THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: MM:ln:1310300
Direct Line: 9926 0310

28 September 2010

Mr Laurie Glanfield AM
Director General
Department of Justice & Attorney General
GPO Box 6
SYDNEY NSW 2001

Dear Mr Glanfield,

Foreign Evidence Amendment Act 2010 (Cth) – Application to Proceedings under NSW Law

Thank you for your letter dated 11 August 2010. You have asked for our views as to whether the amendments contained in the *Foreign Evidence Amendment Act 2010* (Cth), which apply to Commonwealth matters, should apply to NSW matters. The Law Society's Criminal Law Committee ('Committee') has had the opportunity to review the provisions of the *Foreign Evidence Amendment Act 2010* (Cth) and provides the following comments for your consideration.

Summary

The Committee is of the view that the protections contained in s 69(2) and (3) of the *Evidence Act 1995* (NSW) should not be abandoned. If the amendments contained in the *Foreign Evidence Amendment Act 2010* (Cth) are introduced to apply to NSW matters, the discretion to exclude foreign business records should be strengthened by permitting a court to take into account considerations such as those set out in s 69(2) and (3) of the *Evidence Act 1995*.

Overview - pre-amendment regime

Without the amendments made by the *Foreign Evidence Amendment Act 2010*, the *Foreign Evidence Act 1994* (Cth) (**FEA**) operates to apply domestic evidence law and protections. Section 24(2)(b) of the FEA provides that foreign evidence, as defined, is not to be adduced if the evidence would not have been admissible if adduced from the person at the hearing. A party is consequently no better off in terms of admissibility under the pre-amendment regime than if the deponent of the foreign evidence affidavit was in Australia.

Overview - the regime as amended

1. Defining a "business record"

The change brought about by the amendment to s 24 of the FEA, inserting subsections (3) and (4), is twofold, and confined in its effect to business records. The new s 24(3) provides that s 24(2)(b) does not apply if the foreign material is a business record and the only reason why the evidence would not have been

admissible if adduced by the deponent at the hearing was that an Australian law relating to hearsay would have applied to the evidence. The important distinction between the regimes is not contained within the terms of s 24(3) itself, but in the definition of "business record" in the amendments, which is different to the definition which appears in s 69 of the *Evidence Act 1995* (both NSW and Cth). In summary, the definition of "business record" in s 3 of the FEA only requires proof that the material sought to be adduced was part of the records belonging to or kept for the purposes of a business.

The provision constitutes a shift from a concept of representations (as contained in the *Evidence Act 1995*) to the concept of the record itself. That is, s 69 of the *Evidence Act 1995* creates an exception to the hearsay rule for representations rather than the record itself.

2. <u>Personal knowledge of the fact asserted</u>

Section 69(2) of the *Evidence Act 1995* additionally requires proof that the representation was made, directly or indirectly, by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact. The FEA, as amended, contains no analogous provision.

3. <u>Contemplation of litigation/investigation</u>

Section 69(3) of the *Evidence Act 1995* excludes representations made in contemplation of litigation or in connection with an investigation relating to or leading to a criminal proceeding. Again, there is no analogous provision under the FEA regime, as amended.

The efficacy of section 69(2) and (3), Evidence Act 1995 (NSW)

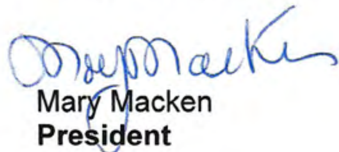
The changes referred to above should not be a concern for the most common kinds of business records such as, for example, bank statements. As a practical matter, in the experience of the Committee, in the vast majority of cases the records are the evidence and the barriers in s 69(2) and (3) rarely, if ever, apply. The area of concern is when there is a potential live issue as to the reliability of the records, being the original concern underlying the hearsay rule. The business records exception arose because business systems and the interest in keeping accurate records met such reliability concerns, at least in theory. The limitations in s 69(2) and (3) of the *Evidence Act 1995* are intended to address situations in which that reliability is questionable, either because the source is itself more remote than first-hand hearsay, or because the shadow of litigation creates an incentive to tailor records to present a distorted picture of what has transpired. One may consider, in this context, the case of minutes of a meeting of a company. If a company is about to sue, or is about to be sued, it has incentives to records facts in a way that may help it in the litigation down the track.

Conclusion

The Committee submits that the interests of justice in the context of foreign business records would best be served by the inclusion, at section 25(2) of the FEA, of two additional grounds reflecting s 69(2) and (3) of the *Evidence Act 1995*, to guide the exercise of the discretion to exclude business records. If the FEA amendments are to apply to NSW matters, the safeguards in s 69(2) and (3) of the *Evidence Act 1995* will otherwise be lost altogether.

Should you have any queries in relation to this correspondence, please do not hesitate to contact the Acting Executive Member for the Criminal Law Committee, Ms Lana Nadj, on 9926 0310.

Yours sincerely



Mary Macken
President