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6 February 2009

The Hon Robert McClelland MP
Attorney-General
House of Representatives
Parliament House
PO Box 6022
CANBERRA ACT 2600

Dear Attorney-General,

Re: Foreign Evidence Amendment Bill 2008

The Law Society's Business Law and Criminal Law Committees (Committees) have had their attention draw to the *Foreign Evidence Amendment Bill 2008*. The Bill seeks to substantially alter the law on admissibility of foreign business records in criminal proceedings for offences against the laws of the Commonwealth, the States, the Territories and related civil proceedings.

The Committees have had the opportunity to review the Law Council of Australia's submission (attached) and fully endorse the content of its submission. I have also enclosed an article from the 9 January 2009 Weekly Tax Bulletin which outlines further concerns about the operation of the proposed amendments.

The Committees note that the Bill was passed by the House of Representatives on 5 February 2009 and has been introduced and read for a first time in the Senate. The Committees request that you refer the Bill to the Senate Committee on Legal and Constitutional Affairs to provide interested stakeholders with the opportunity to make submissions on the content of the Bill.

Yours sincerely,

Joe Catanzariti
President

Law Council
OF AUSTRALIA

From the Office of the President

15 January 2009

The Hon Robert McClelland MP
Attorney General
House of Representatives
Parliament House
PO Box 6022
Canberra ACT 2600

JOHN CORCORAN
president@lawcouncil.asn.au

Dear Attorney,

FOREIGN EVIDENCE AMENDMENT BILL 2008

I write in respect of the *Foreign Evidence Amendment Bill 2008* ('the Bill') which was introduced into Parliament and read a second time in December 2008.

The Bill has been brought to the attention of the Law Council of Australia by its Criminal Law Liaison Committee, which has a number of concerns with the content of the Bill.

The Bill seeks to substantially alter the law on admissibility of foreign business records in criminal proceedings for offences against the laws of the Commonwealth, the States, the Territories and related civil proceedings.

The proposed amendments provide that if documents appear to be foreign business records, obtained in accordance with Part 3 of the *Foreign Evidence Act 1994* (Cth) ('the Act'), they will be admissible unless the defendant shows the documents are not reliable, not probative, or privileged.

If the Bill is enacted, the current statutory and common law rules of evidence on admissibility of business records will no longer apply to foreign business records, but will continue to apply to the admissibility of domestic business records. The statutory and common law rules on discretion to exclude will also be displaced for foreign business records.

The Law Council is concerned that the Bill would affect the admissibility of foreign business records and the judicial discretion to exclude foreign business records in criminal proceedings in the following ways:

- Foreign material which merely appears to consist of a business record would be treated as if it was in fact a business record.

- By displacing the general principles of admissibility currently governing business records and foreign material in favour of a requirement that an opposing party show that the record is not reliable, probative or privileged, the Bill effectively reverses the burden of proving admissibility. This is in stark contrast to the established principles applying to the use of all other business records, namely that the tendering party should bear the burden of establishing admissibility.

- The displacement of the general principles of admissibility by the new provisions will mean that the courts will be unable to draw upon the established rules of evidence to determine if the evidence is accurate and reliable. This may lead to global entities seeking to adduce business records from overseas that would not be admissible in Australia.

- There is no preservation in proposed subsection 24(4) of the rules of admissibility which would otherwise apply if the content of the foreign material were being sought to be adduced as oral evidence in the proceeding.

- Proposed subsection 24(4) departs from the 'business records rule' in section 69 of the Uniform Evidence Acts, which requires an assessment of the quality of knowledge of the person who made the representation in the business record. No such inquiry is required by the proposed subsection.

- The Act (both in its current and amended form) displaces the operation of the provisions of the Uniform Evidence Acts and the relevant common law principles which confer a discretion upon the court to exclude, or to limit the use of, evidence. Under the amended Act, for example, the only discretions available to the court would be those contained in sections 24A, 25 and 25A. Such protections are significantly weaker than those found in sections 135, 137 and 138 of the Uniform Evidence Act.

Finally, although the policy behind the Bill has been identified as the need to 'streamline' the requirements for adducing foreign material that appears to consist of a business record, little evidence has been offered to demonstrate why it is necessary to amend the existing provisions in this way. .

Reference was made in the second reading speech to the varying evidentiary rules governing the admission of business records around Australia and the difficulties this may pose for Australian authorities seeking to adduce foreign business records in Australian proceedings. However, it is not clear why this justifies the creation of a special regime for foreign business records adduced as evidence in criminal proceedings and related civil proceedings, as distinct from the creation of a regime which governs the adducing of business records generally.

