

WESTERN AUSTRALIA

EVIDENCE AMENDMENT ACT

No. 66 of 1987

AN ACT to amend the *Evidence Act 1906* and to repeal the *Evidence Act Amendment Act 1974*.

[Assented to 1 December 1987.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title

1. This Act may be cited as the *Evidence Amendment Act 1987*.

Commencement

2. The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation.

Principal Act

3. In this Act the *Evidence Act 1906** is referred to as the principal Act.

[*Reprinted as at 14 August 1986.]

Section 3 amended

4. Section 3 of the principal Act is amended—

(a) in the definition of “bank” or “banker”—

(i) in paragraph (a), by deleting “demand, and” and substituting the following—

“ demand; ”; and

(ii) by inserting after paragraph (b) the following paragraphs—

“ (c) any building society as defined by section 5 of the *Building Societies Act 1976*; and

(d) any credit union registered under the *Credit Unions Act 1979*; ”; and

(b) by deleting “expressions relating to “bankers’ books” include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank;” and substituting the following—

“ “bankers’ books” and expressions referring to bankers’ books include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank however such books are compiled, recorded or stored, whether in written form or on microfilm or by electronic process or otherwise; ”.

Sections 79B, 79C, 79D and 79E repealed and sections 79B, 79C, 79D, 79E, 79F and 79G substituted

5. Sections 79B, 79C, 79D and 79E of the principal Act are repealed and the following sections are substituted—

Interpretation

“ 79B. In this section and in sections 79C, 79D, 79E, 79F and 79G—

“derived” means derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures;

“document” means any record of information and includes, in addition to a document in writing—

- (a) any book, map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom; and
- (d) any film, negative, disc, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom;

“proceedings” includes arbitrations and references and “court” shall be construed accordingly;

“qualified person”, in relation to a statement, means a person who—

- (a) had, at the time of making of the statement, or may reasonably be supposed to have had at that time, personal knowledge of the matters dealt with by the statement; or
- (b) where the statement is not admissible in evidence unless made by an expert on the subject of the statement, was at the time of making of the statement such an expert;

“statement” includes any representation of fact or opinion whether made in words or otherwise.

Admissibility of documentary evidence

79C. (1) Subject to subsection (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement—

- (a) was made by a qualified person; or
- (b) directly or indirectly reproduces or is derived from one or other or both of the following—
 - (i) information in one or more statements, each made by a qualified person;
 - (ii) information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.

(2) Where a statement referred to in subsection (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless—

- (a) he is dead;
- (b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;
- (c) he is out of the State and it is not reasonably practicable to secure his attendance;
- (d) all reasonable efforts to identify or find him have been made without success;
- (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;
- (f) having regard to the time which has elapsed since he made the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;

- (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or
- (h) he refuses to give evidence.

(3) This section makes a statement admissible notwithstanding—

- (a) the rules against hearsay;
- (b) the rules against secondary evidence of the contents of a document;
- (c) that the person who made the statement or the person who made a statement from which the information in the statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with the statement; or
- (d) that the statement is in such a form that it would not be admissible if given as oral evidence,

but does not make admissible a statement which is otherwise inadmissible.

(4) Notwithstanding subsections (1) and (2), in any criminal proceedings a statement in a document which was made in the course of or for the purpose of—

- (a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceedings;
- (b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;
- (c) the preparation of a defence to a charge for any offence; or
- (d) the preparation of the case of the prosecution in respect of any offence,

shall not be rendered admissible as evidence by this section.

(5) For the purposes of this section a court may—

- (a) for the purpose of deciding whether or not a statement is admissible as evidence, draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances;
- (b) in deciding whether or not a person is fit to attend or give evidence as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner.

(6) For the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility—

- (a) may necessitate undue consumption of time; or
- (b) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

Weight of evidence and corroboration

79D. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular—

- (a) to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated;
- (b) to the question of whether or not the qualified person or any person concerned with making or keeping the document containing the statement, had any incentive to conceal or misrepresent the facts;
- (c) to the question of whether or not the information in the statement was of a kind which was collected systematically;
- (d) to the question of whether or not the information in the statement was collected pursuant to a duty to do so;

- (e) where the statement wholly or in part reproduces or is derived from information from one or more devices, to the reliability of the device or devices; and
- (f) where the statement reproduces or is derived from any information, to the reliability of the means of reproduction or derivation.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person.

Evidence of credibility of person making statement

79E. Where in any proceedings a statement is admitted as evidence under section 79C but the qualified person is not called as a witness in the proceedings—

(a) any evidence—

- (i) which, if that person had been so called, would have been admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; or
- (ii) tending to prove that, whether before or after that person made that statement, he made another statement (whether orally or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself,

but nothing in subparagraph (i) or (ii) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party; and

- (b) any evidence proving that that person has been guilty of any indictable offence shall be admissible in the proceedings to the same extent as if he had been so called and on being questioned as to whether or not he had been convicted of an indictable offence had denied the fact or had not admitted the fact or had refused to answer the question.

