



Foreign Evidence Act 1994

Act No. 59 of 1994 as amended

This compilation was prepared on 1 January 2012
taking into account amendments up to Act No. 174 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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An Act about certain evidentiary matters involving overseas jurisdictions

Part 1—Preliminary

1 Short title *[see Note 1]*

This Act may be cited as the *Foreign Evidence Act 1994*.

2 Commencement *[see Note 1]*

- (1) Subject to subsections (2) and (4), this Act commences on the day on which it receives the Royal Assent.
- (2) Subject to subsection (3), Part 3 commences on a day to be fixed by Proclamation.
- (3) If Part 3 does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.
- (4) Subject to subsection (5), Part 5 commences on a day to be fixed by Proclamation.
- (5) The day fixed under subsection (4) must not be a day occurring before the Convention enters into force for Australia.

3 Definitions

- (1) In this Act, unless the contrary intention appears:

ASIC means the Australian Securities and Investments Commission.

Australian court means:

- (a) the High Court; or
- (b) a court exercising federal jurisdiction; or
- (c) a court of a State or Territory; or
- (d) a judge, justice or arbitrator under an Australian law; or

(e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; and, for the purposes of Part 6, includes a person or body authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the person or body is empowered to require the answering of questions or the production of documents.

Australian law means a law (whether written or unwritten) of or in force in the Commonwealth, a State or a Territory.

business has a meaning affected by clause 1 of Part 2 of the Dictionary in the *Evidence Act 1995*.

business record means a document that:

- (a) 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
- (b) at any time was or formed part of such a record.

civil proceeding means a proceeding other than a criminal proceeding.

Convention means the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, a copy of the English text of which is set out in the Schedule.

criminal proceeding means a prosecution for an offence and includes a proceeding for the committal of a person for trial or sentence for an offence, but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953*.

designated offence means:

- (a) an offence against subsection 34L(4) of the *Australian Security Intelligence Organisation Act 1979*; or
- (b) an offence against section 49 of the *Aviation Transport Security Act 2004*; or
- (c) an offence against section 21 of the *Charter of the United Nations Act 1945*; or
- (d) an offence against Subdivision A of Division 72 of the *Criminal Code*; or
- (e) an offence against Part 5.3 of the *Criminal Code*; or

- (f) an offence against Part 5.4 of the *Criminal Code*; or
- (g) an offence against section 24AA or 24AB of the *Crimes Act 1914*; or
- (h) an offence against Division 1 of Part 2 of the *Crimes (Aviation) Act 1991*; or
- (i) an offence against section 8 of the *Crimes (Biological Weapons) Act 1976*; or
- (j) an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978*; or
- (k) an offence against section 8 of the *Crimes (Hostages) Act 1989*; or
- (l) an offence against the *Crimes (Internationally Protected Persons) Act 1976*; or
- (m) an offence against section 6 of the *Crimes Act 1914* that relates to an offence mentioned in any of the above paragraphs.

Note: For other ancillary offences, see section 11.6 of the *Criminal Code*.

document means any record of information, and includes:

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph.

examination includes any proceeding that is for the taking of evidence of a person conducted by the judicial authorities of a foreign country in relation to a letter of request issued as a result of an order made by a superior court under Part 2.

foreign business authority means a person or body that has, under a law of a foreign country, functions relating to the administration or enforcement of a law of that country that regulates, or relates to the regulation of, business or persons engaged in business.

foreign law means a law (whether written or unwritten) of or in force in a foreign country.

foreign material means:

Section 3

- (a) for the purposes of Part 3—the testimony of a person that:
 - (i) was obtained as a result of a request of a kind referred to in section 21; and
 - (ii) complies with the requirements of section 22; including any exhibit annexed to such testimony; and
- (b) for the purposes of Part 4—the testimony of a person that:
 - (i) was obtained as a result of a request of a kind referred to in section 29; and
 - (ii) complies with the requirements of section 30; including any exhibit annexed to such testimony.

foreign public document means a document to which Article 1 of the Convention applies, other than a document executed in a foreign country (if any) that has objected to Australia's accession to the Convention.

inferior court means any of the following courts (other than a superior court):

- (a) a court of a State when exercising federal jurisdiction;
- (b) subject to subsection (2), a court of a Territory (other than the Northern Territory);
- (c) a court of the Northern Territory when exercising jurisdiction conferred or vested by an Act of the Parliament.

