THE *FOREIGN EVIDENCE ACT*

KAREN COLEMAN*

I. INTRODUCTION

As its title suggests, the *Foreign Evidence Act* 1994 (Cth) ("the Act") deals with certain evidentiary matters involving overseas jurisdictions.

The increasing globalisation of business activities and, indeed, life in general, has seen an increase in the number of legal matters, civil and criminal, involving more than one country. This, in turn, has resulted in the development and refinement of international procedures to enable the obtaining of evidence between countries.

The main purpose of the Act was to make new provisions concerning the admission into evidence in domestic civil or criminal proceedings of evidence obtained abroad by the Australian Securities Commission ("the ASC") or the Commonwealth Attorney-General. In addition, the then existing provisions contained in Parts IIIB and IIIC of the *Evidence Act* 1905 (Cth) were substantially re-enacted, with minor modifications. In particular, Part 2 of the Act now contains provisions for the obtaining of evidence abroad in civil and criminal matters.

The Act received royal assent on 9 April 1994 and, except for Parts 3 and 5, commenced on that day. Part 3 came into effect on 9 October 1994 and Part 5 commenced on 16 March 1995.[1]

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* LLB (Hons) (Syd), LLM (Lond); Partner, Mallesons Stephen Jaques, Sydney.

The primary difficulty in obtaining evidence outside Australia compulsorily is that the power of each nation's courts extends only to that court's national boundaries and no further. No Australian court has the power to compel a person outside Australia to produce documents to it or to require the attendance of that person to give evidence at a trial.

In *Re Tucker, ex parte Tucker*[2] Dillon LJ, delivering the judgment of the Court of Appeal, made the following comments in relation to a summons under s 25 of the *Bankruptcy Act* 1914 (UK) requiring a British subject resident in Belgium to produce documents and attend an English court for examination:

> I look, therefore, to see what s 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents. I note that the general practice of international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under RSC, Ord 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect s 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court.[3]

Similar issues arose in the New South Wales Supreme Court in *Arhill Pty Limited v General Terminal Co Pty Limited.*[4] In that case, Rogers CJ heard an application to set aside a subpoena which had been issued against a company in Japan. It was submitted that the Court had no power to give leave for the issue of a subpoena for service on a Japanese company in Japan. Alternatively, it was contended that, in the exercise of its discretion, the Court should not authorise service.

Chief Justice Rogers referred to Part 10 r 3 of the Supreme Court Rules 1970, which provided:

> Service outside the State of a document other than originating process is valid if the service is in accordance with the prior leave of the Court or is confirmed by the Court.

His Honour held:

> Part 10 r 3 is in terms clear authority for the Court to give leave to serve the subpoena outside Australia. The fact that an order made pursuant to it could, in some instances, involve an infringement of the sovereignty of another country does not mean that it is a reason for holding the rule to be invalid. Nonetheless, the rule should be construed consistently with "the established criteria of international law with regard to comity: cf *Re Tucker* (at 758, 611). Whichever way the rule is read down it will not authorise giving leave to serve a Japanese company in Japan.

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1 Proclamation of the Governor-General, Commonwealth of Australia Gazette No GN8, 1 March 1995. See, also, *Foreign Evidence (Transitional Provisions and Consequential Amendments) Act* 1994.

2 [1988] 2 WLR 748.

3 *Ibid* at 756.

4 (1990) 23 NSWLR 545.

> As well, even if an order for leave could be made under this rule, it seems that, in some circumstances, there would be a strong argument for setting aside any order for service on Japan as a matter of discretion.[5]

Even the United States courts, frequently the subject of international criticism for over-reaching their jurisdiction, have recognised these principles. For example, in *Federal Trade Commission v Compagnie de Saint Gobain-Pont-A-Mousson*[6] the United States Court of Appeals, District of Columbia Circuit declared invalid the service of a subpoena by the United States Federal Trade Commission on a French corporation by registered mail to its offices in France. Justice Wilkey expressed the opinion of the majority:

> When compulsory process is served, however, the act of service itself constitutes an exercise of one nation's sovereignty within the territory of another sovereign. Such an exercise constitutes a violation of international law... Given the compulsory nature of a subpoena, however, subpoena service by direct mail upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance, is perhaps maximally intrusive.[7]

As early as the beginning of last century, it was sought to overcome these difficulties by taking evidence on commission. An examiner was appointed to examine, cross-examine and re-examine the witnesses. The examiner could be a judge, officer of the court or any other person.

However, this procedure too was fraught with the essential difficulty that the commissioner had no power once he arrived on the foreign shores to compel witnesses to appear before him or to produce documents. By the beginning of this century this procedure had almost been superseded by the letter of request procedure, whereby a court seeking evidence outside its jurisdiction would write to the court with relevant jurisdiction, asking the assistance of that court to obtain the evidence and promising reciprocal treatment.

This practice was later formalised in conventions which committed the signatory countries to providing the assistance if the requirements of the convention were satisfied. Initially, these conventions were bilateral. In the civil arena, this process has culminated now in a multilateral convention, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded on 18 March 1970 ("the Hague Convention").[8]

In the criminal arena, the process is still dealt with largely on a bilateral basis, either in a bilateral treaty or other arrangement between the two countries.

II. OBTAINING EVIDENCE OUTSIDE AUSTRALIA

There are now three main regimes for the obtaining of evidence abroad (putting aside the regime in the case of bankruptcy or company liquidation):

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5 *Ibid* at 553.

6 636 F 2d 1300 (1980).

7 *Ibid* at 1313.

