

Evidence on Commission Act 1995 No 26

[1995-26]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**
Industrial Relations Amendment Act 2023 No 41 (not commenced — to commence on 1.7.2024)

Authorisation

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Evidence on Commission Act 1995 No 26



New South Wales

An Act in relation to the taking of evidence outside the State for the purposes of proceedings in the State and in relation to the taking of evidence in the State for the purposes of proceedings outside the State.

Part 1 Preliminary

1 Name of Act

This Act is the *Evidence on Commission Act 1995*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

Expressions used in this Act that are defined in the *Evidence Act 1995* have the meanings set out in that Act.

Part 2 Examination of witnesses abroad

Division 1 Preliminary

4 Definitions

In this Part:

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 (other than a superior court) except when exercising federal jurisdiction.

superior court means:

- (a) the Supreme Court, and
- (b) the Land and Environment Court, and

(c), (d) (Repealed)

(e) the Dust Diseases Tribunal of New South Wales, and

(f) the District Court,

except when exercising federal jurisdiction.

5 References to evidence taken in an examination

A reference in this Part to evidence taken in an examination includes a reference to:

(a) a document produced at the examination, and

(b) answers made to any written interrogatories presented at the examination, whether the answers are made in writing or are made orally and put in writing.

Division 2 Proceedings in superior courts

6 Orders for taking evidence abroad

(1) In any proceeding before a superior court, the court may, if it appears in the interests of justice to do so, on the application of a party to the proceeding, make an order relating to a person outside Australia:

(a) for 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, or

(b) for issue of a commission for examination of the person on oath or affirmation at any place outside Australia, or

(c) for issue of a letter of request to the judicial authorities of a foreign country to take the evidence of a person or cause it to be taken.

(2) In deciding whether it is in the interests of justice to make such an order, the matters to which the superior court is to 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 making or refusing to make the order.

7 Directions and requests relating to orders

(1) If a superior court makes an order of the kind referred to in section 6 (1) (a) or (b), the

court may, at the time of making the order or at a later time, give such directions as it thinks just relating to the procedure to be followed in relation to the examination, including directions about:

- (a) the time, place and manner of the examination, and
- (b) any other matter that the court thinks relevant.

(2) If a superior court makes an order of the kind referred to in section 6 (1) (c), the court may include in the order a request about any matter relating to taking that evidence, including any of the following matters:

- (a) examination, cross-examination or re-examination of the person, whether the person's evidence is given orally, on affidavit or otherwise,
- (b) attendance of the Australian legal practitioner representing each party to the proceeding in question and participation of those persons in the examination in appropriate circumstances,
- (c) any matter prescribed by the regulations.

8 Use of evidence taken in an examination

(1) The superior court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:

- (a) a person's evidence taken in an examination held as a result of an order made under section 6, or
- (b) a record of that evidence.

(2) Evidence of a person so tendered is not admissible if:

- (a) it appears to the court's satisfaction 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 adduced at the hearing of the proceeding.

Division 3 Proceedings in inferior courts

9 Orders for taking evidence abroad

A superior court may, on the application of a party to a proceeding before an inferior court, exercise the same power to make an order of the kind referred to in Division 2 for the purpose of that proceeding as the superior court has under that Division for the purpose of a proceeding in the superior court.

10 Use of evidence taken in an examination

- (1) The superior court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination held as a result of an order made under section 9, or
 - (b) a record of that evidence.
- (2) Evidence of a person so tendered is not admissible if:
 - (a) it appears to the court's satisfaction 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 adduced at the hearing of the proceeding.

Division 4 Subsequent proceedings

11 Directions for use in subsequent proceedings of evidence taken abroad

- (1) If, under section 9, a superior court makes an order in relation to a committal proceeding, it may include in the order a direction that evidence taken outside Australia under the order may, subject to this Division, be tendered in a proceeding that is:
 - (a) a criminal proceeding that results from the committal proceeding, or
 - (b) a related civil proceeding.
- (2) If, under section 6 or 9, a superior court makes an order in relation to a criminal proceeding (other than a committal proceeding), it may include in the order a direction that evidence taken outside Australia under the order may, subject to this Division, be tendered in a proceeding that is a related civil proceeding.
- (3) In this section:

related civil proceeding, in relation to a criminal proceeding, means any civil proceeding arising from the same subject-matter from which the criminal proceeding arose, and, in particular, includes:

 - (a) a proceeding under the *Confiscation of Proceeds of Crime Act 1989*, or
 - (b) a proceeding for the recovery of tax, or of any duty, levy or charge payable to the State.

12 Use of evidence in subsequent proceedings

- (1) This section applies to a proceeding to which a direction included in an order under

section 6 or 9 relates.

- (2) The court before which the proceeding takes place may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination held as a result of the order under section 6 or 9, or
 - (b) a record of that evidence.
- (3) A person's evidence so tendered is not admissible if:
 - (a) it appears to the court's satisfaction at the hearing of the subsequent 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 adduced at the hearing of the subsequent proceeding.

