



AUSTRALIAN CAPITAL TERRITORY

Evidence (Amendment) Ordinance 1990

No. 4 of 1990

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910*.

Dated 18 June 1990.

BILL HAYDEN
Governor-General

By His Excellency's Command,

MICHAEL TATE
Minister of State for Justice and Consumer Affairs for and on
behalf of the Attorney-General

An Ordinance to amend the *Evidence Ordinance 1971* and for related purposes

Short title

1. This Ordinance may be cited as the *Evidence (Amendment) Ordinance 1990*.¹

(Ord. 1/90) Cat. No.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Principal Ordinance

2. In this Ordinance, “Principal Ordinance” means the *Evidence Ordinance 1971*.²

Repeal

3. Section 4 of the Principal Ordinance is repealed.

Insertion

4. After Part XII of the Principal Ordinance the following Parts are inserted:

**“PART XIIA—EXAMINATION OF WITNESSES OUTSIDE THE
TERRITORY BUT WITHIN AUSTRALIA**

Application

“85A. This Part applies only in relation to an examination within Australia, and accordingly a reference in this Part to a person or place outside the Territory shall be read as not including a reference to a person or place outside Australia.

Interpretation

“85B. In this Part—

‘examination’ includes any proceeding for the taking of evidence of a person conducted by a judicial authority of a place outside the Territory in accordance with a letter of request issued pursuant to an order made by the Supreme Court under this Part;

‘inferior court’ means a court of the Territory other than the Supreme Court;

‘judicial authority’, in relation to a place outside the Territory, means a court or person prescribed as a judicial authority for that place.

Supreme Court proceedings

“85C. (1) In any civil or criminal proceeding in the Supreme Court, the Court may, where it appears in the interests of justice to do so, make an order—

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

“(2) In determining whether it is in the interests of justice to make an order under subsection (1) in relation to the taking of evidence of a person, the Supreme Court shall have regard to—

- (a) whether the person is willing or able to come to the Territory 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; and
- (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by making or refusing to make the order.

“(3) Where the Supreme Court makes an order of the kind referred to in paragraph (1) (a) or (b), the Court may, then or subsequently, give such directions as it thinks just with respect to the place, time and manner of the examination, the procedure to be followed in relation to it, and any other matter that the Court thinks relevant.

“(4) Where the Supreme Court makes an order of the kind referred to in paragraph (1) (c), the Court may include in the order a request as to any matter relating to the taking of the evidence, including any of the following matters:

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

“(5) Subject to subsection (6), the Supreme Court may, on such terms, if any, as it thinks just, permit a party to the proceeding to tender as evidence in the proceeding the evidence taken in an examination held pursuant to an order under subsection (1) or a record of that evidence.

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

- (a) at the hearing of the proceeding the Supreme Court is satisfied that the person is in the Territory 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.

“(7) Where it is in the interests of justice to do so, the Supreme Court may exclude from the proceeding evidence taken in an examination held pursuant to an order under subsection (1) even if it is otherwise admissible.

“(8) In this section, a reference to evidence taken in an examination shall be read as including 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.

Inferior court proceedings

“85D. (1) The Supreme Court may, 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 85C (1) 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 85C (5), (6) and (7) apply in relation to evidence taken in an examination held pursuant to an order made by the Supreme Court by virtue of this section as if—

- (a) in those subsections—
 - (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 85C (5) and (7), a reference to an order under subsection (1) were a reference to an order made by the Supreme Court by virtue of this section.

Other proceedings

“85E. (1) Where the Supreme Court makes an order under subsection 85D (1) for the purpose of a committal proceeding, it may include in the order an order that evidence taken outside the Territory pursuant to the first-mentioned

order may, subject to this section, be tendered in a proceeding (in this section called a ‘subsequent proceeding’) that is—

- (a) a criminal proceeding that results from the committal proceeding; or
- (b) a related civil proceeding.

“(2) Where the Supreme Court makes an order under subsection 85C (1) or 85D (1) for the purpose of a criminal proceeding other than a committal proceeding, it may include in the order an order that evidence taken outside the Territory pursuant to the first-mentioned order may, subject to this section, be tendered in a proceeding (in this section called a ‘subsequent proceeding’) that is a related civil proceeding.

“(3) Subject to subsection (4), where the Supreme Court has included in an order under subsection 85C (1) or 85D (1) an order under this section, the court before which the subsequent proceeding is instituted may, on such terms (if any) as it thinks just, permit a party to the subsequent proceeding to tender as evidence in the subsequent proceeding the evidence of a person taken in an examination held pursuant to the order made under subsection 85C (1) or 85D (1) or a record of that evidence.

“(4) Evidence so tendered is not admissible if—

- (a) at the hearing of the subsequent proceeding the court is satisfied that the person is in the Territory 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.

“(5) Where it is in the interests of justice to do so, the court before which the subsequent proceeding is instituted may exclude from the subsequent proceeding evidence taken in an examination held pursuant to an order under subsection 85C (1) or 85D (1) even if it is otherwise admissible.

“(6) In this section, unless the contrary intention appears—

‘related civil proceeding’, in relation to a criminal proceeding, means any civil proceeding relating to a cause of action arising from the same subject matter.

Variation or revocation of orders

“85F. (1) The Supreme Court may vary or revoke an order made under subsection 85C (1) or 85D (1) (in this section called a ‘primary order’).