8 The Convention came into force for Australia on 22 December 1992.

- the powers of the Commonwealth Attorney General pursuant to the *Mutual Assistance in Criminal Matters Act* 1987 (Cth) and otherwise;
- the powers of the ASC pursuant to its memoranda of understanding with other foreign business authorities; and
- the power of Australian courts to make an order for the issue of a letter of request to the judicial authorities of a foreign country requesting the taking of evidence, or for the examination of a person outside Australia by a commissioner, judge of the court, officer of the court or such other person as the court may appoint.

A. The Attorney-General's Powers

The *Mutual Assistance in Criminal Matters Act* 1987 (Cth) confers power on the Attorney-General to seek evidence abroad. Section 10 provides that requests by Australia for international assistance in criminal matters may be made by the Attorney-General. Section 12 provides that the Attorney-General may, in his or her discretion, request an appropriate authority of a foreign country to arrange for:

(a) evidence to be taken in a foreign country; or
(b) documents or other articles in the foreign country to be produced;

for the purpose of a proceeding in relation to a criminal matter in Australia.

Section 6 provides that nothing in the *Foreign Evidence Act* prevents the provision or obtaining of international assistance in criminal matters otherwise than as provided in the Act or pursuant to a treaty or other arrangement between Australia and a foreign country.

Significantly, material obtained by the Attorney-General under the *Mutual Assistance in Criminal Matters Act* or via other international arrangements is usually obtained subject to a restriction that the material will only be used in relation to the criminal matters under investigation specified in the request for assistance and for no other purpose.

B. The ASC

The ASC is working to set up its own framework for international reciprocal assistance through the establishment of memoranda of understandings ("MOUs") with its counterparts abroad. MOUs are statements of intent between agencies, reflecting a willingness to co-operate on mutually agreed terms in respect of information exchange, investigative assistance and regulatory matters generally.[9] As at 27 March 1995, the ASC had signed MOUs with the following agencies:

- HM Treasury and the United Kingdom Securities and Investment Board;
- the Hong Kong Securities and Futures Commission;
- the Securities Commission of New Zealand;
- the Securities and Exchange Commission and the Commodity Futures Trading Commission in the United States; and
- the Commission des Operations de Bourse in France.[10]

9 ASC Digest, memo 135.
10 *Ibid.*

Legislative provision to enable the ASC to honour its obligations under these MOUs is provided in the *Mutual Assistance in Business Regulation Act* 1992 (Cth). Section 5(1) provides:

> The object of this Act is to enable Commonwealth regulators to render assistance to foreign regulators in their administration or enforcement of foreign business laws by obtaining from persons relevant information, documents and evidence and transmitting such information and evidence and copies of such documents to foreign regulators.

As is the case in relation to evidence obtained by the Commonwealth Attorney-General, evidence obtained from abroad by the ASC is almost invariably subject to an undertaking that it will only be used by the ASC for its purposes and not otherwise.

C. The Powers of the Courts

The power of certain Australian courts to take steps to obtain evidence abroad is now dealt with in the Act. The powers in the Act will be examined in detail later in this article. At this stage, it is important to observe that evidence obtained in this way will almost always be subject to an express or implied undertaking that it will only be used in connection with the proceedings for which it was obtained.

III. ACCESS TO THE FOREIGN EVIDENCE

Once material has been obtained from an overseas jurisdiction and brought back to Australia, an issue may arise as to who may have access to that material. For example, in a matter in which the ASC was conducting an investigation, there may well be several litigants, or potential litigants, such as the company itself, who wish to pursue remedies. For example, where the company wishes to bring an action against its directors, evidence which the ASC has obtained from abroad may be important or even crucial. Similarly, in a case where the Attorney-General is investigating a criminal matter with civil consequences, the civil litigant may have a great interest in obtaining the material which the Attorney-General has obtained abroad using his powers in the *Mutual Assistance and Criminal Matters Act*.

A civil litigant with an interest in documents obtained by the Attorney-General or the ASC would normally, after the commencement of proceedings, have a power to compel the production of documents presently in Australia by way of subpoena. However, as noted earlier, the documents obtained by the Attorney-General or the ASC will often be subject to an undertaking or restriction that the documents which have been made available pursuant to the arrangements for mutual assistance will only be used for the express purpose for which they have been given. Further, they will in many cases have been obtained by the use of compulsory powers in the foreign country, expressly invoked because of the request from the Australian authorities.

The use of a domestic subpoena to obtain access to documents obtained from abroad does not appear to have been considered in any court in Australia or England. However, the subsequent use of a compulsory power to obtain

documents from an entity who itself obtained them by use of a compulsory power within a single jurisdiction has been considered in both England and Australia and the principles enunciated in these decisions are helpful in indicating how an Australian court might approach this problem were the issue to arise.

In *Marcel v Commissioner of Police of the Metropolis*[11] the police had seized documents using compulsory powers in the course of a criminal investigation. Subsequently, in separate civil proceedings relating to the same transaction, a subpoena duces tecum was issued requiring the police to produce at the trial certain documents which one of the defendants wished to use as evidence, including documents which had been seized by the police using their powers.

The English Court of Appeal held that the subpoena could be issued, subject to the true owner having the right to challenge the subpoena, or the production of documents, on any of the grounds on which a subpoena could be challenged. Lord Justice Dillon observed:

> All this emphasises, in my judgment, that the documents seized remain the property or the person from whom they were seized. That raises what to my mind is the essential question on this appeal, namely: why should not the police, having themselves no objection to doing so, be liable to produce to the court on a subpoena duces tecum documents which the true owner would be liable to produce on a similar subpoena if the documents were still in his possession.[12]

Lord Justice Nolan suggested that the correct approach in dealing with the problem was that the owners of the original documents should be no better off and no worse off, as regards the production of their documents on subpoena, than if the documents were still in their own hands. This approach examines the position of the original document holder as if the second seeker of the documents was in fact seeking to obtain them from the original owner.