Dispute as to happening of event

79F. (1) Where in any proceedings the happening of an event is in question, and a system has been followed to make and keep a record of the happening of all events of that description, oral or other evidence to establish that there is no record of the happening of the event is admissible to prove that the event did not happen.

(2) Where evidence is, or is proposed to be, tendered under this section, a court may require that the whole or part of the record concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(3) In estimating the weight, if any, to be attached to evidence rendered admissible by this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including whether or not any person concerned with the making or keeping of the relevant record had any incentive to omit recording the happening of the event in question.

Method of production of documents

79G. (1) For the purposes of sections 79C and 79F—

- (a) a statement in a document may be proved by the production of a copy of the document, or of the material part of the document, certified to be a true copy of the document or part of the document in such manner as is approved by the court;
- (b) a statement in a document which is designed to be used to reproduce the statement in the form of sound or of a visual image may be proved by reproducing the statement in that form in the presence of the court; and
- (c) a statement in a document in which sounds or data are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom may be proved by reproducing the statement in a form which is capable of being understood by sight.

(2) The absence of a record of the happening of an event in a record of information made by the use of a computer or any other device for storing, recording or processing information may be

proved by the production of a document produced by the use of the computer or other device containing a statement affirming the absence of the first-mentioned record.

(3) Where a person proposes to prove, or proves, a statement in a document otherwise than by producing the document the court may require that the document be produced or made available to the court or to other parties for examination or testing and, in default, may reject the statement, or if it is in evidence, exclude it.

(4) Where a person proposes to prove, or proves, a statement by reproducing the statement in the form of sound or of a visual image the court may direct a record of the statement to be produced, and, in default, may reject the statement, or if it is in evidence, exclude it. ”.

Section 89 repealed and substituted

6. Section 89 of the principal Act is repealed and the following section is substituted—

Entries in bankers' books

“ 89. Subject to this Act—

- (a) any entry in a banker's book shall be evidence of the matters, transactions, and accounts therein recorded; and
- (b) a copy of any entry in a banker's book shall be evidence of the entry and of the matters, transactions, and accounts therein recorded. ”.

Section 90 amended

7. Section 90 of the principal Act is amended in subsection (1)—

- (a) in paragraph (b), by deleting “business; and” and substituting the following—
 - “ business. ”; and
- (b) by deleting paragraph (c).

Section 91 repealed and substituted

8. Section 91 of the principal Act is repealed and the following section is substituted—

Verification of copy

“ 91. A copy of an entry in a banker’s book shall not be received in evidence unless it is certified to be a true copy of the entry in such manner as is approved by the court. ”.

Sections 109 to 114 inserted

9. After section 108 of the principal Act the following heading and sections are inserted—

“ *Examination of witnesses outside the State*

Interpretation

109. (1) In this section and in sections 110 to 114, 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 Act;

“inferior court” means a court of the State, except when exercising federal jurisdiction, not being a superior court;

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

“superior court” means the Supreme Court, the District Court or the Family Court of Western Australia, except when exercising federal jurisdiction.

(2) In sections 109 to 114, a reference to a place outside the State shall be taken to refer to a place outside the State whether within or outside Australia.

Proceedings in superior courts

110. (1) In any civil or criminal proceedings 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 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.

(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 matters to which the court shall have regard include the following—

- (a) whether the person is willing or able to come to Western 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 subsection (1) of the kind referred to in subsection (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 subsection (1) of the kind referred to in subsection (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 subsection (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 subsection (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 Western 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 subsection (1), notwithstanding that it is otherwise admissible.

(8) 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

111. (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 the kind referred to in section 110 (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 (5), (6) and (7) of section 110 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 subsections (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 subsections (5) and (7), a reference to an order made under subsection (1) were a reference to an order made by a court by virtue of this section.

Exclusion of evidence in criminal proceeding

112. Sections 109 to 114 do 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

113. Sections 109 to 114 are not intended to exclude or limit the operation of any 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.

Regulations and rules of court

114. (1) The Governor may make regulations for or with respect to any matter that by sections 109 to 113 is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to those sections and, in particular, for or with respect to the practice and procedure of a superior court in proceedings for the making of an order under section 110 or 111.

(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 sections 109 to 113 in or before that court, to making any rules, not inconsistent with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to those sections and, in particular, for or with respect to the practice and procedure of that superior court in proceedings for the making of an order under section 110 or 111.

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

Repeal of *Evidence Act Amendment Act 1974*

10. The *Evidence Act Amendment Act 1974** is repealed.

[*Act No. 18 of 1974.]
