



InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

Policy Cross-domain

Archival Legislation in Australia Australian Evidence Act 1995

Compiled by Greg Kozak
February 2005

1. Introduction

This report is a review of the Evidence Act (1995) of Australia¹ as it pertains to recordkeeping practices. The report has three parts. The first part is a general introduction that provides additional information regarding the Act. The second section are the excerpted sections of the Act with additional commentary. The last section is a compilation of definitions. In the second section, those sections adjudged to be most applicable to InterPARES 2 policy research have been selected and quoted or summarised. This report is also meant to compliment the previous summary on Australian legislation.²

The Evidence Act is currently under review by the Attorney-General of Australia. The review is meant to create harmony between the Evidence Act and other Australian legislation. The main area under consideration that relates to recordkeeping practices is the hearsay rule and its exceptions. The commission reviewing the Evidence Act will report no later than December 5, 2005.³

2. Evidence Act 1995

Section 2.2 is useful because it relates specifically to evidence that can be adduced from documents. Section 48 allows copies of documents, reproduced by any device that reproduces its contents, to be submitted as evidence [Sect. 48 (1)b(i-ii)]. As mentioned above, a summary or an extract of a document can be submitted as evidence in lieu of the original [Sect. 48 (1)e(ii) & Sect. 50]. The reason for allowing summaries or extracts is convenience. The name of the person completing the summary must be provided. This is interesting, since diplomatically this summary would constitute an original with a new writer and author. If the document is public (see definitions below), the copy must be made by an authorised person [Sect. 48 (1)f(i-iii)]. As

¹ <http://www.legislation.nsw.gov.au/main/top/scanact/inforce/NONE/0>.

² See [http://www.interpares.org/display_file.cfm?doc=ip2\(policy\)archival_legislation_AUSTRALIA.pdf](http://www.interpares.org/display_file.cfm?doc=ip2(policy)archival_legislation_AUSTRALIA.pdf).

³ Source:

http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Third_Quarter_26_July_2004_-_ALRC_to_review_Evidence_Act_and_management_of_federal_offenders_-_1302004.

mentioned above, needing to provide the original record is no longer a requirement for evidence [Sect. 51]. Also, the court or the judge might require that a demonstration of the evidence be performed for inspection purposes [Sect. 53]. Although it is not known how this has been used in the past, it might be used to demonstrate the integrity and reliability of electronic recordkeeping systems; it is more likely, however, to have an expert comment on such matters.

In terms of the admissibility of annotations (in the archival sense) - called tags, labels and writing in the Act – these attachments to the record are admissible as evidence if they were attached to the record in the normal course of business, and, describe or state the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the record [Sect. 70]. This is interesting because, in the electronic world, this could relate to the metadata or any written annotations associated with a record. The Acts from other countries should be scanned to see if they have like provisions.

In the facilitation of proof section, evidence produced by processes, machines and other devices applies to a document or thing: (1a) that is produced wholly or partly by a device or process, and (1b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome. Furthermore, if it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome. [Sect. 146] Example: It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document [Sect. 146]. This section would apply directly to the integrity of the electronic system in question.

The previous section (i.e., 146) is followed by another similar section that deals with records produced in the course of business. This section [Sect. 147] applies to a document: (1a) that is produced wholly or partly by a device or process, and (1b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome. If: (2a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence), and (2b) the device or process is or was at that time used for the purposes of the business, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome. This appears to be the business exception to the hearsay law when applied to mechanically produced documents.

Section 149 states that it is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested. In other words, a signature is taken at face value unless there is reason to bring it into doubt. Likewise, in Section 150, a seal or signature of a public office holder is not questioned unless there is good reason. This relates to Sections 155 and 156 which speaks of the status of official records. Namely, state records are deemed to be admissible unless reasonable doubt can be raised.

Documents older than 20 years old that have been kept in the proper custody are presumed to be authentic and reliable [Sect. 152]. This section is commonly known as the ancient documents provision. This is very important for electronic records, since it becomes more complicated. Section 153 must be taken in conjunction with section 146 and 147. Namely, 146 and 147 relate to ‘proper custody.’ It should be noted that the law does not define what constitutes ‘proper authority,’ as it is probably assumed that such institutions that keep electronic records have proper policies and procedures in place.

Section 166 allows for a party to request a document in order to test it. Of note, it also specifies that a party can call a “person believed to be concerned in the production or maintenance of a specified document or thing, to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time, in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of **document** in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept” [Sect. 166 b-e]. This is an important section since this entails a competent person to testify on the reliability of the electronic recordkeeping processes at an organisation. If the person cannot sufficiently ‘defend’ the recordkeeping system, the evidence produced by the system is placed into doubt. Naturally this relates to other sections identified above. This provision is also mirrored in other country’s Evidence Acts (e.g., Canada). If the request to ‘defend’ the system is rejected or fails, the evidence is deemed not admissible [Sect. 169]

3. Definitions of Record

1. *Commonwealth Record* – (a) a record made by a Department within the meaning of the *Public Service Act 1999* of the Commonwealth, or (b) the Parliament, a House of the Parliament, a committee of a House of the Parliament or a committee of the Parliament, or (c) a person or body other than a Legislative Assembly holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth, or (d) body or organisation other than a Legislative Assembly, whether incorporated or unincorporated, established for a public purpose: (d-i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island), or (d-ii) by the Governor-General, or (d-iii) by a Minister of the Commonwealth, or (e) any other body or organisation that is a Commonwealth owned body corporate, and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), (d) or (e), but does not include a record made by a person or body holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth if the record was not made in connection with holding the office concerned, or exercising the power concerned. [Dictionary Part 1]
2. *Document* - means any record of information, and includes: (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph. [Dictionary Part. 1]

3. *Public Document* - means a document that: (a) forms part of the records of the Crown in any of its capacities, or (b) forms part of the records of the government of a foreign country, or (c) forms part of the records of a person or body holding office or exercising a function under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, or (d) is being kept by or on behalf of the Crown, such a government or such a person or body, and includes the records of the proceedings of, and papers presented to: (e) an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament, and (d) a legislature of a foreign country, including a House or committee (however described) of such a legislature. [Dictionary Part. 1]
4. *Representations in Documents* - For the purposes of this Act, a representation contained in a document is taken to have been made by a person if: (a) the document was written, made or otherwise produced by the person, or (b) he representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document. [Dictionary Sect. 6]
5. *References to Documents* - A reference in this Act to a document includes a reference to: (a) any part of the document, or (b) any copy, reproduction or duplicate of the document or of any part of the document, or (c) any part of such a copy, reproduction or duplicate. [Dictionary Part. 8]
6. *Document in Question* - reference to a document as to the contents of which it is sought to adduce evidence. [Sect. 47 (1)]
7. *Copy of a Document* - includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects. [Sect. 47 (2)]
8. *Business Record* (in the context of the business exception to the hearsay rule) - This section applies to a document that: (1a) either: (1a-i) 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 (1a-ii) at any time was or formed part of such a record, and (1b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business. [Sect. 69]