A similar approach was followed by Sir Donald Nicholls V-C in *Morris v Director of the Serious Fraud Office*.[13] In that case, the Serious Fraud Office had obtained many documents from the auditors of an insolvent bank using their compulsory powers under legislation in the United Kingdom. Subsequently, the liquidators of the insolvent bank sought an order that the Serious Fraud Office be obliged to produce twenty-three categories of documents in their possession seized from other entities. Sir Donald Nicholls V-C referred to *Marcel* and held:

> That reasoning is equally applicable in the present case. There is no sound distinction between production of documents in answer to a subpoena and production of documents pursuant to an order made under s 236. In both cases, those from whom the documents were seized or the true owners of the documents, are in general entitled to an opportunity to present to the court any ground of objection they may have to the production of the documents. The court will take those matters into account when considering whether to make the order sought under s 236 or to set aside the subpoena in whole or in part.[14]

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11 [1992] Ch 225.
12 *Ibid* at 254.
13 [1993] Ch 372.
14 *Ibid* at 384.

These English authorities were considered in *Bond v Tuohy*.[15] The Official Receiver had issued a notice under s 77C of the *Bankruptcy Act* 1966 (Cth) directed to certain police officers to obtain copies of documents which the police had themselves obtained from other parties under search warrants. It was submitted on behalf of the applicants, who were the original document holders, that s 77C should be construed as not permitting the issue of a notice to an authority, such as the police, for the production of documents which they had obtained by the exercise of some coercive power. Justice Ryan followed the approach in two English decisions referred to above, holding that

> ...it would be a curious result if the Official Receiver could not directly procure from an authority like the [Australian Federal Police] under s 77C documents which could be procured from their actual owners under s 77C, or indirectly from their owners, or probably the AFP itself, under s 130.[16]

The cornerstone of each of these three decisions was that the second seeker of the documents would have been entitled to use its powers of mandatory process to obtain the documents from the original holders or owners of the documents. All that had happened was that the possession of the documents had passed to another party, namely the first user of compulsory power. Each court sanctioned the second user of the power obtaining the documents from the then holder of the documents because it was satisfied that the power sought to be used could have been used against the original document holder or owner, subject to the original owners or holders receiving notice so as to give them the same opportunity to object as if the notices had been issued directly to them.

The situation in relation to evidence obtained from abroad will present greater difficulties. It seems highly unlikely that the purported use of an Australian domestic power to obtain documents from the Attorney-General or the ASC, which they have in turn obtained from abroad, would be able to establish that this domestic power could have been used vis a vis the original holder.

An example will illustrate the difficulty. The Attorney-General may seek the production of documents from banks in Switzerland via appropriate communication with the relevant authorities in Switzerland, pursuant to arrangements in place between the governments of the Commonwealth of Australia and Switzerland. If the Swiss authorities decide to accede to the request, they obtain the documents from the Swiss banks by use of valid domestic powers. Having thus obtained the documents, they are then remitted to the Commonwealth Attorney-General, subject to the undertaking that they be used only for the specific purpose for which they were granted. An entity then purporting to use an Australian domestic power of production to take the documents from the Commonwealth Attorney-General or the officers to whom the documents had been passed, would not be able to establish that as against the original documents holders, the Swiss bank, it would have been entitled to obtain the documents using the domestic power. That reason alone would appear to be an insurmountable obstacle for it being granted access to the documents.

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15 (1995) 128 ALR 595.

16 *Ibid* at 606.

In addition, the court would have to consider the significance of allowing the domestic power to override any relevant undertaking given by the Commonwealth Attorney-General or the ASC that the documents would only be used for the purpose specified. Were the court to override that undertaking, there would be a substantial risk that the arrangements which are in place between the Commonwealth of Australia and other countries would no longer be honoured, on the basis that there could be no guarantee that the restriction on use would be observed.

In these circumstances, the Australian courts may allow an invocation of public interest immunity to excuse government officials from compliance with a domestic notice. A detailed examination of this doctrine is beyond the scope of this article. However, the decision in *Aboriginal Sacred Sites Protection Authority v Maurice* is a pertinent example of the circumstances in which the immunity may be invoked.[17] The Aboriginal Sacred Sites Protection Authority resisted the production of the documents prepared by its employees or persons under contract to it on a claim of public interest immunity. The majority upheld the objection to the production of documents, Bowen CJ holding as follows:

> It is not easy to isolate the factors which are of critical importance in deciding whether a particular case not at the higher levels of government attracts the immunity. Confidentiality of the material is not alone sufficient though it may be of significance...
> The fact that disclosure may dry up a source of information is also of some significance. The protection of informers against disclosure has always been an important factor. ... The reason for this rule regarding informers appears to have two bases, first that the disclosure would cause the flow of information to dry up and, secondly, disclosure may place the informer's health at risk.[18]

For these reasons, it appears unlikely that an Australian court would permit the use of domestic powers to obtain access to documents obtained by the Commonwealth Attorney-General or the ASC in circumstances where:

- the domestic power could not have been used to obtain the documents from the original owners or document holders; and
- the documents are subject to an undertaking or restriction that the documents will be used only for the purposes for which they had been sought and no other purpose.

The position may well be different after the documents have been used at a public trial in Australia and have thereby passed into the public arena. However, even in that situation, the consequences of Australia's arrangements for obtaining access to international evidence would have to be examined and the issue remains one for the courts to consider and resolve. In addition, it will be open to the ASC or the Attorney-General to seek a release from the restrictions in particular cases. Some treaties also provide that victims of the crimes may inspect the documents.

