



## Foreign Evidence Amendment Bill 2008

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### Contents

Purpose.....	2
Background.....	2
Financial implications.....	2
Main provisions .....	2
Part 1—Amendments.....	3
Items 1, 2 and 3— Definitions of ‘business’, ‘business records’ and ‘proceeds of crime law’.....	3
Item 6 - .....	3
Items 7 and 8— flexibility in the operation of the testimony provision .....	4
Item 11 – circumstances in which foreign material may be adduced as evidence .....	4
Item 12 – discretion to limit the use of foreign material .....	4
Item 13 – certificates relating to foreign material .....	5

## Foreign Evidence Amendment Bill 2008

**Date introduced:** 3 December 2008

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The day after Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

To amend Part 3 of the *Foreign Evidence Act 1994* (hereafter “the Act”), so as to enhance the process for adducing foreign business records as proof in Commonwealth criminal proceedings, related civil proceedings, and all proceedings under the *Proceeds of Crime Act 2002* and the *Proceeds of Crime Act 1987*.

### Background

The realities of commerce in a globalised world, combined with greater access to information relating to international business dealings, has meant an increase in the number of mutual assistance requests seeking business records from foreign countries in an effort to combat white collar crime such as fraud and money laundering.

Making effective use of evidence obtained from foreign countries relies on *inter alia*, maintaining appropriate legislation to effectively deal with such evidence.

### Financial implications

The Explanatory Memorandum states that there is no financial impact.

### Main provisions

A summary of the Bill’s provisions is as follows:

- Foreign business records will be presumed to be admissible as evidence unless a court is satisfied that the records are not reliable or probative or that they are privileged.
- Testimony provisions will operate more flexibly to allow for evidence to be received where an individual is under a legal obligation to tell the truth, even though no formal

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oath or admonition has occurred – unless of course, there is sufficient evidence to raise doubt as to the contrary.

- Courts will be given greater discretion to limit the use of foreign material where there is a danger that it may be unfairly prejudicial to a party to the proceedings.
- There are also miscellaneous amendments - inserting and updating definitions, as well as clarification about the operation of the Act in relation to non-conviction based proceeds of crime matters.

## Part 1—Amendments

### *Foreign Evidence Act 1994*

Items 1, 2 and 3— Definitions of ‘business’, ‘business records’ and ‘proceeds of crime law’.

**Item 1** proposes a definition of ‘**business**’ in subsection 3(1) with the same meaning as the definition of ‘business’ in clause 1 Part 2 of the Dictionary in the *Evidence Act 1995* (Cth). It covers a profession or calling, an occupation or trade or undertaking and a range of other activities, including the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

**Item 2** proposes a definition of ‘**business record**’ in subsection 3(1) to mean 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; or
- at any time was or formed part of such a record.

**Item 3** inserts a definition of ‘**proceeds of crime law**’ to refer to *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*, which is necessary for the amendment proposed by **item 5** to current subsection 20(1) of the Act. Basically, the amendment made by **item 5** clarifies that **Part 3**<sup>1</sup> of the Act applies to all non-conviction based proceeds of crime proceedings.

Item 6

Current subsection 20(2) provides that Part 3 of the Act applies to applies to a proceeding, in any court of a State or Territory specified in the regulations, that is:

- a criminal proceeding for an offence against the law of that State or Territory; or

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1. Part 3 of the Act relates to the use of foreign material in criminal and related civil proceedings.

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(b) a related civil proceeding of a kind specified in the regulations in respect of where the State or Territory is specified in regulations and the proceeding type is similarly specified.

**Proposed paragraph 20(2)(c)** provides that Part 3 of the Act would also apply to State or Territory proceedings that are proceedings ‘under a law that is corresponding law within the meaning of a proceeds of crime law’. Hence it would operate with **current paragraph 20(2)(b)** to capture non-conviction based proceeds of crime proceedings.

Items 7 and 8– flexibility in the operation of the testimony provision

Current section 22 deals with the requirements for testimony for the purposes of Part 3 of the Act. **Proposed paragraph 22(1)(aa)** allows for evidence to be received where an individual is under a legal obligation to tell the truth, even though no formal oath or admonition has occurred. It will be assumed that the requirements for testimony under **Part 3** of the Act have been met unless there is sufficient evidence to raise doubt as to the contrary (**proposed subsection 22(3)**). Thus, where a foreign country has procedures for receiving testimony which may not conform with Australian formalities, but nonetheless place the individual under an obligation to tell the truth, then it is recognised that it may be appropriate to receive such evidence.

Item 11 – circumstances in which foreign material may be adduced as evidence

Current section 24 provides the requirements for foreign material to be adduced as evidence.

**Proposed subsection 24(2)** provides that foreign material is not to be adduced as evidence if it appears to the court that the person who gave the testimony concerned is in Australia and is able to attend the hearing.

**Proposed subsection 24(3)** deals with the situation where the foreign material does not appear to consist of a business record. In that case, 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 providing the testimony concerned at the hearing.

**Proposed subsection 24(4)** provides that where foreign material appears to consist of a business record, that business record will not be admissible as evidence if a court is satisfied that the record is not reliable or probative or that it is privileged from production in the proceedings.

Item 12 – discretion to limit the use of foreign material

Consistent with a similar discretion in the *Evidence Act 1995* (Cth) **proposed section 24A** provides the court with the discretion to limit the use of foreign material where there is a danger that it may be unfairly prejudicial to a party to the proceedings.

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Item 13 – certificates relating to foreign material

Current subsection 26(1) of the Act provides that:

the Attorney-General or an authorised officer may, by signed writing, certify that specified foreign material was obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General.

The Explanatory Memorandum identifies a concern that the reference to ‘foreign material’ could be interpreted as the Attorney-General certifying that the ‘foreign material’ is ‘testimony’ (as defined in the Act). Because this determination is a matter for the court, **proposed subsection 26(1)** removes the reference to ‘specified foreign material’ and replaces it with ‘specified documents or things were’. This clarifies that the Attorney-General only needs to be satisfied that the specified material was obtained as a result of a request made to a foreign country, not that it satisfied the definition of foreign material by qualifying as testimony.

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