

EVIDENCE AMENDMENT ACT 1978

No. 14 of 1978

An Act relating to the admissibility of business records in evidence in proceedings in federal courts.

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

1. This Act may be cited as the *Evidence Amendment Act* 1978.¹ Short title

2. This Act shall come into operation on the day on which it receives the Royal Assent.¹ Commence-
ment

3. After Part III of the *Evidence Act* 1905² the following Part is inserted:

“PART IIIA—ADMISSIBILITY OF BUSINESS RECORDS

“7A. (1) In this Part, unless the contrary intention appears— Interpret-
ation

‘business’ includes—

- (a) any business, profession, occupation, calling, trade or undertaking whether or not engaged in or carried on for profit and whether engaged in or carried on in Australia or elsewhere, including any business, profession, occupation, calling, trade or undertaking engaged in or carried on by the Crown in right of the Commonwealth or of a State; and
- (b) the administration of the government of the Commonwealth, of a State, of a Territory or of another country, whether carried on in Australia or elsewhere;

‘criminal proceeding’ means a proceeding for an offence;

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

‘document’ includes—

- (a) a book, plan, paper, parchment, film or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them;
- (b) a disc, tape, paper, film or other device from which sounds or images are capable of being reproduced; and
- (c) any other record of information;

‘proceeding’ means a proceeding before the High Court or any court (other than a court of a Territory) created by the Parliament;

‘qualified person’, in relation to a statement made in the course of, or for the purposes of, a business, means a person who—

(a) at the time when the statement was made, was—

- (i) an owner of the business or a person carrying on the business;
- (ii) a servant or agent employed or engaged in the business;
- (iii) a person retained for the purposes of the business; or
- (iv) a person associated with the business in the course of another business; and

(b) at that time—

- (i) in the case of a statement that is not admissible in evidence unless made by an expert on the subject matter of the statement—was such an expert; or
- (ii) in any other case—had, or may reasonably be supposed to have had, personal knowledge of the facts stated;

‘statement’ includes any representation of fact, whether made in words or otherwise.

“(2) For the purposes of this Part, a statement in a document shall be taken to be made by a person if—

- (a) it is written, made, dictated or otherwise produced by him; or
- (b) it is recognised by him as his statement by signing, initialling or otherwise.

“(3) For the purposes of this Part, a person shall be taken to be concerned in the making of a statement if—

- (a) he made that statement; or
- (b) he made a statement containing information—
 - (i) which the first-mentioned statement reproduces; or
 - (ii) from which the first-mentioned statement is derived, wholly or in part.

Admissibility of statements generally

“7B. (1) Subject to this Part, where, in any proceeding, evidence of a fact is admissible, a statement of the fact in a document is admissible as evidence of the fact if—

- (a) the document containing the statement forms part of a record of a business, whether or not the business is in existence at the time when the question of admissibility arises;
- (b) the statement was made in the course of, or for the purposes of, the business; and

- (c) the statement was made by a qualified person or reproduces, or was derived from, either or both of the following descriptions of information:
 - (i) information in one or more statements, each made by a qualified person in the course of, or for the purposes of, the business;
 - (ii) information from one or more devices designed for, and used for the purposes of the business in or for, recording, measuring, counting or identifying information, not being information based on information supplied by any person.

“(2) 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 any person concerned in the making of the statement is a witness in the proceeding, whether or not he gives testimony 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 testimony,

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

“(3) In this section, ‘fact’ includes opinion.

“7C. (1) A statement is not admissible under section 7B in a proceeding if it was made or obtained for the purpose of, or in contemplation of, any judicial or administrative proceeding.

General
restrictions
on admissi-
bility under
section 7B

“(2) Where a person proposes to tender, or tenders, a statement in evidence under section 7B, the court may—

- (a) require that any other document related to the statement be produced; and
- (b) if a document is not produced in accordance with the requirement—reject the statement or, if it has been received, exclude it.

“(3) In this section, ‘judicial or administrative proceeding’ means—

- (a) a proceeding before any court, whether a court of Australia or of another country; or
- (b) a proceeding before any other person or body (not being a court) authorized by law, whether a law of Australia or of another country, or by consent of parties, to hear or receive evidence.

