material was obtained from a foreign country in response to a mutual assistance request. However, the reference to ‘foreign material’ in existing section 26 could be interpreted as requiring the Attorney-General to also certify that the material is testimony within the meaning of section 22 of the Foreign Evidence Act. These matters are more appropriately considered by the court.

50. The proposed amendment would clarify that the Attorney-General does not need to be satisfied that the foreign material is testimony. Instead, the Attorney-General would need to be satisfied that specified documents or things were obtained as a result of a request made to a foreign country. The task of determining whether material is testimony will be a matter for the court to consider.

Item 14 – Subsection 26(2)

51. Item 14 would amend subsection 26(2) to omit the words ‘foreign material’ and insert ‘documents or things’ as a consequence of the amendments made by item 13.

Part 2—Application and transitional provisions

52. Part 2 of the Schedule sets out the application and transitional provisions for Schedule 1.

Item 15 – Application of amendments made by items 7 and 8

53. Items 7 and 8 would amend section 22, which sets out the requirements relating to testimony. Item 15 would provide that these amendments apply to testimony taken before or after the commencement of item 15 where the testimony is *adduced on or after the commencement* of the item.

54. Clause 2 of the Bill would provide that this item commences on the day after the Bill receives the Royal Assent.

Item 16 – Application of amendments made by items 10 and 11

55. Items 10 and 11 would amend section 24, which sets out when foreign material may be adduced. Item 16 would provide that these amendments apply in relation to foreign material obtained before or after commencement of item 16 where the foreign material is *adduced on or after the commencement* of this item.

56. Clause 2 of the Bill would provide that this item commences on the day after the Bill receives the Royal Assent.

Item 17 – Application of amendments made by item 12—section 24A of the Foreign Evidence Act 1994

57. Item 12 would insert proposed section 24A, which would provide that the court may limit the use to be made of foreign material in particular circumstances. Item 17 would provide that proposed section 24A would apply in relation to foreign material *adduced on or after the commencement* of item 17.

58. Clause 2 of the Bill would provide that this item commences on the day after the Bill receives the Royal Assent.

Item 18 – Application of amendments made by items 13 and 14

59. Items 13 and 14 would amend section 26, which enables the Attorney-General or an authorised officer to certify that foreign material was obtained in response to a request to a foreign country made by or on behalf of the Attorney-General. Item 18 would provide that these amendments apply in relation to a *certificate that is given on or after the commencement* of item 18, where the certificate relates to documents or things obtained as a result of a request made before or after the commencement of item 18.

60. Clause 2 of the Bill would provide that this item commences on the day after the Bill receives the Royal Assent.

Item 19 – Transitional and application provision—proceedings in a court of a State or Territory

61. Existing subsection 20(2) applies Part 3 of the Foreign Evidence Act to certain State and Territory proceedings. Subitem 19(1) would provide that, despite the amendments to be made by Schedule 1 of the Bill, Part 3 of the Foreign Evidence Act would continue to apply to proceedings mentioned in subsection 20(2) of the Foreign Evidence Act as if the amendments had not been made. Subitem 19(2) would provide for regulations to be made applying the amendments to relevant proceedings in a particular State or Territory.

62. Subitems 19(1) and 19(2) would ensure that the current provisions of the Foreign Evidence Act would continue to apply to State and Territory criminal and related civil proceedings until regulations are made to specifically apply the amendments in this Bill to such provisions.

63. Subitem 19(3) would provide that the Governor-General may make regulations for the purpose of subitem 19(2).