proceeds of crime law means the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*.

related civil proceeding, in relation to a criminal proceeding, means any civil proceeding arising from the same subject matter from which the criminal proceeding arose, and, in particular, includes:

- (a) a proceeding under a proceeds of crime law; or
- (b) a proceeding under the *Customs Act 1901*; or
- (c) a proceeding for the recovery of tax, or of any duty, levy or charge, payable to the Commonwealth.

superior court means:

- (a) the High Court; or
- (b) the Federal Court of Australia or the Family Court of Australia; or

- (c) the Supreme Court of a State, or the Family Court of Western Australia, when exercising federal jurisdiction; or
 - (d) subject to subsection (2), the Supreme Court of a Territory (other than the Northern Territory); or
 - (e) the Supreme Court of the Northern Territory when exercising jurisdiction conferred or vested by an Act of the Parliament.
- (2) On and after a day fixed by Proclamation:
- (a) the Supreme Court of the Australian Capital Territory ceases to be a superior court for the purposes of this Act except so far as it exercises jurisdiction conferred or vested by an Act of the Parliament; and
 - (b) any other court of the Australian Capital Territory ceases to be an inferior court for the purposes of this Act except so far as it exercises jurisdiction conferred or vested by an Act of the Parliament.

4 References to evidence taken in an examination

A reference in this Act to evidence taken in an examination includes a reference to:

- (a) a document produced at the examination; and
- (b) answers made to any written interrogatories presented at the examination, whether the answers are made in writing or are made orally and put in writing.

5 External Territories

This Act extends to each external Territory.

6 Act to bind Crown

This Act binds the Crown in all its capacities.

Part 2—Examination of witnesses abroad

Division 1—Proceedings in superior courts

7 Orders for taking evidence abroad

- (1) In any proceeding before a superior court, the court may, if it appears in the interests of justice to do so, on the application of a party to the proceeding, make an order, relating to a person outside Australia:
 - (a) for examination of the person on oath or affirmation at any place outside Australia before a judge of the court, an officer of the court or such other person as the court may appoint; or
 - (b) for issue of a commission for examination of the person on oath or affirmation at any place outside Australia; or
 - (c) for issue of a letter of request to the judicial authorities of a foreign country to take the evidence of the person or cause it to be taken.
- (2) In deciding whether it is in the interests of justice to make such an order, the matters to which the court is to have regard include the following:
 - (a) whether the person is willing or able to come to Australia to give evidence in the proceeding;
 - (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;
 - (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.

8 Directions and requests relating to orders

- (1) If a court makes an order of the kind referred to in paragraph 7(1)(a) or (b), the court may, at the time of making the order or at a later time, give such directions as it thinks just relating to the procedure to be followed in relation to the examination, including directions about:
 - (a) the time, place and manner of the examination; and
 - (b) any other matter that the court thinks relevant.

- (2) If a court makes an order of the kind referred to in paragraph 7(1)(c), the court may include in the order a request about any matter relating to taking that evidence, including any of the following matters:
- (a) examination, cross-examination or re-examination of the person, whether the person's evidence is given orally, on affidavit or otherwise;
 - (b) attendance of the legal representative of each party to the proceeding in question and participation of those persons in the examination in appropriate circumstances;
 - (c) any matter prescribed by the regulations.

9 Use of evidence taken in an examination

- (1) Subject to subsection (2), the court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
- (a) a person's evidence taken in an examination held as a result of an order under subsection 7(1); or
 - (b) a record of that evidence.
- (2) Evidence of a person so tendered is not admissible if:
- (a) it appears to the court's satisfaction at the hearing of the proceeding that the person is in Australia and is able to attend the hearing; or
 - (b) the evidence would not have been admissible had it been adduced at the hearing.

Division 2—Proceedings in the Federal Magistrates Court and inferior courts

9A Orders for taking evidence abroad—Federal Magistrates Court

Child support or family law matters

- (1) The Family Court of Australia may, on the application of a party to a proceeding before the Federal Magistrates Court in a child support or family law matter, exercise the same power to make an order of the kind referred to in Division 1 as the Family Court of Australia has under that Division for the purpose of a proceeding in the Family Court of Australia.

Matters other than child support or family law matters

- (2) The Federal Court of Australia may, on the application of a party to a proceeding before the Federal Magistrates Court in a matter other than a child support or family law matter, exercise the same power to make an order of the kind referred to in Division 1 as the Federal Court of Australia has under that Division for the purpose of a proceeding in the Federal Court of Australia.