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17 (1986) 65 ALR 247.
18 *Ibid* at 250-1.

IV. ADMISSIBILITY OF THE FOREIGN MATERIAL

A. Admissibility Generally

After the successful invocation by the Attorney-General or by the ASC of their powers to obtain evidence abroad, either the transcript of evidence given by a witness abroad under compulsory force or documents, either originals or copies, produced pursuant to an order for production will normally be brought back to Australia. In many instances, that material could not be admitted into evidence in Australian domestic proceedings, unless witnesses could be made available to the court to give oral testimony in conformity with the rules of evidence.

However, in many cases the reason why the evidence will have been obtained abroad is because of the inability to force a person resident abroad to attend the Australian court to give oral testimony. Thus, these rules of evidence have the potential to render nugatory the regimes in place to allow the Commonwealth Attorney-General and the ASC to obtain evidence abroad.

The matter was the subject of discussion at the National Complex White Collar Crime Conference held between 15 and 17 June 1992. That conference passed the following resolution:

> 5. Foreign Evidence
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> The conference supports the implementation of current action being taken by the Commonwealth and encourages the States and Territories to draft legislation which will:
>
> (a) enable transcripts of evidence taken at a foreign court pursuant to a request by Australia under the Mutual Assistance Act to be admissible, subject to discretion in evidence in court proceedings relating to offences, provided that the transcripts are authenticated in the prescribed manner;
>
> (b) enable affidavits or other material provided by the foreign country in support of the chain of custody of documents seized in that country pursuant to a request by Australia under the Mutual Assistance Act to be admissible, subject to discretion in evidence if authenticated as requested;
>
> (c) make the admission of material obtained pursuant to a request by Australia under the Mutual Assistance Act admissible, subject to the discretion of the court conducting the proceedings in Australia; and
>
> (d) extend the legislation to criminal proceedings in all Australian courts (subject to the agreement of the States and Territories).[19]

When the Minister for Justice, Mr Duncan introduced the Bill at its second reading on 2 March 1994 he said:

> Under the present law, documentary foreign material available pursuant to mutual assistance treaties or arrangements frequently cannot be admitted into evidence unless witnesses are made available to give oral testimony in conformity with the traditional rules of evidence. Currently, only a small proportion of the material received from foreign countries is admissible as evidence without a foreign witness giving oral testimony in Australia. It is costly and cumbersome to make a foreign witness available in Australia. Implementation of the part is expected to reduce the need for foreign witnesses to be made available, thereby lowering the overall cost of obtaining foreign evidence and improving the capacity of the courts to have regard to all

19 National Complex White Collar Crime Conference, Conference Papers, 15-17 June, 1992.

relevant material received from foreign countries pursuant to requests by or on behalf of the Attorney-General. Implementation of the part would improve the effectiveness of mutual assistance in criminal matters arrangements and thereby assist complex prosecutions involving foreign evidence.[20]

B. Part 3 - The Attorney-General

Part 3 of the Act deals with the admissibility into evidence 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 that testimony.[21] It is thus intended to deal with material which has been obtained by the Commonwealth Attorney-General either under the *Mutual Assistance in Criminal Matters Act* or otherwise. Section 24(1) provides that foreign evidence in the form of testimony and exhibits which otherwise complies with the provisions of Part 3 may be admitted in a proceeding to which the Part applies.

Section 20(1) provides that the Part applies to proceedings in any Australian court which is either:

(a) a criminal proceeding for an offence against the law of the Commonwealth; or
(b) a related civil proceeding.

'Australian court' is defined in s 3(1) to mean:

(a) the High Court;
(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.

'Civil proceeding' is defined in s 3(1) as a "proceeding other than a criminal proceeding". 'Related civil proceeding' is also defined in that subsection in the following terms:

> ...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:
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> (a) a proceeding under the Proceeds of Crime Act 1987; 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...

On its face, the phrase "arising from the same subject matter from which the criminal proceeding arose" is very wide and would appear to extend to a wide range of civil proceedings between private litigants. For example, if a company director had stolen one million dollars from a company and criminal charges had been laid in relation thereto, civil proceedings by the company against the director would on their face appear to be civil proceedings arising from the same subject matter from the which the criminal proceeding arose. If that were the proper meaning to be applied to the Act, then the potential operation of Part 3 would be

20 Australia, House of Representatives, Debates, Wednesday, 2 March 1994, Weekly Hansard, p 1659.
21 Section 21.

very wide, assuming the civil litigant could obtain access to the evidence in light of the issues discussed above in Part III of this article.

However, further examination of the Act indicates that this wide definition is not intended. Firstly, the particular examples given of a 'related civil proceeding' in s 3(1) are all proceedings which can only be pursued by or in the name of the Commonwealth or an officer of the Commonwealth. Secondly, the wide definition would render illogical the provisions in Part 4 dealing with the use of foreign material obtained by the ASC in proceedings under the Corporations Law or the ASC Law to which the ASC is a party and civil proceedings other than related civil proceedings.

Section 20(2) provides that the operation of Part 3 can be extended to any court of a State or Territory in relation to criminal proceedings for an offence against the law of that State or Territory or a related civil proceeding. Regulations were made in October 1994 which extend the operation of s 20(2) to the six Australian States, the Australian Capital Territory and the Northern Territory. The related civil proceedings to which the subsection is extended are also specified in regulation 4(2) of the *Foreign Evidence (Foreign Material - Criminal and Related Civil Proceedings) Regulations* 1994.

