

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FOREIGN EVIDENCE BILL 1994

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Honourable Duncan Kerr MP)

THIS MEMORANDUM TAKES ACCOUNT OF ISSUES RAISED BY THE
OPPOSITION AND TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED



FOREIGN EVIDENCE BILL 1994

OUTLINE

This Bill has 3 purposes.

2. First, it re-enacts, with minor changes, Parts IIIB and IIIC of the *Evidence Act 1905*. These Parts relate respectively to enabling evidence from other countries for use in Australian proceedings and preventing, for national security reasons, certain evidence being obtained in Australia for use in foreign proceedings.

3. Secondly, it provides new procedures for enabling authenticated foreign testimony, and exhibits to such testimony, to be admissible, subject to appropriate safeguards, in -

- criminal proceedings for offences against Commonwealth law;
- related civil proceedings;
- proceedings for offences against the law of a prescribed State or Territory;
- prescribed related civil proceedings under the law of a prescribed State or Territory; and
- civil proceedings (other than related civil proceedings) under the Corporations Law or the ASC Law to which the Australian Securities Commission ('ASC') is a party.

4. Thirdly, the Bill includes provisions to implement the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ('the Convention') so that Australia is in a position to accede to the Convention. Australian law does not require legalisation (authentication of certain matters by a diplomatic or consular official), and the benefit of accession to the Convention will be to relieve Australian residents of the need to get public documents legalised for use in countries that are party to the Convention.

Financial Impact Statement

5. The Bill will provide less expensive means of obtaining some foreign evidence but is not expected to have a significant impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

6. This clause provides for the short title of the Act.

Clause 2: Commencement

7. The Act commences on the day it receives the Royal Assent, except for Parts 3 and 5. Part 3 commences on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier. Part 5 commences on a day to be fixed by Proclamation, which can not be before the Convention enters into force for Australia.

Clause 3: Definitions

8. This clause defines words and expressions used in the Act. The principal definitions are -

'Australian court' means all federal, State and Territory courts, any judge, justice or arbitrator under an Australian law, and any person or body authorised to take and examine evidence. For the purposes of Part 6 it also includes any person or body authorised to take or receive evidence.

'superior court' includes all federal courts, Territory (except ACT and Northern Territory) Supreme Courts, State Supreme Courts and the Family Court of Western Australia when exercising federal jurisdiction, ACT and Northern Territory Supreme Courts when exercising jurisdiction conferred or vested by an Act and, until a Proclamation under the clause, the ACT Supreme Court when exercising any jurisdiction.

'inferior court' includes all other State courts when exercising federal jurisdiction, other Territory courts when exercising jurisdiction conferred or vested by an Act, Territory courts (except ACT and Northern Territory courts) when exercising any jurisdiction and, until a Proclamation is made under the clause, ACT courts exercising any jurisdiction.

'related civil proceeding' means, in relation to a criminal proceeding, a civil proceeding arising from the same subject matter as the criminal proceeding, particularly a proceeding under the *Proceeds of Crime Act 1987*, the *Customs Act*

1901, or for the recovery of any tax, duty, levy or charge owing to the Commonwealth.

Clause 4: References to evidence taken in an examination

9. This clause defines 'evidence taken in an examination'.

Clause 5: External Territories

10. This clause extends the Act to each external Territory.

Clause 6: Act to bind Crown

11. This clause provides for the Crown in all its capacities to be bound by the Act.

PART 2 - EXAMINATION OF WITNESSES ABROAD

12. Part 2 sets out procedures for the examination of witnesses while they are outside Australia for the purpose of proceedings in federal courts, certain Territory courts, State courts exercising federal jurisdiction and Territory courts exercising jurisdiction conferred by an Act. It substantially re-enacts Part IIIB of the *Evidence Act 1905*.