Definition

- (3) In this section:

child support or family law matter means:

- (a) a matter arising under the *Family Law Act 1975* or regulations under that Act; or
- (b) a matter arising under the *Child Support (Assessment) Act 1989* or regulations under that Act; or
- (c) a matter arising under the *Child Support (Registration and Collection) Act 1988* or regulations under that Act.

10 Orders for taking evidence abroad—inferior courts

- (1) The Supreme Court of a State or Territory may, on the application of a party to a proceeding before an inferior court in that State or Territory, exercise the same power to make an order of the kind referred to in Division 1 for the purpose of that proceeding as the
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Supreme Court has under that Division for the purpose of a proceeding in the Supreme Court.

- (2) This section does not apply to a proceeding before a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975*.

11 Orders for taking evidence abroad—family law matters

- (1) The appropriate court may, on the application of a party to a proceeding before a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975*, exercise the same power to make an order of the kind referred to in Division 1 for the purpose of that proceeding as the appropriate court has under that Division:
- (a) if it is the Family Court of Australia—for the purpose of any proceeding before it; or
 - (b) otherwise—for the purpose of a proceeding before it when it is exercising jurisdiction under the *Family Law Act 1975*.
- (2) In this section:

appropriate court means:

- (a) if the proceeding takes place in a State other than Western Australia, or in a Territory other than the Northern Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands—the Family Court of Australia; or
- (b) if the proceeding takes place in Western Australia, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands—the Family Court of Western Australia; or
- (c) if the proceeding takes place in the Northern Territory—the Supreme Court of the Northern Territory.

12 Use of evidence taken in an examination

- (1) Subject to subsection (2), if an order has been made under section 9A, 10 or 11 for the purposes of a proceeding before the Federal Magistrates Court or an inferior court, the court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
- (a) a person's evidence taken in an examination held as a result of the order; or

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- (b) a record of that evidence.
- (2) Evidence of a person so tendered is not admissible if:
 - (a) it appears to the Federal Magistrates Court's satisfaction or the inferior court's satisfaction, as the case may be, at the hearing of the proceeding that the person is in Australia and is able to attend the hearing; or
 - (b) the evidence would not have been admissible had it been adduced at the hearing.

Division 3—Subsequent proceedings

13 Directions for use in subsequent proceedings of evidence taken abroad

- (1) If, under subsection 10(1), a superior court makes an order in relation to a committal proceeding, it may include in the order a direction that evidence taken outside Australia under the order may, subject to this Division, be tendered in a proceeding that is:
 - (a) a criminal proceeding that results from the committal proceeding; or
 - (b) a related civil proceeding.
- (2) If, under subsection 7(1) or 10(1), a superior court makes an order in relation to a criminal proceeding (other than a committal proceeding), it may include in the order a direction that evidence taken outside Australia under the order may, subject to this Division, be tendered in a proceeding that is a related civil proceeding.

14 Use of that evidence in subsequent proceedings

- (1) This section applies to a proceeding to which a direction, included in an order under subsection 7(1) or 10(1), relates.
- (2) Subject to subsection (3), the court before which the proceeding takes place may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination held as a result of the order under subsection 7(1) or 10(1); or
 - (b) a record of that evidence.
- (3) A person's evidence so tendered is not admissible if:
 - (a) it appears to the court's satisfaction at the hearing of the subsequent proceeding that the person is in Australia and is able to attend the hearing; or
 - (b) the evidence would not have been admissible had it been adduced at the hearing of the subsequent proceeding.

Division 4—Miscellaneous

15 Discretion to exclude evidence

- (1) This section applies to any civil proceeding or criminal proceeding in a superior court, the Federal Magistrates Court or an inferior court.
- (2) If it is in the interests of justice to do so, a court may exclude from the proceeding evidence obtained under this Part, even if it is otherwise admissible.
- (3) This Part does not affect a court's power under any other law to exclude, or limit the use of, evidence:
 - (a) because it has been obtained unlawfully or improperly; or
 - (b) because it would, if admitted, operate unfairly or be unfairly prejudicial to a party; or
 - (c) for any other reason.

16 Variation or revocation of orders

- (1) A superior court may vary or revoke an order made by the court under section 7, 9A, 10 or 11.
- (2) The power to vary an order includes the power to:
 - (a) include in the order a direction under section 13; or
 - (b) vary or revoke a direction under section 13 that is included in the order.
- (3) If an order under section 7 or 10 that includes a direction under section 13 is revoked, the direction under section 13 is taken to have been revoked at the same time.