Restrictions
on
admissibility
under section
7B in
criminal
proceedings

“7D. (1) This section applies in relation to a statement tendered in a criminal proceeding for admission under section 7B where the statement—

- (a) is a statement made by a person; or
- (b) reproduces, or is derived from, information supplied by a person.

“(2) If a party to the proceeding, being a party opposed to the party tendering the statement, requires the tendering party to call a person concerned in the making of the statement as a witness in the proceeding, the statement is not admissible under section 7B unless—

- (a) the tendering party calls the person as a witness in the proceeding; or
- (b) it appears to the court—
 - (i) that the person is dead or is unfit, by reason of any physical or mental incapacity, to attend as a witness;
 - (ii) that the person is outside Australia and it is not reasonably practicable to secure his attendance;
 - (iii) that all reasonable steps have been taken to identify the person and he cannot be identified;
 - (iv) that the identity of the person is known and all reasonable steps have been taken to find him but he cannot be found;
 - (v) that, having regard to the time that has elapsed since the person supplied the information and to all the other circumstances, the person cannot reasonably be expected to have any recollection of the matters dealt with in the statement; or
 - (vi) that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the person as a witness.

“(3) A statement made in connexion with, or in connexion with any investigation relating or leading to, a criminal proceeding is not admissible under section 7B.

“(4) In this section, ‘criminal proceeding’ includes a proceeding under section 77 of the *Trade Practices Act 1974*.

Dispute as to
happening of
event

“7E. (1) Where, in any proceeding—

- (a) the happening of an event of any description is in question; and
- (b) in the course of a business, 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 in question is admissible to prove that the event did not happen.

“(2) Where evidence is, or is proposed to be, tendered under this section, the court may—

- (a) require that the whole or a part of the record concerned be produced; and
- (b) if the whole or a part of the record required to be produced is not produced—reject the evidence or, if it has been received, exclude it.

“7F. (1) In estimating the weight (if any) to be attached to a statement tendered for admission or admitted under section 7B, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

Weight of evidence

- (a) in the case of a statement made by a person or a statement wholly or in part reproducing or derived from a statement made by a person—
 - (i) the recency or otherwise at the time when the person made his statement of any relevant matter dealt with in his statement; and
 - (ii) the presence and nature, or the absence, of any incentive for him to conceal or misrepresent any relevant matter in his statement;
- (b) in the case of a statement wholly or in part reproducing or derived from information from one or more devices—the reliability of the device or devices; and
- (c) in the case of a statement reproducing or derived from any information—the reliability of the means of reproduction or of derivation.

“(2) In estimating the weight (if any) to be attached to evidence admissible under section 7E, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including whether any person concerned with the system had any incentive to omit recording the happening of the event concerned and, if so, the nature of that incentive.

“7G. (1) Where—

- (a) a person makes a statement;
- (b) that statement, or a statement wholly or in part reproducing or derived from information in that statement, is tendered for admission, or is admitted, under section 7B in a proceeding; and
- (c) that person is not called as a witness in the proceeding,

Credibility of the maker of a statement

evidence is admissible in the proceeding as provided by this section.

“(2) Evidence is admissible where, if the person had been called as a witness, the evidence would have been admissible for the purpose of destroying or supporting his credibility.

“(3) Evidence is admissible to show that a statement made by the person is inconsistent with another statement made at any time by him.

“(4) Notwithstanding sub-sections (2) and (3), evidence is not admissible of any matter of which, if the person had been called as a witness and denied the matter in cross-examination, evidence would not be admissible if it had been adduced by the cross-examining party.

Inferences
concerning
admissi-
bility

“7H. A court may, for the purpose of deciding questions of admissibility under this Part, draw inferences from the form or content of the document in which the statement is contained as well as from other matters from which inferences may lawfully be drawn.

Ancillary
evidence

“7J. (1) Evidence relevant to the matters mentioned in section 7B, 7D or 7E may, if given by a person who had, at the relevant time or afterwards, a responsible position in relation to the making or keeping of the records concerned, be given on information and belief.

“(2) Evidence given under sub-section (1) may include evidence of the contents of a document notwithstanding that the document is not produced and that its non-production is not accounted for.

Production
of document,
&c.