Division 1 - Proceedings in superior courts

Clause 7: Orders for taking evidence abroad

13. This clause enables a superior court, on the application of a party in any civil or criminal proceeding before it, to order, in relation to a person outside Australia that -

- (a) the person be examined on oath or affirmation at any place outside Australia before a judge or officer of the court, or another person appointed by the court;
- (b) a commission be issued for the person to be examined on oath or affirmation at any place outside Australia; or
- (c) a letter of request be issued to the judicial authorities of a foreign country to take the person's evidence, or cause it to be taken.

14. In considering an application under this clause the matters to which the court is to have regard include -

- (a) whether the person is willing or able to come to Australia to give evidence;

- (b) whether the person's evidence would be material to any issue in the proceedings;
- (c) whether, having regard to the interests of the parties, justice will be better served by granting or refusing the order.

Clause 8: Directions and requests relating to orders

15. This clause enables a court which makes an order under clause 7 for examination of the person, or for issue of a commission for examination, to give directions about the procedure to be followed in relation to the examination or, where a court makes an order for the issue of a letter of request, to include in the order a request about any matter relating to taking the evidence, including examination, re-examination and cross-examination of the person, attendance and participation of the legal representatives of the parties, and any matter prescribed in the regulations.

Clause 9: Use of evidence taken in an examination

16. This clause enables a superior court to permit a party to tender in the proceeding the evidence or a record of the evidence taken in an examination resulting from an order under clause 7. Evidence so tendered is not to be admissible if at the hearing of the proceeding the court is satisfied that the person is in Australia and able to attend the hearing or if the evidence would not have been admissible if adduced at the hearing.

Division 2 - Proceedings in inferior courts

Clause 10: Orders for taking evidence abroad

17. This clause permits a State or Territory Supreme Court to exercise the same power to make orders for examination of a person, issue of a commission for an examination or for issue of a letter of request in relation to a proceeding before an inferior court of the State or Territory as it can in relation to a proceeding before itself.

18. This clause does not apply to a proceeding before a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975*.

Clause 11: Orders for taking evidence abroad - family law matters

19. This clause permits specified courts to exercise the same power to make orders for examination of a person, issue of a commission for an examination or for issue of a letter of request in relation to proceedings before a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975* as they can in relation to proceedings before themselves.

20. The specified courts are:

- for proceedings in Western Australia, the Christmas Island Territory or the Territory of Cocos (Keeling) Islands - the Family Court of Western Australia;
- for proceedings in the Northern Territory - the Supreme Court of the Northern Territory;
- for proceedings elsewhere - the Family Court of Australia.

Clause 12: Use of evidence taken in an examination

21. The clause enables an inferior court to permit a party to tender in the proceeding before it the evidence or a record of the evidence taken in an examination resulting from a order under clause 10 or clause 11. Evidence so tendered is not to be admissible if at the hearing of the proceeding the court is satisfied that the person is in Australia and able to attend the hearing, or the evidence would not have been admissible if adduced at the hearing.

Division 3 - Subsequent proceedings

Clause 13: Directions for use in subsequent proceedings of evidence taken abroad

22. This clause provides that a superior court may, when making an order for the obtaining of evidence abroad for a committal proceeding, direct that the evidence obtained may also be tendered in a trial resulting from the committal proceeding, or in a related civil proceeding. Similarly, a superior court making an order for obtaining evidence abroad for a criminal proceeding (other than a committal proceeding) may direct that the evidence may also be tendered in a related civil proceeding.

Clause 14: Use of that evidence in subsequent proceedings

23. This clause provides that a court may permit a party to tender, in a proceeding which is the subject of an order under clause 13, the evidence or a record of the evidence taken in an examination held as a result of an order under subclause 7(1) or subclause 10(1). Evidence so tendered is not to be admissible if at the hearing of the proceeding the court is satisfied that the person is in Australia and able to attend, or the evidence would not have been admissible if adduced at the hearing.

Division 4 - Miscellaneous

Clause 15: Discretion to exclude evidence

24. This clause confers on courts a discretion to exclude otherwise admissible evidence that has been obtained under this Part where exclusion is in the interests of justice.