Further, section 69 of the Uniform Evidence Act could already be described as a streamlined procedure. It allows the hearsay rule to be dispensed with where a business record satisfies the conditions set out in the provision and nothing in the Uniform Evidence Act requires that a business record be obtained by way of a prescribed procedure, or be in a prescribed form.

The Law Council regrets that it was not provided with the opportunity to express these concerns prior to the Bill's introduction into Parliament.

In light of the above concerns, the Law Council is of the view that the Bill should be withdrawn.

If the Bill is not withdrawn, I request that you refer the Bill to the Senate Committee on Legal and Constitutional Affairs. This would provide the legal profession and other interested members of the public with the opportunity to make submissions and open the Bill to public scrutiny.

I look forward to your timely response.

Yours sincerely,

John Corcoran

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PRACTITIONER ARTICLES

[1] Tax audits and foreign transactions: proposed amendments a backward step

by Malcolm Stewart, Partner, Speed and Stracey Lawyers

Tax audits are increasingly raising issues concerning foreign transactions. In practice, this involves consideration of what foreign evidence can be obtained, either by the ATO or the taxpayer, about such transactions and the admissibility of such evidence in legal proceedings in Australia. This is an area of law which up until now has received little attention in tax audits. This will change if proposed amendments to the *Foreign Evidence Act 1994*, currently before the House of Representatives, are enacted. The changes are contained in the *Foreign Evidence Amendment Bill 2008* that was introduced into the House of Representatives on 3 December 2008 - see report at 2008 WTB 51 [2290].

Foreign Evidence Act 1994

The *Foreign Evidence Act 1994* contains detailed provisions for:

- The examination of persons abroad as part of proceedings before a superior court in Australia (Part 2).
- The admissibility of foreign material (transcripts of oral evidence and exhibited documents) obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country in certain types of criminal and civil proceedings (Part 3).
- The admissibility of foreign material in ASIC civil penalty proceedings (Part 4).

What is of immediate relevance are the provisions in Pt 3 of the Act which concern the use of transcripts and exhibits in proceedings in an Australian court, being proceedings for an offence against the law of the Commonwealth or related civil proceedings. For the purpose of the Act, a related civil proceeding is any civil proceeding arising from the same subject matter from which the criminal proceeding arose, and in particular, includes a proceeding for the recovery of tax payable to the Commonwealth: s3(1).

As the Act presently stands, Pt 3 would not apply to proceedings challenging a tax assessment by way of the objection process in Pt IVC of the *Taxation Administration Act 1953*. It would apply, however, to civil proceedings for the recovery of tax.

Part 3 provides the authority for the Commonwealth Attorney-General to make a request to a foreign country for the testimony of a person. The request would normally be made in accordance with a mutual assistance agreement made with the country concerned under the *Mutual Assistance in Criminal Matters Act 1987*.

Part 3 also provides for the adducing of the testimony obtained overseas (with exhibits) into evidence in Australian proceedings.

Without detailing the relevant provisions in the Part, what is important for present purposes is that the established law in Australia governing the admissibility of evidence applies to that foreign material once it has been obtained. This is important because Australia has developed in the Uniform Evidence Acts (after careful expert and legislative consideration) a system for admitting into evidence that which is reliable and furthers the fairness and integrity of Australian legal proceedings. In recognition that foreign material may be different to Australian material, the Act contains an additional safeguard of a general discretion in the court to exclude the foreign evidence, even if it would otherwise be admissible.

Foreign Evidence Amendment Bill 2008

The *Foreign Evidence Amendment Bill 2008* was introduced into the House of Representatives on 3 December 2008 and has

been adjourned for debate until the House resumes in February 2009.

The Bill seeks to remove the various safeguards that govern the admissibility of documents if the document is a foreign business record. The Bill proposes to amend the Act so as to "streamline" the process for adducing foreign business records as evidence in Australian courts. At this stage, the proceedings are limited to criminal proceedings and related civil proceedings referred to above. ***There is a real concern, however, that this is the beginning of a process whereby such evidence will also be able to be admitted in Pt IVC disputes*** .

What the Bill seeks to do is to make it easier for regulatory authorities to obtain foreign business records and have them admitted into evidence in legal proceedings in Australia.

Foreign business records

The existing law in Australia has provided for a long period the relaxation of the hearsay rule, which prohibits evidence being admitted when the person is not called to testify in court and be cross-examined. One area of relaxation has been in respect of business records which have been prepared in the course of a business activity where it might be reasonably expected that they would be accurate.