“7K. (1) For the purposes of section 7B—

- (a) a statement in a document may, as prescribed or by leave of the court, be proved by the production of a copy of the document, or of the material part of the document;
- (b) a statement in a document that is designed to be used to reproduce the statement in the form of a visible display or of sound may be proved by reproducing the statement in that form in the presence of the court; and
- (c) a statement in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing the statement in a form that can be understood by sight.

“(2) For the purposes of section 7E, the absence of a record of the happening of an event in a record of information made by the use of a computer may be proved by the production of a document produced by the use of a computer containing a statement based on the absence of such a 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 be made available to the court or to other parties for examination or testing and, if the document is not so produced or made available, 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 a visible display or of sound, the court may direct a record of the statement to be produced and, if the

record is not produced, may reject the statement or, if it is in evidence, exclude it.

“(5) For the purposes of this section, ‘computer’ means any device for storing or processing information.

“7L. For the purposes of this Part, a document, a copy of a document or a copy of part of a document may be authenticated in such manner as is prescribed or the court approves.

Authenti-
cation

“7M. (1) Where a party to a proceeding tenders any evidence under this Part, and it appears to the court that—

Rejection for
unfairness,
&c.

- (a) the weight of the evidence is too slight to justify its admission;
- (b) the utility of the evidence is outweighed by a probability that its admission will unduly prolong the proceeding;
- (c) the evidence may be unfair to any other party; or
- (d) in a case where there is a jury—the evidence may mislead the jury,

the Court may reject the evidence or, if it has been received, exclude it.

“(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this Part.

“7N. Where—

Withholding
statement
from jury

- (a) in a proceeding there is a jury;
- (b) a statement in a document is admitted in evidence under this Part; and
- (c) it appears to the court that, if the jury were to have the document with it during its deliberations, the jury might give the statement undue weight,

the court may direct that the document be withheld from the jury during its deliberations.

“7P. For the purposes of any Act or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement admissible under section 7B shall not be treated as corroboration of evidence given by a qualified person who was concerned in the making of the statement.

Corrobor-
ation

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

Rejection of
evidence in
criminal
proceedings

“7R. A court may make orders concerning the admissibility of any statement or evidence under this Part at any stage of a proceeding.

Time for
order

“7S. (1) The Governor-General may make regulations, not inconsistent with this Part, prescribing all matters required or permitted by this Part to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Part.

Regulations
and rules of
court

“(2) Any authority having for the time being power to make rules regulating the practice and procedure of any court to proceedings in which this Part applies may, for the purpose of regulating any proceedings in or before that court, make rules, not inconsistent with this Part or with any regulations made under this section, prescribing all matters required or permitted by this Part to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Part.

“(3) Without limiting the generality of sub-sections (1) and (2), the matters that may be prescribed by regulations or rules under those sub-sections include the making of provision for or in relation to—

- (a) the giving, by a party who proposes to tender a statement under section 7B or evidence under section 7E, to the court or to other parties of notice of his intention to do so and of particulars of the statement or evidence (including copies of any statement or document);
- (b) the giving, by a party who has received notice from another party of his intention to tender a statement under section 7B or evidence under section 7E, to the court or to other parties of notice of his intention to dispute the statement or evidence and of particulars of the grounds on which he intends to dispute the statement or evidence;
- (c) the production, by a party who proposes to tender a statement under section 7B or evidence under section 7E or to adduce evidence in answer to any such statement or evidence, to the court or to other parties for inspection of any document related to any such statement or evidence he proposes to tender;
- (d) the making by a court of orders requiring a person who is not a party to a proceeding in the court to produce to the court, or to parties to the proceeding, for inspection any document that a party desires to inspect for the purposes of the application of this Part to the proceeding; and
- (e) the proof of any of the matters mentioned in sections 7B, 7D and 7E by affidavit or statutory declaration.

“(4) If a regulation or rule is made under this section for or in relation to the proof of any of the matters mentioned in sections 7B, 7D and 7E by affidavit or statutory declaration, the regulation or rule shall, if it is not otherwise so provided, provide for the attendance at the proceeding of the deponent or maker of any such affidavit or statutory declaration for cross-examination by any party who desires to cross-examine him.

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

NOTES

1. Act No. 14, 1978; assented to 14 April 1978.
2. Act No. 4, 1905, as amended. For previous amendments *see* Act 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; and No. 37, 1976.