25. The clause also makes it clear that Part 2 does not limit a court's power under any other law to exclude or limit the use of evidence, including where that evidence has been obtained unlawfully or improperly or where the evidence would operate unfairly.

Clause 16: Variation or revocation of orders

26. This clause provides that a superior court may revoke or vary an order for the taking of evidence abroad. The power to vary includes a power to add, vary or revoke a direction under clause 13 in the order.

Clause 17: Courts may exercise certain powers in chambers

27. This clause provides that a court may exercise its powers under clauses 7, 10, 11, 13 or 16 in chambers.

Clause 18: Operation of other laws

28. This clause states that Part 2 is not intended to exclude or limit the operation of any Australian law providing for the examination of witnesses outside Australia for the purpose of a proceeding in Australia.

Clause 19: Rules of court

29. This clause extends a power to make rules regulating the practice and procedure of a superior court to include making rules to give effect to Part 2. Such rules must be consistent with the Act and regulations. The clause does not affect any power to make rules under any other law.

PART 3: USE OF FOREIGN MATERIAL IN CRIMINAL AND RELATED PROCEEDINGS

30. Part 3 implements new procedures for enabling foreign material authenticated in a prescribed manner to be admissible in evidence in criminal proceedings and in related civil proceedings, subject to appropriate safeguards.

Division 1 - Preliminary

Clause 20: Proceedings to which this Part applies

31. Subclause 20(1) provides that the Part applies to a proceeding (defined in clause 3) in any Australian court that is a criminal proceeding for a Commonwealth offence or a related civil proceeding. ('Related civil proceeding' is defined in clause 3 so that the Part can extend to civil proceedings arising from the same subject matter from which the relevant criminal proceeding arose. This will include proceedings under the *Proceeds of Crime Act 1987*, the *Customs Act 1901* or proceedings for the recovery of tax, or of any duty, levy or charge payable to the Commonwealth).

32. Subclause 20(2) provides that the Part also applies to a proceeding, in any court of a State or Territory specified in regulations, in relation to a criminal offence against the law of that State or Territory, or a related civil proceeding of a kind specified in the regulations in respect of that State or Territory.

Division 2 - Obtaining foreign material

Clause 21: Requests for foreign material

33. This clause provides that the Part applies to testimony and annexed exhibits obtained pursuant to a request to a foreign country by or on behalf of the Attorney-General.

Clause 22: Requirements for testimony

34. Subclause 22(1) sets out the manner in which the testimony must have been taken by courts in the foreign country concerned. It provides that the testimony must have been taken either on oath or affirmation, or alternatively, 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.

35. Subclause 22(2) prescribes the manner in which testimony is to be authenticated, and is equivalent to the manner of authentication of documents which is prescribed by subsection 43(2) of the *Mutual Assistance in Criminal Matters Act 1987* in relation to proceedings under that Act or the *Proceeds of Crime Act 1987* arising from a request made under the *Mutual Assistance in Criminal Matters Act 1987*. The testimony will first have to be signed or certified by a judge, magistrate or officer in or of the foreign country. In addition, the testimony will have to bear an official or public seal of either

the country, or a Minister of State, or a Department or officer of the Government, of the country.

Clause 23: Form of testimony

36. Clause 23 is intended to ensure that there is flexibility in the form in which the testimony may be taken. Subclause 23(1) provides that the testimony may be reduced to writing or be recorded on an audio or video tape or produced in another form. Subclause 23(2) provides that the testimony does not have to be in the form of an affidavit or constitute a transcript of a proceeding in a foreign court though either of these forms may be used.

Division 3 - Using foreign material

Clause 24: Foreign material may be adduced as evidence

37. Clauses 24 and 25 focus on the two limbs of admissibility of evidence. Clause 24 relates to whether the evidence is admissible in a strict application of the law (sometimes referred to as legal admissibility) and relates to such things as the competence of the witness, hearsay or whether a person who purports to give evidence as an expert is qualified to give such evidence. Clause 24 modifies the existing rules of evidence only in relation to certain foreign evidence and only in respect of legal admissibility.