As a result of s 20(1), the application of the Part is quite narrow, applying only to criminal proceedings and related civil proceedings as narrowly contemplated. The Act has no application in relation to the use of material obtained by the Attorney-General in ordinary civil proceedings.

C. Part 4 - The ASC

Part 4 of the Act deals with the use of testimony, and any exhibit annexed to such testimony, obtained as a result of a request by the ASC to a foreign business authority for the testimony of a person and any exhibit annexed to such testimony. Section 32(1) provides that this evidence may be admitted in proceedings to which the Part applies, subject to compliance with the other provisions of the Part.

The potential application of the Part is wider than Part 3 as it applies to any proceedings in an Australian court (as defined above) which are either:

- proceedings under the Corporations Law or the ASC Law in which the ASC is a party; or
- a civil proceeding other than a related civil proceeding.[22]

The effect of the definition of 'related civil proceeding' as discussed above would appear to be that the material obtained by the ASC cannot be used in proceedings in the nature of a recovery of a tax, of a duty, levy or charge payable to the Commonwealth, but can be used in ordinary private civil litigation to which the material is relevant. The operation of Part 4 is thus potentially, much wider than Part 3 which does not extend into the realm of private litigation.

The utility of the Part in practice in relation to private proceedings will depend on the extent to which the problems described above in Part III of this article can

22 Sections 28(a) and (b).

be overcome by a civil litigant to obtain access to the material obtained by the ASC in the first place.

D. Formal Requirements and Other Pre-requisites

Parts 3 and 4 contain identical provisions setting out formal requirements, certain pre-requisites and the conferring of a discretion on the court as to whether the foreign material should in any event be admitted.

Sections 22 and 23 (in relation to the material obtained by the Attorney-General) and ss 30 and 31 (in relation to material obtained by the ASC) set out the formal requirements in order for the testimony and accompanying exhibits to qualify for admission. These requirements can be summarised as follows:

- The testimony must have been taken on oath or affirmation, or under such caution or admonition as would be accepted for the purposes of giving testimony in proceedings before the courts in the foreign country concerned.[23]
- The testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the Attorney-General made the request; or, in the case of an ASC request, by an individual if the foreign business authority is an individual and otherwise by an office holder of the foreign business authority.[24]
- The testimony must purport to bear an official public seal of the country or a minister or state, or a department or officer of the government of the country to which the Attorney-General sent his request; or, in the case of an ASC request signed by an office holder of the foreign business authority, purport to bear an official or public seal of the foreign business authority or an office holder of the foreign business authority.[25]
- The testimony may be reduced to writing or be recorded on an audio or video tape.[26]
- The testimony need not be in the form of an affidavit or constitute a transcript of proceedings in a foreign court.[27]

The foreign material may not be admitted into evidence if:

- it appears to the court's satisfaction at the hearing of the proceedings that the person who gave the testimony concerned is in Australia and is able to attend the hearing; or
- the evidence would not have been admissible had it been adduced from the person at the hearing.[28]

These provisions emphasise the need to ensure that the evidence taken abroad is taken in a form that would be admissible if it had been adduced from the person at the actual hearing in Australia. This would appear to necessitate the presence of

23 Sections 22(1)(a) and (b), 30(1)(a) and (b).
24 Sections 22(2)(a), 30(2)(a) and (b).
25 Sections 22(2)(b), 30(2)(d).
26 Sections 23(1), 31(1).
27 Sections 23(2), 31(2).
28 Sections 24(2), 32(2).

Australian lawyers, or persons conversant with the Australian laws of evidence, at the examination of a person abroad in order to ensure that this requirement can be satisfied. Failure to pay sufficient heed to this requirement at the time of the examination of the witness abroad may result in the whole exercise being rendered nugatory because the evidence cannot later be admitted.

Even if the requirements of all of these provisions are satisfied, ss 25(1) and 33(2) give the court a discretion not to admit the evidence if it appears to the court that, having regard to the interests of the parties to the proceedings, justice would be better served if the foreign material were not adduced as evidence.

Subsection (2) of ss 25 and 33 set out five factors which the court must take into account in exercising this discretion, but without limiting the matters which it can take into account. The five matters which the court must take into account are:

- the extent to which the foreign material provides evidence that would not otherwise be available;
- the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding;
- 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;
- whether exclusion of the foreign material would cause undue expense or delay; and
- whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

There is thus no certainty that evidence obtained by the Commonwealth Attorney-General or the ASC, in the correct form as laid down by the Act and from a witness who is not in Australia or otherwise available to attend the hearing, will be admitted. Rather than attempting to lay down iron clad rules as to when the foreign material can be admitted, the matter has been left to the discretion of the court. It appears that this was a deliberate measure taken to ensure that the legitimate rights of an accused person (or other party to proceedings to which these Parts relate) and against whom the evidence was tendered are protected. To date, there appear to have been no decisions under the Act and we must await developments on a case by case basis before the operation and effectiveness of the new Parts can be assessed.

V. ORDERS BY AN AUSTRALIAN COURT TO OBTAIN EVIDENCE ABROAD

Part 2 of the Act replaced Part IIIB of the *Evidence Act* 1905 (Cth) for the reason that the balance of that Act was being replaced by other legislation. It was thought desirable to find a new home for the substantive provisions of Part IIIB, which dealt with orders made by an Australian court to obtain evidence abroad.

Section 7(1) of the Act empowers the courts to make an order relating to a person outside Australia. If it appears in the interests of justice to do so, the court may make an order:

(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 an 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 a person or cause it to be taken.