17 Courts may exercise certain powers in chambers

A court may exercise its power under section 7, 9A, 10, 11, 13 or 16 in chambers.

18 Operation of other laws

This Part is not intended to exclude or limit the operation of any Australian law, or of any rule or regulation made under such a law, that provides for the examination of witnesses outside Australia for the purpose of a proceeding in Australia.

19 Rules of court

- (1) The power to make rules regulating the practice and procedure of a superior court extends, for the purpose of regulating proceedings brought under this Part in or before that court, to making any rules:
 - (a) prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part; and
 - (b) in particular, prescribing matters relating to the practice and procedure of that superior court in proceedings for making an order under Division 1 or 2.
- (2) Rules so made must not be inconsistent with this Act or with regulations made under section 46.
- (3) This section does not affect any power to make rules under any other law.

Part 3—Use of foreign material in criminal and related civil proceedings

Division 1—Preliminary

20 Proceedings to which this Part applies

- (1) This Part applies to a proceeding, in any Australian court, that is:
 - (a) a criminal proceeding for an offence against the law of the Commonwealth; or
 - (b) a related civil proceeding; or
 - (c) a proceeding under a proceeds of crime law.
- (2) This Part also applies to a proceeding, in any court of a State or Territory specified in the regulations, that is:
 - (a) a criminal proceeding for an offence against the law of that State or Territory; or
 - (b) a related civil proceeding of a kind specified in the regulations in respect of that State or Territory; or
 - (c) a proceeding under a law that is a corresponding law within the meaning of a proceeds of crime law.

Division 2—Obtaining foreign material

21 Requests for foreign material

This Part applies to testimony, and any exhibit annexed to such testimony, obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country for the testimony of a person, and any exhibit annexed to such testimony, to be made available.

22 Requirements for testimony

- (1) The testimony must have been taken:
 - (a) on oath or affirmation; or
 - (aa) under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned; or
 - (b) 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.
- (2) The testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made.

23 Form of testimony

- (1) The testimony may be reduced to writing or be recorded on a tape, disk or other device from which sounds or images are capable of being reproduced.
- (2) The testimony need not:
 - (a) be in the form of an affidavit; or
 - (b) constitute a transcript of a proceeding in a foreign court.

Division 3—Using foreign material

24 Foreign material may be adduced as evidence

- (1) Subject to this section, foreign material may be adduced in a proceeding to which this Part applies.
- (2) The foreign material is not to be adduced as evidence if:
 - (a) it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing; or
 - (b) the evidence would not have been admissible had it been adduced from the person at the hearing.
- (3) Paragraph (2)(b) does not apply if:
 - (a) the foreign material is a business record; and
 - (b) the only reason why the evidence would not have been admissible had it been adduced from the person at the hearing is that an Australian law relating to hearsay evidence (however described) would have applied to the evidence.
- (4) For the purpose of determining whether foreign material is a business record, and may be adduced as evidence, the court may:
 - (a) examine the foreign material; and
 - (b) draw any reasonable inference from the form and contents of the foreign material as well as from any other matters from which inferences may properly be drawn.

25 Discretion to prevent foreign material being adduced—general

- (1) The court may direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.

Note: See also subsection 25A(1) (proceedings for designated offences).
- (2) Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:

- (a) the extent to which the foreign material provides evidence that would not otherwise be available; and
- (b) the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding; and
- (c) the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them; and
- (d) whether exclusion of the foreign material would cause undue expense or delay; and
- (e) whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

**25A Discretion to prevent foreign material being adduced—
proceedings for designated offences**

- (1) If a proceeding is:
 - (a) a criminal proceeding for a designated offence; or
 - (b) a proceeding under the *Proceeds of Crime Act 2002* in relation to a designated offence;and the prosecutor seeks to adduce foreign material as evidence in the proceeding, then:
 - (c) the court must not give a direction under subsection 25(1) in relation to the foreign material; and
 - (d) the court may direct that the foreign material not be adduced as evidence in the proceeding if the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

*Extended meaning of **prosecutor** and **defendant***

- (2) This section has effect, in relation to a proceeding under the *Proceeds of Crime Act 2002*, as if:
 - (a) the responsible authority (under that Act) in relation to the proceeding were the prosecutor; and
 - (b) each other party to the proceeding were a defendant in the proceeding.