38. Clause 24 provides that foreign material is prima facie legally admissible subject to two mandatory grounds on which foreign material must be excluded. These are:

where the court is satisfied that the relevant witness is present in Australia and able to attend the proceeding; or

where the material would not have been legally admissible had it been adduced from the relevant witness at the hearing,

Clause 25: Discretion to prevent foreign material being adduced

39. Clause 25 preserves and reflects the general discretion of the court at common law to exclude legally admissible evidence. Subclause 25(1) provides that the court may direct that certain foreign material not be adduced as evidence. The court is given a wide discretion to refuse admission of foreign material if the court is satisfied that justice will be better served by the foreign material not being adduced. However, before the discretion vested in the court to exclude foreign material by subclause 25(1) may be exercised, the foreign material must be legally admissible under clause

24. Only then may the court turn its mind to the exercise of the discretion vested in it under subclause 25(1).

40. The court is not limited in the matters it can take into account in exercising the discretion provided for under subclause 25(1) and seeks to preserve the very broad discretion that a court has at common law to exclude legally admissible evidence. For example, evidence of a low probative value which is highly prejudicial could be excluded by the court under subclause 25(1). Subclause 25(2) sets out five matters which the court must take into account in exercising its discretion whether or not to issue a direction under subclause 25(1):

- the extent to which the material supplies evidence which would not otherwise be available;
- the probative value of the material with respect to any issue that is likely to be determined in the proceedings;
- the extent to which statements in the foreign material could have been challenged at the time they were made;
- whether exclusion of the material would cause undue expense or delay; and
- whether exclusion of the material would unfairly prejudice any party to the proceeding.

Division 4 - Miscellaneous

Clause 26: Certificates relating to foreign material

41. Subclause 26(1) provides that the Attorney-General or an authorised officer (defined in subclause 26(3)) may certify that material was obtained pursuant to a request to the foreign country by or on behalf of the Attorney-General.

42. Subclause 26(2) imports a presumption that the material specified in the certificate was obtained pursuant to a request of the nature referred to in subclause 26(1) unless sufficient evidence is adduced to raise doubt about the presumption.

43. Subclause 26(3) sets out the necessary qualifications for a person to be appointed as an authorised officer and the means by which such an appointment can take place. The Attorney-General may appoint as authorised officers by notice in the *Gazette* any persons holding or performing the duties of a Senior Executive Service office in the Attorney-General's Department.

Clause 27: Operation of other laws

44. This clause provides that Part 3 does not limit the operation of other Commonwealth, State or Territory laws relating to the way in which a matter may be proved or evidence may be adduced.

**PART 4 - USE OF FOREIGN MATERIAL AND RECORDS OF FOREIGN
BUSINESS AUTHORITIES IN CERTAIN CIVIL PROCEEDINGS**

45. The bringing of civil proceedings is crucial to the ASC's regulatory role. Part 4 will facilitate the admissibility of foreign material as evidence in civil proceedings brought by the ASC under the Corporations Law or the ASC Law.

46. Part 4 will not, however, apply to 'related civil proceedings' (defined in clause 3). The admissibility of foreign material in related civil proceedings, to which the ASC is a party, is covered by Part 3 of the Bill.

Division 1 - Preliminary

Clause 28: Proceedings to which this Part applies

47. Clause 28 provides that the Part applies to a proceeding (defined in clause 3) that is a civil proceeding other than a related civil proceeding (defined in clause 3), brought in an Australian court under the Corporations Law or the ASC Law and to which the ASC is a party. 'ASC Law' is an alternative citation of the Australian Securities Commission Act 1989.