Division 5 General

13 Variation or revocation of orders

- (1) A superior court may vary or revoke an order made by the court under section 6 or 9.
- (2) The power to vary such an order includes the power to:
 - (a) include in the order a direction under section 11, or
 - (b) vary or revoke a direction under section 11 that is included in the order.
- (3) If an order under section 6 or 9 that includes a direction under section 11 is revoked, the direction under section 11 is taken to have been revoked at the same time.

14 Courts may exercise certain powers in chambers

A court may exercise its power under this Part in chambers.

15 Operation of other laws

This Part is not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under such a law, that provides for the examination of witnesses outside Australia for the purpose of a proceeding in the State.

16 Rules of court

- (1) The power to make rules under an Act 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 prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part.

- (2) In particular, rules may be made prescribing matters for or with respect to the practice and procedure of the superior court in proceedings for the making of an order under section 6 or 9.
- (3) Rules so made must not be inconsistent with this Act or any regulation made under section 37.
- (4) This section does not affect any power to make rules under any other law.

Part 3 Examination of witnesses outside the State but within Australia

Division 1 Preliminary

17 Application of this Part

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

18 Definitions

In this Part:

examination includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a place outside the State 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 (other than a superior court) except when exercising federal jurisdiction.

judicial authority of a place outside the State means a court or person prescribed as an appropriate judicial authority for that place.

superior court means:

- (a) the Supreme Court, and
- (b) the Land and Environment Court, and
- (c), (d) (Repealed)
- (e) the Dust Diseases Tribunal of New South Wales, and
- (f) the District Court,

except when exercising federal jurisdiction.

19 References to evidence taken in an examination

A reference in this Part to evidence taken in an examination includes a reference to:

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

Division 2 Proceedings in superior courts

20 Orders for taking evidence outside NSW

- (1) In any proceeding before a superior court, the court may, if it appears in the interests of justice to do so, make an order relating to a person outside the State:
 - (a) for 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, or
 - (b) for issue of a commission for examination of the person on oath or affirmation at any place outside the State, or
 - (c) for issue of a letter of request to the judicial authorities of a place outside the State to take the evidence of a person or cause it to be taken.
- (2) In deciding whether it is in the interests of justice to make such an order, the matters to which the superior court is to 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 making or refusing to make the order.

21 Directions and requests relating to orders

- (1) If the superior court makes an order of the kind referred to in section 20 (1) (a) or (b), the court may, at the time of making the order or at a later time, give such directions as it thinks just relating to the procedure to be followed in relation to the examination, including directions about:
 - (a) the time, place and manner of the examination, and
 - (b) any other matter that the court thinks relevant.
- (2) If the superior court makes an order of the kind referred to in section 20 (1) (c), the court may include in the order a request about any matter relating to taking that evidence, including any of the following matters:

- (a) examination, cross-examination or re-examination of the person, whether the person's evidence is given orally, on affidavit or otherwise,
- (b) attendance of the Australian legal practitioner representing each party to the proceeding in question and participation of those persons in the examination in appropriate circumstances,
- (c) any matter prescribed by the regulations.

22 Use of evidence taken in an examination

- (1) The superior court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination held as a result of an order made under section 20, or
 - (b) a record of that evidence.
- (2) Evidence of a person so tendered is not admissible if:
 - (a) it appears to the court's satisfaction 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 adduced at the hearing of the proceeding.

Division 3 Proceedings in inferior courts

23 Orders for taking evidence

A superior court may, on the application of a party to a proceeding before an inferior court, exercise the same power to make an order of the kind referred to in Division 2 for the purpose of that proceeding as the superior court has under that Division for the purpose of a proceeding in the superior court.

24 Use of evidence taken in an examination

- (1) The superior court may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination, or
 - (b) a record of that evidence.
- (2) Evidence of a person so tendered is not admissible if:
 - (a) it appears to the court's satisfaction 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 adduced at the hearing of the proceeding.

Division 4 Subsequent proceedings

25 Directions for use in subsequent proceedings of evidence taken abroad

- (1) If, under section 23, a superior court makes an order in relation to a committal proceeding, it may include in the order a direction that evidence taken outside the State under the order may, subject to this Division, be tendered in a proceeding that is:
 - (a) a criminal proceeding that results from the committal proceeding, or
 - (b) a related civil proceeding.
- (2) If, under section 20 or 23, a superior court makes an order in relation to a criminal proceeding (other than a committal proceeding), it may include in the order a direction that evidence taken outside the State under the order may, subject to this Division, be tendered in a proceeding that is a related civil proceeding.
- (3) In this section:

related civil proceeding, in relation to a criminal proceeding, means any civil proceeding arising from the same subject-matter from which the criminal proceeding arose, and, in particular, includes:

- (a) a proceeding under the *Confiscation of Proceeds of Crime Act 1989*, or
- (b) a proceeding for the recovery of tax, or of any duty, levy or charge payable to the State.

26 Use of evidence in subsequent proceedings

- (1) This section applies to a proceeding to which a direction included in an order under section 20 (1) or 23 relates.
- (2) The court before which the proceeding takes place may, on such terms (if any) as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding:
 - (a) a person's evidence taken in an examination held as a result of the order under section 20 (1) or 23, or
 - (b) a record of that evidence.
- (3) A person's evidence so tendered is not admissible if:
 - (a) it appears to the court's satisfaction at the hearing of the subsequent 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 adduced at the hearing of the subsequent proceeding.

