

**EVIDENCE AMENDMENT (EVIDENCE ON
COMMISSION) ACT 1987**

No. 77 of 1987

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EVIDENCE AMENDMENT (EVIDENCE ON COMMISSION) ACT 1987

No. 77 of 1987

AN ACT to amend the Evidence Act 1910.

[Royal Assent 27 November 1987]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

1—This Act may be cited as the *Evidence Amendment* Short title. *(Evidence on Commission) Act 1987.*

2—(1) Except as provided by subsection (2), this Act shall Commencement. commence on the day on which it receives the Royal assent.

(2) Sections 4 and 5 shall commence on such day as may be fixed by proclamation.

3—In this Act, the *Evidence Act 1910** is referred to as Principal Act. the Principal Act.

* 1 Geo. V No. 20. For this Act, as amended to 1st June 1979, see the continuing Reprint of Statutes. Subsequently amended by No. 52 of 1981, Nos. 60 and 75 of 1982, No. 29 of 1984, Nos. 5, 21, and 51 of 1985, No. 34 of 1986, and No. 55 of 1987.

Insertion in
Principal Act of
new Parts VII
and VIII.

4—After section 144B of the Principal Act, the following Parts are inserted:—

**PART VII
EXAMINATION OF WITNESSES ABROAD**

Interpretation.

145—In this Part, unless the contrary intention appears—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“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 court of the State, except when exercising federal jurisdiction, not being the Supreme Court within the meaning of section 146.

Proceedings in
the Supreme
Court.

146—(1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.

(2) In any civil or criminal proceeding before the Supreme 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.

(3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:—

- (a) whether the person is willing or able to come to the State 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.

(4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (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.

(5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (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.

(6) Subject to subsection (7), the Supreme 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 subsection (2) or a record of that evidence.

(7) Evidence of a person tendered pursuant to subsection (6) is not admissible if—

(a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State 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.

(8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.

(9) The power vested in the Supreme Court under subsection (2) may be exercised in chambers.

(10) 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.

147—(1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of a kind referred to in subsection (2) of section 146 for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

(2) Subsections (6), (7), and (8) of section 146 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

(a) in subsections (6), (7), and (8)—

(i) a reference to the proceeding were a reference to the proceeding in the inferior court; and

(ii) a reference to the Supreme Court were a reference to the inferior court; and

(b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

(3) The power vested in the Supreme Court under subsection (1) may be exercised in chambers.

148—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. Exclusion of evidence in criminal proceedings.

149—This Part is not intended to exclude or limit the operation of any other law of the State, 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 the State. Operation of other laws.

150—(1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 146 or 147. Regulations and Rules of Court.

(2) The power of the judges of the Supreme Court, or a majority of them, to make Rules of Court, pursuant to section 197 of the *Supreme Court Civil Procedure Act 1932*, regulating the practice and procedure of the Supreme 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 or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 146 or 147 of this Act.

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

PART VIII

EXAMINATION OF WITNESSES OUTSIDE THE STATE BUT WITHIN AUSTRALIA

Application of
this Part.

151—This Part does not apply to an examination outside Australia, and references in this Part to persons, acts, matters, or things outside the State shall be read as excluding those outside Australia.

Interpretation.

152—In this Part, unless the contrary intention appears—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“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 court of the State, except when exercising federal jurisdiction, not being the Supreme Court within the meaning of section 153;

“judicial authority”, in relation to a place outside the State, means a court or person prescribed as an appropriate judicial authority for that place.

153—(1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.

Proceedings in
the Supreme
Court.

(2) In any civil or criminal proceeding before the Supreme 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 the State, an order—

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

(3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:—

- (a) whether the person is willing or able to come to the State 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.

(4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (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.

(5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (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.

(6) Subject to subsection (7), the Supreme 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 subsection (2) or a record of that evidence.

(7) Evidence of a person tendered pursuant to subsection (6) is not admissible if—

- (a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State 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.

(8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.

(9) The power vested in the Supreme Court under subsection (2) may be exercised in chambers.

(10) 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.

154—(1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of a kind referred to in subsection (2) of section 153 for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

Proceedings in inferior courts.

(2) Subsections (6), (7), and (8) of section 153 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

(a) in subsections (6), (7), and (8)—

(i) a reference to the proceeding were a reference to the proceeding in the inferior court; and

(ii) a reference to the Supreme Court were a reference to the inferior court; and

(b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

(3) The power vested in the Supreme Court under subsection (1) may be exercised in chambers.

155—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.

Exclusion of evidence in criminal proceedings.

156—This Part is not intended to exclude or limit the operation of any other law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside the State for the purpose of a proceeding in the State.

Operation of other laws.

Regulations and
Rules of Court.

157—(1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 153 or 154.

(2) The power of the judges of the Supreme Court, or a majority of them, to make Rules of Court, pursuant to section 197 of the *Supreme Court Civil Procedure Act 1932*, regulating the practice and procedure of the Supreme 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 or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 153 or 154 of this Act.

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

Renumbering of
Part VII of
Principal Act,
&c. (EVIDENCE
FOR USE IN
PLACES OUTSIDE
THE STATE).

5—(1) Part VII of the Principal Act (being the Part relating to evidence for use in places outside the State) is renumbered as Part IX.

(2) Part IX of the Principal Act (as renumbered by subsection (1)) is amended as follows:—

- (a) sections 145, 146, 146A, 147, 148, and 149 are renumbered as 158, 159, 160, 161, 162, and 163 respectively;
- (b) section 158, as renumbered by paragraph (a), is amended by omitting “section 146A”, where twice occurring, and substituting “section 160”;
- (c) section 159, as so renumbered, is amended by omitting “section 146A” and substituting “section 160”;
- (d) section 161, as so renumbered, is amended by omitting “Part VII” and substituting “Part IX”;
- (e) section 163, as so renumbered, is amended by omitting from subsection (2) “section 148” and substituting “section 162”.

6—The Principal Act is amended as set out in Schedule 1. Amendments of
Principal Act in
relation to
penalties for
certain offences.

SCHEDULE 1

Section 6

AMENDMENTS OF PRINCIPAL ACT IN RELATION
TO PENALTIES FOR CERTAIN OFFENCES

COLUMN 1 Provision of Principal Act amended	COLUMN 2 Amendment
Section 9 (2) (b)	Omit "a penalty of \$100", substitute "a fine not exceeding 5 penalty units".
Section 16	<p>(a) Insert "(1)" before "If";</p> <p>(b) Omit "he shall be liable to a penalty of \$40.", substitute "he is guilty of an offence and is liable on summary conviction to a fine not exceeding 10 penalty units or imprisonment for a period not exceeding 6 months."; and</p> <p>(c) Add the following subsection as subsection (2) of that section:—</p>
Section 17	<p>(2) Where a person has on any day omitted to do something, and his omission amounts to an offence against subsection (1), and he omits to do the same thing at any meeting or sitting of the commission held on some other day, each such omission shall be a separate offence.</p> <p>(a) Insert "(1)" before "If";</p> <p>(b) Omit "he shall be liable to a penalty of \$40.", substitute "he is guilty of an offence and is liable on summary conviction to a fine not exceeding 10 penalty units or imprisonment for a period not exceeding 6 months.";</p> <p>(c) Add the following subsection as subsection (2) of that section:—</p> <p>(2) Where a person has on any day done something, and his act amounts to an offence against subsection (1), and he does the same thing at any meeting or sitting of the commission held on some other day, each such act shall be a separate offence.</p>