The purpose of admitting such documents in evidence has been stated judicially in the following terms:

"Any significant organisation in our society must depend for its efficient carrying on upon proper records made by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned. In the every day carrying on of the activities of the business, people would look to and depend upon, those records, and use them on a basis that they are most probably accurate... When what is recorded is the activity of a business in relation to a particular person amongst thousands of persons, the records are likely to be a far more reliable source of truth than memory. They are often the only source of truth...": Hope JA, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 548-9.

Of course, foreign business records may not attain the heights of reliability and accuracy to which Hope JA had in mind in the above passage. Indeed, to describe them as records may be a euphemism. There is also a material difference between say bank statements and personal recollections or comments. The records of a foreign business man may be prepared with a totally different emphasis and objective than those kept by a large organisation in Australia. This is particularly relevant when non-financial matters and the like are contained in file notes about such things as meetings that took place and what is alleged to have been said and by who. Experience demonstrates that these sort of file notes can frequently not represent an accurate nor complete statement of the position but rather something written in the writer's particular environment, and written for the record to suit the interests of the writer or the writer's business. No doubt there are countries which are comparable with Australia in this respect but likewise it is anticipated there are many which are not.

It is worth noting that the testimony obtained overseas under the Bill may be of a person to the effect that he is currently employed by the foreign business concerned and that exhibited to his affidavit are certain records from that business made many years earlier. The person concerned may know nothing of the contents of the records or their accuracy or completeness. He need not swear to their accuracy or completeness or make proper inquiries in respect of them. In addition, there is no requirement that the person or the business concerned make their total records available for discovery by the other party.

Absence of safeguards

Even if it was good policy to relax the hearsay rule for foreign business records, the Bill fails to contain adequate safeguards.

The safeguards which are a primary concern include the following:

1. Under the Bill, it will not be necessary that a court satisfy itself that the foreign material is a business record, only that it appears to be so.
2. Under the Bill, it will not be necessary that the foreign material meet the established general rules of evidence in Australia as to admitting business records where the party tendering the material has the onus of satisfying the court that they are admissible. The Bill will in effect reverse the onus of proof and impose upon the other party the obligation to show that the business records are not reliable, not probative or subject to privilege.
3. Under the Bill, having made it easier to obtain the foreign material and to have it adduced into evidence, the Bill fails to contain the safeguards in the Uniform Evidence Act which confer a discretion upon the court to exclude or limit the use of such evidence. Rather, the only discretions available will be those set out in the proposed s24A and 25. These are significantly weaker than those found in ss135, 137 and 138 of the Uniform Evidence Acts.

Conclusion

The Bill represents a backwards step in the proper administration of justice in Australia and an unwelcome precedent for the future.

No case has been made out why the rules as to the admissibility of business records in general or in particular should be weakened. Even if there was a case, any new rules should apply to all business records, whilst preserving a general discretion to reject any foreign business records for the reasons previously given.

What we now have in the Bill is an ad hoc measure which runs counter to all of the substantial work done in producing the Uniform Evidence Acts. It is hoped that the Government withdraws the Bill and substantiates a case why there is a need for an amendment to the Act and introduces a target provision with safeguards which are at least as substantial as those existing at the moment.

[2] GST and problematic elements of the *Travelex* case

by Pier Paolo Parisi, Barrister and Solicitor, Sydney

The decision of the Federal Court (Emmett J) in *Travelex Limited v FCT* [2008] FCA 1961 (reported at para [31] of this *Bulletin*), involved the "question of whether the sale of foreign currency ... to a passenger who has passed through the Customs barrier" ("the Foreign Currency Transaction") was GST-free as "a supply that is made in relation to rights ... for use outside Australia" within s 38-190(1), Item 4(a) of the GST Act. Emmett J held that it was not, and what follows considers 2 problematic elements of the case.

"Goods", "services" and "rights" in the GST Act

Emmett J stated that "[n]one of the terms goods, services or rights is defined in the GST Act" ([9], emphasis in original). But it appears s 195-1 in fact says "*goods* means any form of tangible personal property". Like "supply", it is one of those defined words that does not have an asterisk when it appears in the Act (cf s 3-5(3)).

He later said that "[a]part from any provisions in the GST Act, the Fijian bank notes, being paper or plastic, may have been goods under the general law" ([22]). He then concluded, from the definition of "money" (in s 195-1), and ss 9-10(4) and 11-10(3), that "the GST Act treats money, being both Australian currency and foreign currency, as being in a category distinct from goods" ([34]). This is consistent with *C & E Commissioners v First National Bank of Chicago (Case C-172/96)* [1998] ECR I-4387.

As Emmett J acknowledged, this was a concession made in the case. It was said that "[b]oth the Commissioner and Travelex have accepted that the structure and scheme of the GST Act indicate that the supply constituted by the Fijian Currency Transaction was not a supply of goods" ([35]). However,