Division 5 General

27 Variation or revocation of orders

- (1) A superior court may vary or revoke an order made by the court under section 20 or 23.
- (2) The power to vary such an order includes the power to:
 - (a) include in the order a direction under section 25, or
 - (b) vary or revoke a direction under section 25 that is included in the order.
- (3) If an order under section 20 or 23 that includes a direction under section 25 is revoked, the direction under section 25 is taken to have been revoked at the same time.

28 Courts may exercise certain powers in chambers

A court may exercise its power under this Part in chambers.

29 Operation of other laws

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

30 Rules of court

- (1) The power to make rules under an Act 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 prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part.
- (2) In particular, rules may be made prescribing matters for or with respect to the practice and procedure of the superior court in proceedings for the making of an order under section 20 or 23.
- (3) Rules so made must not be inconsistent with this Act or any regulation made under section 37.
- (4) This section does not affect any power to make rules under any other law.

Part 4 Taking of evidence for foreign and Australian Courts

31 Definitions

In this Part:

Australian court means a person or body authorised to exercise an adjudicative function:

- (a) whether on behalf of a court or otherwise, and
- (b) whether or not the person or body is empowered to require the answering of questions or the production of documents.

proceedings means:

- (a) proceedings in any civil or commercial matter, or
- (b) proceedings in or before a court in relation to the commission of an offence or an alleged offence.

property includes any land, chattel or other corporeal property of any description.

request includes any commission, order or other process issued by or on behalf of a requesting court.

requesting court means a court or tribunal by or on whose behalf a request is issued, as referred to in section 32.

32 Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court

- (1) The following provisions of this Part apply if an application is made to the Supreme Court for an order for evidence to be obtained in the State and the Court is satisfied:
 - (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a place outside the State, and
 - (b) that the evidence to which the application relates is to be obtained for the purposes of proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.
- (2) This Part does not apply in respect of proceedings relating to the commission of an offence or an alleged offence unless the requesting court is a court of a place in Australia or of New Zealand.

33 Power of the Supreme Court to give effect to application for assistance

- (1) The Supreme Court has power, if an application is made under section 32, by order to make such provision for obtaining evidence in the State as may appear to the Court to

be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.

- (2) An order under this section may require a specified person to take such steps as the Court may consider appropriate for that purpose.
- (3) Without limiting the generality of subsections (1) and (2), an order under this section may, in particular, make provision as follows:
 - (a) for the examination of witnesses, either orally or in writing,
 - (b) for the production of documents,
 - (c) for the inspection, photographing, preservation, custody or detention of any property,
 - (d) for the taking of samples of any property and the carrying out of any experiments on or with any property,
 - (e) for the medical examination of any person,
 - (f) without limiting paragraph (e), for the taking and testing of samples of blood from any person.
- (4) An order under this section is not to require any particular steps to be taken unless they are steps that can be required to be taken by way of obtaining evidence for the purposes of proceedings in the Supreme Court (whether or not proceedings of the same description as those 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 (either orally or in writing) otherwise than on oath if this is asked for by the requesting court.
- (6) An order under this section must not require a person:
 - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in the person's possession, custody or power, or
 - (b) to produce any documents other than particular documents specified in the order and appearing to the court making the order to be, or likely to be, in the person's possession, custody or power.
- (7) A person who, because of an order under this section, is required to attend at any place is entitled to similar conduct money and payment for expenses and loss of time on attendance as is a witness in proceedings before the Supreme Court.

34 Privilege of witnesses

- (1) A person must not be compelled by virtue of an order under section 33 to give any evidence which the person could not be compelled to give:
 - (a) in similar proceedings in the State, or
 - (b) in similar proceedings in the place in which the requesting court exercises jurisdiction.
- (2) Subsection (1) (b) does not apply unless the claim of the person in question to be exempt from giving evidence is either:
 - (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) If such a claim by any person is not so supported or conceded, the person may (subject to the other provisions of this section) be required to give the evidence to which the claim relates, but that evidence is not to be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.
- (4) In this section, references to giving evidence include references to answering any question and to producing any document, and the reference in subsection (3) to the transmission of evidence given by a person is to be construed accordingly.

35 Operation of other laws

This Part is not intended to exclude or limit the operation of any law of the State that provides for the taking of evidence in the State for the purpose of a proceeding outside the State.

36 Rules of court

- (1) The power to make rules under the *Supreme Court Act 1970* extends to the making of rules for or with respect to:
 - (a) the manner in which an application under section 32 is to be made, and
 - (b) the circumstances in which an order can be made under section 33, and
 - (c) the manner in which any reference mentioned in section 34 (3) is to be made.
- (2) Any such rules may include such incidental, supplementary and consequential provisions as are necessary or convenient.

Part 5 Miscellaneous

37 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, prescribing matters for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, regulations may be made for or with respect to the practice and procedure of the Supreme Court, the Land and Environment Court and the Dust Diseases Tribunal of New South Wales in proceedings for the making of an order under this Act.