Note: Under that Act, the responsible authority is the Commissioner of the Australian Federal Police or the Director of Public Prosecutions (see the definitions of *responsible authority* and *proceeds of crime*)

Part 3 Use of foreign material in criminal and related civil proceedings

Division 3 Using foreign material

Section 25A

authority in section 338 of that Act). Responsibility can be transferred between these authorities (see section 315B of that Act).

Timing of proceedings

- (3) It is immaterial whether proceedings covered by subsection (1) were instituted before or after the commencement of this section.

Definition

- (4) In this section:

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.

Division 4—Miscellaneous

26 Certificates relating to requests made to foreign countries

- (1) The Attorney-General or an authorised officer may, by signed writing, certify that specified documents or things were obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General.
- (2) It is presumed (unless evidence sufficient to raise doubt is adduced to the contrary) that the documents or things specified in the certificate were obtained as a result of that request.
- (3) In this section:
authorised officer means a person:
 - (a) who is an SES employee or acting SES employee in the Attorney-General's Department; and
 - (b) whom the Attorney-General has, by notice published in the *Gazette*, appointed as an authorised officer.

27 Operation of other laws

This Part does not limit the ways in which a matter may be proved, or evidence may be adduced, under this Act (other than this Part) or any other Australian law.

Part 4 Use of foreign material and records of foreign business authorities in certain civil proceedings

Division 1 Preliminary

Section 28

Part 4—Use of foreign material and records of foreign business authorities in certain civil proceedings

Division 1—Preliminary

28 Proceedings to which this Part applies

This Part applies to a proceeding, in an Australian court, that:

- (a) is a civil proceeding other than a related civil proceeding; and
- (b) is a proceeding under the *Corporations Act 2001* or the *Australian Securities and Investments Commission Act 2001* in which ASIC is a party.

Division 2—Obtaining foreign material

29 Requests for foreign material

This Part applies to testimony, and any exhibit annexed to such testimony, obtained as the result of a request by ASIC to a foreign business authority for the testimony of a person, and any exhibit annexed to such testimony, to be made available.

30 Requirements for testimony

- (1) The testimony must have been taken:
 - (a) on oath or affirmation; or
 - (b) 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.
- (2) The testimony must:
 - (a) if the foreign business authority is an individual—purport to be signed or certified by that individual; or
 - (b) otherwise—purport to be signed by an office holder of the foreign business authority, and purport to bear an official or public seal of the foreign business authority or an office holder of the foreign business authority.

31 Form of testimony

- (1) The testimony may be reduced to writing or be recorded on an audio or video tape.
- (2) The testimony need not:
 - (a) be in the form of an affidavit; or
 - (b) constitute a transcript of a proceeding in a foreign court.

Part 4 Use of foreign material and records of foreign business authorities in certain civil proceedings

Division 3 Using foreign material

Section 32

Division 3—Using foreign material

32 Foreign material may be adduced as evidence

- (1) Subject to subsection (2), foreign material may be adduced in a proceeding to which this Part applies.
- (2) The foreign material is not to be adduced as evidence if:
 - (a) it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing; or
 - (b) the evidence would not have been admissible had it been adduced from the person at the hearing.

33 Discretion to prevent foreign material being adduced

- (1) The court may direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.
- (2) Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:
 - (a) the extent to which the foreign material provides evidence that would not otherwise be available; and
 - (b) the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding; and
 - (c) the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them; and
 - (d) whether exclusion of the foreign material would cause undue expense or delay; and
 - (e) whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

Division 4—Records of foreign business authorities

34 Evidence of records of foreign business authorities

Evidence of a record of a foreign business authority may be adduced in a proceeding to which this Part applies by producing a document that:

- (a) purports to be a copy of, or an extract from or summary of, the record; and
- (b) purports to have been certified by:
 - (i) if the foreign business authority is an individual—that individual; or
 - (ii) otherwise—an office holder of the foreign business authority;

to be a true copy, extract or summary, as the case may be.

Part 4 Use of foreign material and records of foreign business authorities in certain civil proceedings

Division 5 Miscellaneous

Section 35

Division 5—Miscellaneous

35 Certificates relating to foreign material

- (1) The Chairperson of ASIC or the Deputy Chairperson of ASIC may, by signed writing, certify that specified foreign material was obtained as a result of a request made to a foreign business authority by ASIC.
- (2) It is presumed (unless evidence sufficient to raise doubt is adduced to the contrary) that the foreign material specified in the certificate was obtained as a result of that request.