“(2) The power conferred by subsection (1) includes the power to—

- (a) include in a primary order an order under section 85E; or
- (b) vary or revoke an order under section 85E that is included in a primary order.

“(3) Where a primary order that includes an order under section 85E is revoked, the last-mentioned order shall be taken to have been revoked at the same time.

Exclusion of evidence in criminal proceeding

“85G. This Part shall not be taken to affect the power of a court hearing a criminal proceeding to exclude evidence that has been obtained illegally or that would, if admitted, operate unfairly against the defendant.

Operation of other laws

“85H. This Part is not intended to exclude or limit the operation of any law of the Territory that makes provision for the examination of witnesses outside the Territory for the purpose of a proceeding in the Territory.

Regulations and Rules of Court

“85I. (1) The Attorney-General may make regulations, not inconsistent with this Part, prescribing 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.

“(2) The Rules of Court under section 28 of the *Australian Capital Territory Supreme Court Act 1933* of the Commonwealth may provide, not inconsistently with any regulations made under subsection (1), for or with respect to 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 a proceeding for the making of an order under subsection 85C (1) or 85D (1).

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

“PART XIIB—TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS

Interpretation

“85J. In this Part—

‘property’ includes any land, chattel or other corporeal property of any description;

‘request’ includes any commission, order or other process issued for the making of an application under subsection 85K (1);

‘requesting court’ means a court or tribunal by or on behalf of which a request is issued.

Power of Supreme Court

“85K. (1) If, on an application made to the Supreme Court for an order for evidence to be obtained in the Territory, the Supreme Court is satisfied—

- (a) that the application is made pursuant to a request issued by or on behalf of a court or tribunal exercising jurisdiction in a place outside the Territory; and
- (b) that the evidence to which the application relates is sought to be obtained for the purpose of a proceeding which has been or may be instituted before the requesting court;

the Supreme Court may, by order, make such provision for obtaining evidence in the Territory as appears to the Court to be appropriate for the purpose of giving effect to the request.

“(2) An order under subsection (1) shall not be made in respect of a criminal proceeding unless the requesting court is a court of a place in Australia or New Zealand.

“(3) Without limiting the generality of subsection (1), an order under that subsection may make provision for all or any of the following matters:

- (a) the examination of witnesses, orally or in writing;
- (b) the production of documents;
- (c) the inspection, photographing, preservation, custody or detention of property;
- (d) the taking of samples of property and the carrying out of any experiments on or with property;
- (e) the medical examination of a person;
- (f) without limiting paragraph (e), the taking and testing of samples of blood from a person.

“(4) An order under subsection (1) may require a specified person to take such steps as the Supreme Court considers appropriate, being steps of a kind that could be required to be taken to obtain evidence for the purpose of a proceeding in the Supreme Court (whether or not a proceeding of the same kind as that to which the application for the order relates).

“(5) Subsection (4) does not preclude the making of an order requiring a person to give testimony, orally or in writing, otherwise than on oath where this is asked for by the requesting court.

“(6) An order under subsection (1) shall not require a person—

- (a) to state what documents relevant to the proceeding to which the application for the order relates are or have been in the person’s possession, custody or control; or
- (b) to produce any documents other than particular documents specified in the order and appearing to the Supreme Court to be, or to be likely to be, in the person’s possession, custody or control.

“(7) A person who, by virtue of an order under subsection (1), is required to attend at any place is entitled to the like conduct money and payment for expenses and loss of time on attendance as a witness in a proceeding in the Supreme Court.

Privilege of witnesses

“85L. (1) A person shall not be compelled by virtue of an order under subsection 85K (1) to give any evidence which the person could not be compelled to give in similar proceedings in—

- (a) the Territory; or
- (b) the place where the requesting court exercises jurisdiction.

“(2) Paragraph (1) (b) does not apply unless the claim of the person to be exempt from giving evidence is—

- (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
- (b) conceded by the applicant for the order.

“(3) Where such a claim is not so supported or conceded, the person may, subject to this section, be required to give the evidence to which the claim

relates, but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

“(4) In this section, a reference to giving evidence shall be read as including a reference to answering a question or to producing a document.

Operation of other laws

“85M. This Part is not intended to exclude or limit the operation of any law of the Territory that makes provision for the taking of evidence in the Territory for the purpose of a proceeding outside the Territory.

Rules of Court

“85N. The Rules of Court under section 28 of the *Australian Capital Territory Supreme Court Act 1933* of the Commonwealth may provide for or with respect to—

- (a) the manner in which an application under subsection 85K (1) is to be made;
- (b) the circumstances in which an order may be made under subsection 85K (1);
- (c) the manner in which any reference referred to in subsection 85L (3) is to be made; and
- (d) any incidental, supplementary or consequential matters.”.

Amendment of Crimes Act 1900 (NSW) in its application in Territory

5. After section 333 of the Crimes Act, 1900 of the State of New South Wales in its application in the Territory the following section is inserted:

False statement in evidence on commission

“334. A person who, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so pursuant to an order under subsection 85K (1) of the *Evidence Ordinance 1971*, makes a statement—

- (a) which the person knows to be false in a material particular; or
- (b) which is false in a material particular and which the person does not believe to be true;

is guilty of an offence punishable, on conviction, by imprisonment for 3 years.”.

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 27 June 1990.
2. No. 4, 1971 as amended by Nos. 9, 19, 61 and 67, 1985; Nos. 14, 53 and 74, 1986; Nos. 25 and 38, 1989.