Only the third procedure, the issue of a letter of request to the judicial authorities of a foreign country, will be of any utility in a situation where the person whose evidence is sought is not a volunteer. In that situation, it will be necessary to obtain orders from the court to whose jurisdiction the person is amenable compelling the giving of that evidence. The letter of request is a letter addressed to those judicial authorities asking them to take that evidence.

The provisions apply to:

- the High Court;
- the Federal Court of Australia or the Family Court of Australia;
- the Supreme Court of a State, or the Family Court of Western Australia, when exercising federal jurisdiction (in relation to proceedings before it or on the application of a party to a proceeding before an inferior court in that State or Territory); and
- the Supreme Court of a Territory in some instances.[29]

The court has a discretion as to whether to make an order. Section 7(1) directs the court to have regard to the interests of justice. Section 7(2) provides that 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:

(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.

Even if an order is made for the taking of evidence, the right to tender that evidence at the trial does not automatically flow. Sections 9 and 12 (in relation to the inferior State courts and courts exercising jurisdiction in relation to family law matters) give the court a discretion to permit the tender in evidence in the proceedings of a person's evidence taken in an examination, or a record of that evidence.

Sections 9(2) and 12(2) provide that the evidence 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.

This section emphasises that the procedure is not to be used to replace the basic rule that persons living in Australia and able to attend the hearing should do so and the need to ensure that evidence taken abroad is in admissible form according to Australian rules of evidence.

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29 See definition of superior courts in s 3, and ss 10 and 11.

The procedures in this Part apply to both civil and criminal proceedings. Constitutional challenge to these provisions was recently brought in the unreported decision of the *Director of Public Prosecutions v Alexander*.[30] In this case the Director of Public Prosecutions sought the issue of a letter of request to the judicial authorities of the United States of America to take, or cause to be taken, the evidence of two residents of that country. The accused submitted that the relevant sections in the *Evidence Act* of 1905 which are now in identical terms in the Act were constitutionally invalid in so far as they related to a trial for a federal offence on indictment in that:

- they permitted the conduct of that trial to take place in the absence of the jury; and
- they conferred federal jurisdiction on a person or persons not part of the court in which the trial is to take place.

Section 80 of the Constitution provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. This section was modelled upon the guarantee of trial by jury contained in Article III s 2(3) of the United States Constitution which, apart from the nature of the crimes to which it applies, was in similar terms, providing that:

> In all criminal prosecutions, the accused shall enjoy the right to a...public trial, by an impartial jury...; ...[and] to be confronted with witness against him...

Chief Justice Hunt rejected these arguments. Firstly, the taking of evidence pursuant to a letter of request (or on commission) was not part of the trial itself. Rather, it was to be characterised as a procedure for the obtaining of evidence which would subsequently be tendered at the trial. Secondly, it was not an absolute rule, even in the United States, that the only evidence which can be admitted is evidence given in front of the jury. His Honour relied on the decision of the United States Supreme Court in *Ohio v Roberts* as authority for the proposition that the guarantee given by the Fifth Amendment was never intended to produce the extreme result that hearsay evidence which would otherwise normally be permitted would be excluded in a criminal trial.[31] His Honour also referred to the decision by the Court of Appeals (Second Circuit) in *United States v Salamis* in which certain evidence had been taken pursuant to a letter of request to a French court.[32] Objection was taken to this and the Court of Appeals held that there had been no violation of the accused's constitutional right to confront witnesses.[33] The circumstances in which the evidence was taken were said to be "illustrative of the classic 'indicia of reliability' that allay a court's concerns about the physical absence of a hearsay declarant", as the evidence had been given in a judicial setting before a judge who had power to "sanction" the witness, the witness was under oath and was cross-examined and the evidence was corroborated on certain points by other evidence in the trial.

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30 (Unreported, Supreme Court of New South Wales, Hunt CJ, 29 September 1993).

31 448 US 56 (1980) at 63-6.

32 855 Fed R (2d Series) 944 (1988).

33 *Ibid* at 955.

Thirdly, the reliance upon the United States provision was held to be misplaced. His Honour noted that s 80 did not expressly provide for a right to confront the witnesses in the presence of the jury and held that there was no reason to imply in s 80 a right of the accused to confront the Crown witnesses in the presence of the jury if that right was to be construed in the absolute terms for which it had been contended.

Fourthly, s 80 was to be construed prima facie as an adoption of the institution of trial by jury as that institution was well known in Australia at the time of the Constitution. At that time, it was well recognised by the common law that a deposition of a witness taken in the presence of the accused and in relation to which the accused had the opportunity to cross-examine was admissible at the trial if the witness had subsequently died, and notwithstanding that a charge against the accused at the time of the deposition had been changed. These procedures necessarily denied to the accused the right to confront the witness in the presence of the jury but were justified because of the opportunity given for the accused to cross-examine the witness when the evidence was taken.

His Honour therefore concluded that the constitutional challenge to the validity of ss 7V to 7W of the *Evidence Act* based on s 80 of the Constitution failed. In relation to the argument that the sections conferred federal jurisdiction on a person or persons not part of the court, his Honour held that there was no exercise of federal jurisdiction where evidence was being taken pursuant to a letter of request. The taking of the evidence was not part of the trial but a procedure for the obtaining evidence to be tendered at the trial.

VI. DOCUMENTARY EVIDENCE

Both Part 2 in providing for the taking of evidence outside of Australia and its subsequent admission in proceedings in Australia and Parts 3 and 4 dealing with the admissibility of evidence obtained abroad by the Attorney-General or the ASC are premised on the basis that the evidence to be taken will primarily be the oral evidence of a witness and not documentary evidence.