36 Operation of other laws

This Part does not limit the ways in which a matter may be proved, or evidence may be adduced, under this Act (other than this Part) or any other Australian law.

Part 5—Authenticating foreign public documents

37 Certificates attached to foreign public documents

- (1) This section applies in relation to a foreign public document that has placed on it or annexed to it a certificate issued under the Convention.
- (2) In a proceeding 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:
 - (a) the authenticity of the signature on the foreign public document; and
 - (b) the capacity in which the person signing the foreign public document has acted; and
 - (c) where appropriate, the identity of the seal or stamp that the foreign public document bears.
- (3) Subject to section 39, an Australian court, or a person performing a function or exercising a power under an Australian law, must not require any formality other than the certificate in order to certify:
 - (a) the authenticity of the signature on the foreign public document; and
 - (b) the capacity in which the person signing the foreign public document has acted; and
 - (c) where appropriate, the identity of the seal or stamp that the foreign public document bears.

38 Foreign public documents not requiring legalisation

If a foreign public document is not subject to a requirement of legalisation, an Australian court, or a person performing a function or exercising a power under an Australian law, must not require a certificate issued under the Convention to be placed on or annexed to the foreign public document in order to certify:

- (a) the authenticity of the signature on the foreign public document; and
- (b) the capacity in which the person signing the foreign public document has acted; and

- (c) where appropriate, the identity of the seal or stamp that the foreign public document bears.

39 Lesser formalities for authentication etc.

This Part does not prevent an Australian court, or a person exercising a function or power under an Australian law, requiring or accepting as evidence of:

- (a) the authenticity of the signature on a foreign public document; or
- (b) the capacity in which the person signing a foreign public document has acted; or
- (c) where appropriate, the identity of the seal or stamp that a foreign public document bears;

a lesser formality than a certificate, issued under the Convention, placed on or annexed to the foreign public document.

Part 6—Taking evidence for proceedings in foreign courts

40 Application of this Part

- (1) This Part applies in relation to any proceedings before an Australian court that are proceedings for the taking of evidence for use in proceedings instituted in or before a foreign court.
- (2) The Attorney-General's power to make an order under section 42 may only be exercised in relation to proceedings mentioned in subsection (1).
- (3) In this section:

authority means any person or body authorised to take or receive evidence:

- (a) whether on behalf of a court or otherwise; or
- (b) whether or not the person or body is empowered to require the answering of questions or the production of documents.

foreign court means any court, or authority, of a foreign country or a part of such a country.

41 Exercise of powers under this Part

The Attorney-General must not exercise a power under this Part unless he or she is satisfied that it is desirable to do so for the purpose of preventing prejudice to Australia's security.

42 Orders

- (1) The Attorney-General may make a written order prohibiting one or more of the following acts:
 - (a) the production of a document;
 - (b) the production of a thing;
 - (c) the giving of evidence or information, whether in relation to the contents of a document or otherwise.

Section 43

- (2) An order under this section may:
- (a) be directed to a particular person, to a class of persons or to persons generally; and
 - (b) relate to a particular proceeding, to a class of proceedings or to proceedings generally; and
 - (c) relate to a particular document, thing, evidence or information or to a class of documents, things, evidence or information.

43 Copies etc. of documents

- (1) If the Attorney-General makes an order under section 42 that has effect in relation to a document, the order also has effect in relation to any copy, extract or summary of that document that is in Australia as if the copy, extract or summary were the document.
- (2) Subsection (1) applies to a copy, extract or summary that is in existence at any time while the order concerned remains in force.

44 Intervention

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in proceedings to which this Part applies for the purpose of preventing a contravention of an order made under section 42.
- (2) If the Attorney-General intervenes in proceedings before a court under this section:
 - (a) a certificate by the Attorney-General stating that the doing of an act prohibited by an order made under section 42 would be prejudicial to Australia's security is conclusive evidence of that fact; and
 - (b) the court may, in the proceedings, make such order as to costs against the Commonwealth as the court thinks fit.

