



Evidence Amendment Act 1985

No. 198 of 1985

An Act to amend the *Evidence Act 1905*

[Assented to 16 December 1985]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Evidence Amendment Act 1985*.

(2) The *Evidence Act 1905*¹ is in this Act referred to as the Principal Act.

Commencement

2. This Act shall come into operation on a day to be fixed by Proclamation.

Ancillary evidence

3. Section 7J of the Principal Act is amended—

- (a) by inserting in sub-section (1) “by an authorised person or if given” after “given” (first occurring); and
- (b) by adding at the end the following sub-sections:

“(3) Evidence relevant to a matter mentioned in section 7B, 7D or 7E shall not be given under sub-section (1) by an authorised person unless it appears to the court that—

- (a) it is not reasonably practicable for a person who had, at the relevant time or afterwards, a responsible position in relation to the making or keeping of the records concerned to give that evidence; or
- (b) having regard to all the circumstances of the case, undue expense would be caused by calling a person referred to in paragraph (a) as a witness.

“(4) In this section, ‘authorised person’ means—

- (a) in a case where the evidence is given at a place outside Australia—an Australian Diplomatic Officer or an Australian Consular Officer, as defined by the *Consular Fees Act 1955*, exercising functions in that place; or
- (b) in any case—a member of the Australian Federal Police of or above the rank of sergeant or a person authorised by the Attorney-General for the purposes of this section.”.

4. After Part IIIA of the Principal Act the following Part is inserted:

“PART IIIB—EXAMINATION OF WITNESSES ABROAD

Interpretation

“7T. In this Part, unless the contrary intention appears—

‘Australia’ includes the external Territories;

‘examination’ includes any proceeding 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 court under this Part;

‘inferior court’ means—

- (a) a court of a Territory other than the Northern Territory;
- (b) a court of a State when exercising federal jurisdiction; or
- (c) a court of the Northern Territory when exercising jurisdiction conferred upon it, or vested in it, by an Act of the Parliament,

not being a superior court;

‘superior court’ means—

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

- (c) the Supreme Court of a State, or the Family Court of Western Australia, when exercising federal jurisdiction;
- (d) the Supreme Court of a Territory (other than the Northern Territory); or
- (e) the Supreme Court of the Northern Territory when exercising jurisdiction conferred upon it, or vested in it, by an Act of the Parliament.

Extension to external Territories

“7U. This Part extends to every external Territory.

Proceedings in superior courts

“7V. (1) In any civil or criminal proceeding before a superior court, the court may, in its discretion and where it appears in the interests of justice to do so, on the application of a party to the proceeding, make, in relation to a person outside Australia, an order—

- (a) for the 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;
- (b) for the issue of a commission for the examination of the person on oath or affirmation at any place outside Australia; or
- (c) for the issue of a letter of request to the judicial authorities of a foreign country to take, or to cause to be taken, the evidence of the person.

“(2) In determining whether it is in the interests of justice to make an order under sub-section (1) in relation to the taking of evidence of a person, the matters to which the court shall 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.

“(3) Where a court makes an order under sub-section (1) of the kind referred to in paragraph (1) (a) or (b), the court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination, and to any other matter that the court thinks relevant.

“(4) Where a court makes, in relation to a proceeding, an order under sub-section (1) of the kind referred to in paragraph (1) (c) in relation to the taking of evidence of a person, the court may, in its discretion, include

in the order a request as to any matter relating to the taking of that evidence, including any of the following matters:

- (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;
- (b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;
- (c) any prescribed matter.

“(5) Subject to sub-section (6), 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 the evidence of a person taken in an examination held as a result of an order made under sub-section (1) or a record of that evidence.

“(6) Evidence of a person so tendered is not admissible if—

- (a) it appears to the satisfaction of the court 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 given or produced at the hearing of the proceeding.

“(7) Where it is in the interests of justice to do so, the court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under sub-section (1), notwithstanding that it is otherwise admissible.

“(8) The power vested in a court under sub-section (1) may be exercised in chambers.

“(9) In this section, a reference to evidence taken in an examination includes a reference to—

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

Proceedings in inferior courts

“7W. (1) A superior court, being the Supreme Court of a State or Territory, may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court in that State or Territory (other than 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 sub-section 7V (1) for the purpose of that proceeding as the superior court has under that sub-section for the purpose of a proceeding in the superior court.

“(2) On the application of a party to a proceeding before a court of summary jurisdiction in a State or Territory exercising jurisdiction under the *Family Law Act 1975*—

- (a) where the proceeding takes place in a State other than Western Australia or in a Territory other than the Northern Territory—the Family Court of Australia;
- (b) where the proceeding takes place in Western Australia—the Family Court of Western Australia; or
- (c) where the proceeding takes place in the Northern Territory—the Supreme Court of the Northern Territory,

may, in its discretion, exercise the same power to make an order of the kind referred to in sub-section 7V (1) for the purpose of that proceeding as the court has under that sub-section—

- (d) where the court is the Family Court of Australia—in relation to any proceeding before it; or
- (e) where the court is the Family Court of Western Australia or the Supreme Court of the Northern Territory—in relation to a proceeding before it when it is exercising jurisdiction under the *Family Law Act 1975*.

“(3) Sub-sections 7V (5), (6) and (7) apply in relation to evidence taken in an examination held as a result of an order made by a court by virtue of this section in relation to an inferior court as if—

- (a) in sub-sections (5), (6) and (7)—
 - (i) a reference to the proceeding were a reference to the proceeding in the inferior court; and
 - (ii) a reference to the court were a reference to the inferior court; and
- (b) in sub-sections (5) and (7), a reference to an order made under sub-section (1) were a reference to an order made by a court by virtue of this section.

“(4) The powers vested in a court under sub-section (1) or (2) may be exercised in chambers.

Exclusion of evidence in criminal proceeding

“7X. This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant.

Operation of other laws

“7Y. This Part is not intended to exclude or limit the operation of any law of the Commonwealth or of a State or Territory, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside Australia for the purpose of a proceeding in, or in a part of, Australia.

Regulations and rules of court

“7Z. (1) The Governor-General may make regulations, not inconsistent with this Part, prescribing all matters—

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

and, in particular, for and in relation to the practice and procedure of a superior court in proceedings for the making of an order under section 7V or 7W.

“(2) The power of an authority 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, not inconsistent with this Part or with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part, and in particular for and in relation to the practice and procedure of that superior court in proceedings for the making of an order under section 7V or 7W.

“(3) This section does not affect any power to make regulations or rules under any other law.”.

NOTE

1. No. 4, 1905, as amended. For previous amendments, see: No. 43, 1934; No. 80, 1950; No. 48, 1956; No. 28, 1963; No. 53, 1964; No. 80, 1973; No. 216, 1973 (as amended by No. 20, 1974); No. 31, 1974; No. 14, 1978; No. 139, 1979; Nos. 39 and 177, 1981; and No. 91, 1983.

[*Minister's second reading speech made in—
House of Representatives on 16 October 1985
Senate on 3 December 1985*]