Division 2 - Obtaining foreign material

Clause 29: Requests for foreign material

48. This clause provides that the Part applies to testimony and annexed exhibits obtained pursuant to a request to a foreign business authority (defined in clause 3) by the ASC.

Clause 30: Requirements for testimony

49. Subclause 30(1) sets out the manner in which the testimony must have been taken by courts in the foreign country concerned. It provides that the testimony must have been taken either on oath or affirmation, or alternatively, 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.

50. Subclause 30(2) prescribes the manner in which the testimony is to be authenticated. If the foreign business authority is an individual, the testimony will have to be signed or certified by that individual. If the foreign business authority is an organisation, the testimony will have to be signed by an office holder of that authority and bear an official or public seal of the authority or office holder.

Clause 31: Form of testimony

51. Clause 31 is intended to ensure that there is flexibility in the form in which the testimony is taken. Subclause 31(1) provides that the testimony may be reduced to writing or be recorded on an audio or video tape or produced in another form. Subclause 31(2) provides that the testimony does not have to be in the form of an affidavit or constitute a transcript of a proceeding in a foreign court though either of these forms may be used.

Division 3 - Using foreign material

Clause 32: Foreign material may be adduced as evidence

52. Clauses 32 and 33 focus on the two limbs of admissibility of evidence. Clause 32 relates to whether the evidence is admissible in a strict application of the law (sometimes referred to as legal admissibility) and relates to such things as the competence of the witness, hearsay or whether a person who purports to give evidence as an expert is qualified to give such evidence. Clause 32 modifies the existing rules of evidence only in relation to certain foreign evidence and only in respect of legal admissibility.

53. Clause 32 provides that foreign material is prima facie legally admissible subject to two mandatory grounds on which foreign material must be excluded. These are:

- where the court is satisfied that the relevant witness is present in Australia and able to attend the proceeding; or
- where the material would not have been legally admissible had it been adduced from the relevant witness at the hearing,

Clause 33: Discretion to prevent foreign material being adduced

54. Clause 33 preserves and reflects the general discretion of the court at common law to exclude legally admissible evidence. Subclause 33(1) provides that the court may direct that certain foreign material not be adduced as evidence. The court is given a wide discretion to refuse admission of foreign material if the court is satisfied that justice will be better served by the foreign material not being adduced. However, before the discretion vested in the court to exclude foreign material by subclause 33(1) may be exercised, the foreign material must be legally admissible under clause 32. Only then may the court turn its mind to the exercise of the discretion vested in it under subclause 33(1).

55. The court is not limited in the matters it can take into account in exercising the discretion provided for under subclause 33(1) and seeks to preserve the very broad discretion that a court has at common law to exclude legally admissible evidence. Subclause 33(2) sets out five matters which the court must take into account in exercising its discretion whether or not to issue a direction under subclause 33(1):

- the extent to which the material supplies evidence which would not otherwise be available;
- the probative value of the material with respect to any issue that is likely to be determined in the proceedings;

the extent to which statements in the foreign material could have been challenged at the time they were made;

whether exclusion of the material would cause undue expense or delay; and

whether exclusion of the material would unfairly prejudice any party to the proceeding.

Division 4 - Records of foreign business authorities

Clause 34: Evidence of records of foreign business authorities

56. Clause 34 provides that evidence of a record of a foreign business authority may be adduced in a proceeding to which Part 4 applies by producing a certified copy, extract or summary of that record. If the foreign business authority is an individual, the certification must be by that individual. Otherwise the certification must be by an office holder of the foreign business authority.

Division 5 - Miscellaneous

Clause 35: Certificates relating to foreign material

57. Subclause 35(1) provides that the Chairperson or the Deputy Chairperson of the ASC may certify that foreign material was obtained pursuant to a request by the ASC to a foreign business authority.

58. Subclause 35(2) imports a presumption that the material specified in the certificate was obtained pursuant to a request of the nature referred to in sub-clause 35(1) unless sufficient evidence is adduced to raise doubt about the presumption.