Section 7(1) refers in subparagraphs (a) and (b) to the examination of a person on oath or affirmation at any place outside Australia and in subparagraph (c) to the taking of the evidence of the person outside Australia. Section 9(1) gives the court the power to admit into evidence the person's evidence taken in the examination or a record of that evidence.

Similarly, s 24(1) provides that foreign material may be adduced in a proceeding to which the Part applies, subject to the court's discretion and s 32(1), dealing with material obtained by the ASC, again uses the term 'foreign material', giving the court a discretion to allow that material to be adduced. 'Foreign material' is defined as the testimony of a person and any exhibits annexed to such testimony.[34]

These provisions appear to exclude the possibility of a letter of request being issued pursuant to s 7(1) for the purpose of obtaining documentary evidence only

34 See s 3(1).

and to exclude the possibility of the tender of documents alone which are not annexed to testimony.

This restriction is of quite fundamental significance and the basis for it is unclear. The procedures in our own courts certainly do not discriminate in the same way. The procedure for discovery between parties, notices to produce and the issue of subpoenae to third parties are all frequently used procedures in our own court which provide for the production of documents alone. It therefore seems odd, on its face, that the procedures under discussion have been confined only to oral testimony with exhibits annexed to that testimony.

The distinction is also of enormous practical importance. In many cases, it will be a corporation who has the custody, control and possession of documents. Yet it is well recognised that an order cannot be made for the examination of a company as a witness. Furthermore, it was held by the English Court of Appeal in *Penn-Texas Corporation v Murat Anstalt* that a company cannot be required to attend, by its proper officer to give oral evidence.[35] Sir Donald Nicholls V-C described the problem in the following terms in *Panayiotou v Sony Music Entertainment Limited (UK)*:

> Hence the difficulty: an order to produce a company's documents cannot be directed at an individual; the order must be directed at the company. But an order to produce documents pursuant to a letter of request can only be ancillary to an order to attend for examination, and such an order does not lie against the company. If this is correct, it would mean that the letter of request procedure is never available to compel production of documents which belong to a company and are in its possession. A submission having this result calls for the closest examination.[36]

Sir Donald Nicholls V-C went on to examine the relevant provisions of the English statute and rules of court and appeared to accept that the rules themselves would not permit a letter of request for the production of documents only unless they were amended. However, his Lordship went on to hold that the court had the power to issue a letter of request for documents only stemming from its inherent jurisdiction. He held that:

> It cannot be right that, in the absence of legislation or a rule, the English court is unable to take advantage of this situation when necessary for the purpose of doing justice in a case currently before the English court. That really would make no sense at all.[37]

His Lordship also said:

> It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make [sic] a request to a foreign court for assistance. It is not making an order. It is not making an order addressed to a foreign court or to witnesses. Further, the subject matter on which assistance is sought, the obtaining of evidence, is one over which the court has long exercised close control. This is a subject purely within the court's own control. Thus, the process by which the court compels the attendance of witnesses, or compels the production of documents as evidence, is a process whose source is the court's own inherent powers.[38]

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35 [1964] 1 QB 40.

36 [1994] 2 WLR 214 AT 244.

37 *Ibid* at 247.

38 *Ibid* at 246.

In *Penn-Texas Corporation v Murat Anstalt (No 2)* it was held that, notwithstanding that a company could not be ordered to give oral evidence by its proper officer for foreign proceedings, it could be ordered to attend by its proper officer to produce specified documents.[39]

In *MacKinnon v Donaldson, Lufkin & Jenrette Securities Corporation* Hoffmann J proceeded upon the basis that the English court could issue a letter of request to the New York courts seeking production of documents.[40]

The same issues arose in Australia in *Elna Australia Pty Limited v International Computers (Australia) Pty Limited.*[41] In this case, the applicant sought the issue of a letter of request to the High Court in England for an order for the production of documents by an English company. The applicant submitted that the court had power to make such an order pursuant to Part IIIB of the *Evidence Act* 1905 (Cth) and O 24 of the Federal Court Rules. Justice Gummow rejected this contention on the ground that an order for the production of documents was not an order for the taking of evidence of the party ordered to produce the documents, whether an individual or a corporation appearing by its proper officer. His Honour then had to consider, as Sir Donald Nicholls had done in *Panayiotou*, whether the Federal Court had an inherent jurisdiction to issue a letter of request. His Honour referred to the decision in *Parsons v Martin* in which the Full Federal Court had held that a Court of Petty Sessions of Western Australia had no inherent right or power to cause the issue of a letter of request to the courts of other countries.[42] In referring to that decision, Gummow J noted that:

> the Full Court explained that (a) the expression 'inherent jurisdiction' has come to be used to describe the power a court may have independent of statutory authority and (b) in Australia there is in truth no court of unlimited jurisdiction in this sense.[43]

His Honour then concluded that the effect of the reasoning in *Parsons v Martin* was to deny the generality of the assertion by Wigmore that it should not be doubted that "any domestic court has inherent power at common law to issue...letters rogatory". He held that the statement was never true of the English superior courts exercising common law jurisdiction, and was true only of equity courts. Having reviewed the history of the issue of letters of request and the appointment of examiners or commissioners, his Honour concluded that the existing statutory powers did not authorise an order for the production of documents and that the Chancery and Judicature system powers plainly were directed to the taking of evidence which was not the order sought in the particular case.

Thus, we are presented with a situation of a Chancery judge in England and a judge of the Federal Court of Australia taking a different view as to the inherent powers of the courts in the Chancery and Judicature system.

The problem does not appear to be one of recent legislative drafting. The rules of the English High Court were first amended in 1884 to introduce a new rule,

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39 [1964] 2 QB 647.
40 [1986] Ch. 482.
41 (1987) 74 ALR 232.
42 (1984) 5 FCR 235 at 240-1.
43 Note 41 *supra* at 236.