45 Injunctions

- If:
- (a) an order made under section 42 prohibits the production of a document or thing or the giving of evidence or information; and
 - (b) the Federal Court is satisfied, on application by the Attorney-General, that there are reasonable grounds for
-

believing that the person having possession or control of the document, thing, evidence or information might contravene the order;

the Federal Court may grant an injunction restraining that person from dealing with the document, thing, evidence or information in a manner specified in the injunction or restraining that person from dealing with the document, thing, evidence or information except in a manner specified in the injunction.

Part 7—Miscellaneous

46 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed by carrying out or giving effect to this Act;

and, in particular, may make regulations relating to the practice and procedure of a superior court in proceedings for making an order under section 7, 9A, 10 or 11.

Schedule—Hague Convention abolishing the requirement of legalisation for foreign public documents

Section 3

The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

- a)* documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process server ('huissier de justice');
- b)* administrative documents;
- c)* notarial acts;
- d)* official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

- a)* to documents executed by diplomatic or consular agents;
- b)* to administrative documents dealing directly with commercial or customs operations.

Article 2

Each contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the

formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an “allonge”, it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title “Apostille (Convention de La Haye du 5 octobre 1961)” shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.

When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp on the certificate are exempt from all certification.

Article 6

Each contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.

It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

- a) the number and date of the certificate,
- b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

Article 9

Each contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph d) of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

- a) the notifications referred to in the second paragraph of Article 6;
- b) the signatures and ratifications referred to in Article 10;
- c) the date on which the present Convention enters into force in accordance with the first paragraph of Article 11;
- d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;
- e) the extensions referred to in Article 13 and the date on which they take effect;
- f) the denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

Signatures omitted

Schedule Hague Convention abolishing the requirement of legalisation for foreign public documents

ANNEX TO THE CONVENTION

Model of certificate

The certificate will be in the form of a square with sides at least 9 centimetres long

APOSTILLE (Convention de La Haye du 5 octobre 1961)	
1. Country
This public document	
2. has been signed by
3. acting in the capacity of.....
4. bears the seal/stamp of.....
Certified	
5. at	6. the.....
7. by
8. No
9. Seal/Stamp:	10. Signature:

Table of Acts**Notes to the *Foreign Evidence Act 1994*****Note 1**

The *Foreign Evidence Act 1994* as shown in this compilation comprises Act No. 59, 1994 amended as indicated in the Tables below.

For application, saving or transitional provisions made by the *Corporations (Repeals, Consequential and Transitional) Act 2001*, see Act No. 55, 2001.

For all other relevant information pertaining to application, saving or transitional provisions see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Foreign Evidence Act 1994</i>	59, 1994	9 Apr 1994	Part 3 (ss. 20–27): 9 Oct 1994 Part 5 (ss. 37–39): 16 Mar 1995 (see <i>Gazette</i> 1995, No. GN8) Remainder: Royal Assent	
<i>Public Employment (Consequential and Transitional) Amendment Act 1999</i>	146, 1999	11 Nov 1999	Schedule 1 (item 491): 5 Dec 1999 (see <i>Gazette</i> 1999, No. S584) (a)	—
<i>Federal Magistrates (Consequential Amendments) Act 1999</i>	194, 1999	23 Dec 1999	Schedule 14: 23 Dec 1999 (b)	—
<i>Corporations (Repeals, Consequential and Transitional) Act 2001</i>	55, 2001	28 June 2001	Ss. 4–14 and Schedule 3 (items 201–205): 15 July 2001 (see <i>Gazette</i> 2001, No. S285) (c)	Ss. 4–14 [see Note 1]
<i>Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002</i>	86, 2002	11 Oct 2002	Ss. 1–3: Royal Assent Remainder: 1 Jan 2003 (see s. 2(1) and <i>Gazette</i> 2002, GN44)	—
<i>Crimes Legislation Enhancement Act 2003</i>	41, 2003	3 June 2003	Schedule 2 (item 7): Royal Assent	—

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005</i>	136, 2005	15 Nov 2005	16 Nov 2005	—
<i>ASIO Legislation Amendment Act 2006</i>	54, 2006	19 June 2006	Schedule 1 (item 15): 20 June 2006	—
<i>Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007</i>	3, 2007	19 Feb 2007	Schedules 1–3: 25 Aug 2007 Remainder: Royal Assent	—
<i>Foreign Evidence Amendment Act 2010</i>	55, 2010	3 June 2010	4 June 2010	Sch. 1 (items 15, 16, 18, 19)
<i>Crimes Legislation Amendment Act (No. 2) 2011</i>	174, 2011	5 Dec 2011	Schedule 2 (items 195–197): 1 Jan 2012	Sch. 2 (item 197)