Clause 36: Operation of other laws

59. This clause provides that Part 4 does not limit the operation of other Commonwealth, State or Territory laws relating to the way in which a matter may be proved or evidence may be adduced.

PART 5 - AUTHENTICATING FOREIGN PUBLIC DOCUMENTS

60. This Part implements the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ('the Convention'). This will allow Australia to accede to the Convention. A copy of the English text of the Convention is set out in the Schedule.

61. The Convention abolishes the requirement for legalisation of foreign public documents. Legalisation is a system for authenticating a public document by certificates. Often a chain of certificates is required. The Convention provides for the issue by a Convention country of a single certificate which is sufficient evidence to authenticate the signature or seal on a public document. While the Convention is concerned specifically only to abolish legalisation by a diplomatic or consular official of the country in which the public document is to be produced, the effect of the Convention is also to render unnecessary previous certificates in a legalisation chain.

Clause 37: Certificates attached to foreign public documents

62. This clause gives evidentiary effect to certificates issued under the Convention placed on, or attached to, foreign public documents. It provides that in any Australian court, and for the purposes of any person performing a function or exercising a power under an Australian law, the certificate is evidence of:

- the authenticity of the signature on the foreign public document; and
- the capacity in which the person signing it has acted; and
- where appropriate, the identity of the seal or stamp that it bears.

63. It also provides that, except as provided in clause 39, no formality other than the certificate can be required to certify these matters.

Clause 38: Foreign public documents not requiring legalisation.

64. This clause provides that if a foreign public document is not required to be legalised, no Australian court or person performing a function or exercising a power under an Australian law may require a certificate issued under the Convention in order to certify the matters listed in paragraph 62.

Clause 39: Lesser formalities for authentication etc.

65. This clause provides that Part 5 does not prevent an Australian court or a person performing a function or exercising a power under an Australian law requiring or accepting a lesser formality than a certificate issued under the Convention as evidence of the matters listed in paragraph 62.

PART 6 - TAKING EVIDENCE FOR PROCEEDINGS IN FOREIGN COURTS

66. Part 6 enables the Attorney-General to prohibit the giving of evidence in any Australian court for use in foreign proceedings, in order to prevent prejudice to the security of Australia. It largely re-enacts Part IIIC of the *Evidence Act 1905*. However, unlike Part IIIC, Part 6 is not limited to proceedings to obtain evidence in relation to a civil or commercial matter.

Clause 40: Application of this Part

67. This clause applies Part 6 to proceedings before an Australian court for taking evidence for use in a foreign court. It also contains definitions for the purposes of Part 6.

Clause 41: Exercise of powers under this Part

68. This clause prohibits the Attorney-General from exercising a power conferred by Part 6 unless he or she is satisfied it is desirable to do so for the purpose of preventing prejudice to the security of Australia.

Clause 42: Orders

69. This clause enables the Attorney-General, by order in writing, to prohibit the production of a document or thing, or the giving of evidence or information. The order may be directed to a particular person, a class of persons, or persons generally. It may relate to a particular proceeding, a class of proceedings or proceedings generally, and to particular documents, things, evidence or information or to a class of documents, things, evidence or information.

Clause 43: Copies etc. of documents

70. This clause applies an order relating to a document to any copy, extract or summary of that document.

Clause 44: Intervention

71. This clause enables the Attorney-General to intervene in any proceeding in order to prevent a contravention of an order under clause 42. Where the Attorney-General intervenes, a certificate by the Attorney-General that the doing of an act prohibited by an order under clause 42 would be prejudicial to Australia's security is conclusive evidence of that fact.

72. Power is conferred on the court to order costs against the Commonwealth, if it thinks fit, where the Attorney-General intervenes.

Clause 45: Injunctions

73. This clause enables the Attorney-General to apply to the Federal Court for an injunction to restrain a contravention of an order.

PART 7 - MISCELLANEOUS

Clause 46: Regulations

74. This clause enables the Governor-General to make regulations.