Order 37 r 6A, introducing the possibility of a letter of request. That rule was in the following terms:

> If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 1 and 2 and the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37A and 37B in Appendix A.

The specimen letter of request in Form 37B requested the foreign court to summon the witness and to cause him "to be examined upon the interrogatories which accompany this letter of request (or viva voce)."

This rule was considered by the English Court of Appeal in *Cape Copper Co v Comptoir d'Escompte de Paris*.[44] The defendants had obtained an order for the examination of witnesses and then made a subsequent application for an order that a letter of request should issue under Order 37 r 6A to the French court for the purpose of obtaining production of documents. The court held that the application should be refused on the grounds that the application did not ask for the examination of any witnesses, and therefore the court had no jurisdiction to issue the letter of request. When this decision was considered by Sir Donald Nicholls V-C in *Panayiotou* he treated the decision as an authority on the interpretation of the old Order 37 r 6A and held that it did not exclude the exercise by the court of its inherent jurisdiction to issue a letter of request to the judicial authorities of a foreign country.

A similar restriction does not seem to have been imposed in relation to Australia's or England's treatment of an incoming letter of request, that is a request emanating from a foreign court to a court in Australia or England seeking its assistance. Article 1 of the Hague Convention provides:

> In civil or commercial matters a judicial authority of a contracting state may, in accordance with the provisions of the law of that state request the competent authority of another contracting state, by means of a letter of request, to obtain evidence or to perform some other judicial act.

Sir Donald Nicholls V-C in the *Panayiotou* case interpreted 'evidence' as being wide enough to embrace documentary evidence as well as oral testimony.[45] Furthermore, reference to the performance of other judicial acts would appear to be wide enough to extend to an order calling for the production of documents.

That conclusion is reinforced when one has regard to the relevant statutory provisions both at federal and State level dealing with incoming letters of request. No legislation was passed upon Australia's ratification of the Hague Convention, the view evidently being taken that the existing legislation was sufficient to effect compliance. In fact, there are statutory provisions at the federal and State level which, in relation to the assistance to be provided to a foreign court, each provide specifically that the court can make an order for the production of documents as part of its general power to make provision for obtaining evidence. The distinction between obtaining evidence and discovery is re-inforced by a provision in some of the State Acts which specifically prohibits orders:

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44 (1890) 38 WL 763.

45 Note 36 *supra* at 246.

- requiring a person to state what documents relevant to the proceedings are or have been in the person's possession, custody or power; or
- requiring production of documents other than particular documents specified in the order.[46]

It is also interesting to note that these statutory provisions are not confined to requests from the courts of countries which are signatories to the Hague Convention. It therefore would appear that, whilst Australian courts will order the production of documents in response to a request from a foreign court, they may not themselves have the power to make this request to foreign courts. If this is correct, it does result in a serious limit on the letter of request procedure for which there does not appear to be any justification. It is submitted that Part 2 should be amended to allow for an order seeking the production of documents and Parts 2, 3 and 4 amended to provide that documents so obtained can be admitted to evidence, provided they are admissible according to the Australian rules of evidence concerning the admission of documentary evidence. In some cases, this may require oral evidence from a person overseas. However, if the documents are first obtained, a party can then consider whether it is necessary to send a further letter of request seeking that oral evidence. To deny parties to Australian litigation access to documentary evidence overseas via the letter of request procedure whilst at the same time permitting the seeking of oral evidence seems illogical. Such a distinction was rejected by Devlin J (as he then was) when considering an incoming letter of request to the English High Court in *Radio Corporation of America v Rauland Corporation*.[47] The judge described the position as follows:

> The relevant distinction is not between written documents and oral testimony. If the testimony happened to be direct testimony which was immediately relevant to the issue it could not matter whether it was in a document or not. If the document was the best evidence then the document would have to be produced.[48]

Furthermore, whilst historically letters of request may have been founded on the examination of witnesses, there seems no basis for treating the process as applying exclusively to oral testimony.

The approach adopted in *Panayiotou* and in *MacKinnnon* means that the English courts, at least in the Chancery Division, have avoided this problem. Urgent steps should be taken to rectify the problem immediately by amendment to the Act.

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46 *Evidence Act* 1898 (NSW) Pt 9 (to be replaced from 1 September 1995 by *Evidence on Commission Act* Pt 4); *Evidence Act* 1958 (Vic) Div 1C; *Evidence Act* 1929 (SA) Pt VIB; *Evidence Act* 1906 (WA) ss 115-118C; *Evidence Act* 1994 (NT) ss 52, 53; *Evidence Act* 1977 (Qld) Div 2; *Evidence Act* 1910 (Tas) Pt VIII.

47 [1956] 1 QB 618.

48 *Ibid* at 647.

VII. CONCLUSION

Part 5 of the Act contains new provisions in relation to the admission of foreign public documents, honouring Australia's obligations under the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents.[49] A copy of the English text of the Convention is set out in the Schedule.

Part 6 of the Act, which replaced Part IIIC of the *Evidence Act* 1905 (Cth) sets out a procedure to enable the Commonwealth Attorney-General to object on grounds of national security, to the production of documents or other things or the giving of evidence or information for use in proceedings instituted in or before a foreign court.

The main changes effected by the Act related to the admission into evidence in Australia of evidence obtained abroad by the Attorney-General or the ASC abroad. As the ultimate admissibility of such documents has been left to the discretion of the courts, it remains to be seen how the regime will work in practice.

49 The Convention came into force on generally on 7 October 1992 and for Australia on 22 December 1992.