Act Notes

- (a) The *Foreign Evidence Act 1994* was amended by Schedule 1 (item 491) only of the *Public Employment (Consequential and Transitional) Amendment Act 1999*, subsections 2(1) and (2) of which provide as follows:
- (1) In this Act, **commencing time** means the time when the *Public Service Act 1999* commences.
 - (2) Subject to this section, this Act commences at the commencing time.
- (b) The *Foreign Evidence Act 1994* was amended by Schedule 14 only of the *Federal Magistrates (Consequential Amendments) Act 1999*, subsection 2(1) of which provides as follows:
- (1) Subject to this section, this Act commences on the commencement of the *Federal Magistrates Act 1999*.
- (c) The *Foreign Evidence Act 1994* was amended by Schedule 3 (items 201–205) only of the *Corporations (Repeals, Consequentials and Transitionals) Act 2001*, subsection 2(3) of which provides as follows:
- (3) Subject to subsections (4) to (10), Schedule 3 commences, or is taken to have commenced, at the same time as the *Corporations Act 2001*.

Table of Amendments**Table of Amendments**

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part 1	
S. 3	am. No. 55, 2001; No. 86, 2002; No. 136, 2005; No. 54, 2006; No. 3, 2007; No. 55, 2010
Part 2	
Division 2	
Heading to Div. 2 of Part 2.....	rs. No. 194, 1999
S. 9A	ad. No. 194, 1999
Heading to s. 10	am. No. 194, 1999
S. 12	am. No. 194, 1999
Division 4	
Ss. 15–17	am. No. 194, 1999
Part 3	
Division 1	
S. 20	am. No. 136, 2005; No. 55, 2010
Division 2	
S. 22	am. No. 41, 2003; No. 55, 2010
S. 23	am. No. 55, 2010
Division 3	
S. 24	am. No. 55, 2010
Heading to s. 25	am. No. 136, 2005
Note to s. 25(1)	ad. No. 136, 2005
S. 25A	ad. No. 136, 2005 am. No. 174, 2011
Note to s. 25A(2)	ad. No. 174, 2011
Division 4	
Heading to s. 26	am. No. 55, 2010
S. 26	am. No. 146, 1999; No. 55, 2010
Part 4	
Division 1	
S. 28	am. No. 55, 2001
Division 2	
S. 29	am. No. 55, 2001
Division 5	
S. 35	am. No. 55, 2001
Part 7	
S. 46	am. No. 194, 1999

Table A

Table A

Application, saving or transitional provisions

Foreign Evidence Amendment Act 2010 (No. 55, 2010)

Schedule 1

15 Application of amendment made by item 7

The amendment made by item 7 of this Schedule applies in relation to testimony taken before or after the commencement of this item that is adduced on or after the commencement of this item.

16 Application of amendments made by items 10 and 11

The amendments made by items 10 and 11 of this Schedule apply in relation to foreign material obtained before or after the commencement of this item that is adduced on or after the commencement of this item.

18 Application of amendments made by items 13 and 14

The amendments made by items 13 and 14 of this Schedule apply in relation to a certificate that:

- (a) is given on or after the commencement of this item; and
- (b) relates to a document or thing obtained as a result of a request made before or after the commencement of this item.

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

- (1) Despite the amendments made by this Schedule, Part 3 of the *Foreign Evidence Act 1994* continues to apply to a proceeding mentioned in subsection 20(2) of that Act as if those amendments had not been made.
- (2) However, if the regulations provide that those amendments apply to such a proceeding in a court of a particular State or Territory, Part 3 of that Act, as amended by this Schedule, applies to that proceeding.
- (3) The Governor-General may make regulations for the purposes of subitem (2).

Table A

Crimes Legislation Amendment Act (No. 2) 2011 (No. 174, 2011)

Schedule 2

197 Application of amendments—the *Foreign Evidence Act 1994*

- (1) The amendments of the *Foreign Evidence Act 1994* made by items 195 and 196 of this Schedule apply as set out in this item.
- (2) The amendments apply in relation to proceedings under the *Proceeds of Crime Act 2002* started before, at or after the commencement of those items.
- (3) The amendments apply under subitem (2) of this item regardless of whether the conduct giving rise to those proceedings occurred, or is suspected to have occurred, before, at or after the commencement of those items.