

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Duffy MP)



EVIDENCE BILL 1991

OUTLINE

This Bill will reform the law of evidence applying in the High Court, the Federal Court, the Family Court, the courts of the ACT and persons or bodies authorised by Commonwealth or ACT law to take evidence.

2. The Bill is based substantially on the recommendations of the Law Reform Commission in its report Evidence.

3. The Bill will also repeal and re-enact, with modifications, most of the provisions of the Evidence Act 1905. These provisions will continue to apply, as they do now (either to proceedings in any Australian court or tribunal or to proceedings in courts exercising federal jurisdiction). The provisions of the Bill relating to use of Commonwealth records as evidence, and some State and Territorial records, will also apply to proceedings in any Australian court or tribunal.

4. Provision is made for the Bill to cease to apply to ACT courts and tribunals (in the event that the ACT Government passes its own evidence legislation after responsibility for ACT evidence law passes to it on or before 1 July 1992).

5. The Bill will not enact a code of evidence. Existing common law, and State and Territory evidence laws, will have effect subject to inconsistency with the Bill. Special evidentiary provisions in other Commonwealth Acts will prevail over the Bill. Prescribed ACT laws are to be similarly preserved.

6. The Bill does not deal with unsworn statements, standard of proof, tape-recording of admissions and identification evidence which were included in the Law Reform Commission's report.

7. On unsworn statements, responsibility for criminal law in the ACT passed to the ACT Government on 1 July 1990.

8. The Law Reform Commission's recommendations on standard of proof restate the common law, preserved in any event by the Bill.

9. Tape-recording of admissions made by persons in custody was recently the subject of legislative reform in the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991. Possible legislation on identification evidence is under consideration, in the context of the Fifth Interim Report of the Review of Commonwealth Criminal Law.

Financial Impact Statement

10. The Bill will permit significant savings in Commonwealth storage costs. Departments and statutory authorities will be able to abandon storage of original documents, after their microfilming or transfer to other modern storage media (for example, optical laser disk), now necessary because of the 'best evidence' rule and diverse State and Territory laws relating to documentary evidence.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

11. This clause provides for the short title of the Act.

Clause 2: Commencement

12. Sections 1 and 2 are to commence on Royal Assent. The other provisions of the Act are to commence on a day or days to be fixed by Proclamation, or if not so commenced on the first day after 6 months from Royal Assent.

Clause 3: Interpretation

13. This clause defines words and expressions used in the Bill. The principal definitions are:

'admission' means a previous representation by a party (including a defendant in a criminal proceeding) that is adverse to the party's interest in the outcome of the court proceeding.

'Australian court' means a federal court, a State or Territory court, an arbitrator under Commonwealth, State or Territory law, a person or body authorised by Commonwealth, State or Territory law or consent of parties to receive and examine evidence or, for the purposes of Part 3 Division 5 (which enables the Attorney-General by order to prohibit the giving of evidence in Australia where it would prevent prejudice to Australia's security), any person or body authorised to take or receive evidence. The definition is used for the provisions of the Bill which are to apply in all courts and tribunals.

'Commonwealth record' means the records of a Commonwealth Department or House of the Parliament, Commonwealth statutory office holders, bodies established for a public purpose, and corporations wholly owned by the Commonwealth. Clause 183 provides for the operation of several provisions relating to the use of Commonwealth records as evidence in proceedings before any Australian court.

'credibility' is defined to include a witness's capacity for observation.

'document' is defined to include, broadly, any paper, material or article on which information is stored, and any copy or duplicate.

'representation' includes any express or implied representation, one inferred from conduct, and an assertion in a document prepared by a person solely for his or her own use.

Clause 4: References to businesses

14. This clause provides that a business includes:

- . a profession, calling, occupation, trade or undertaking;
- . any Crown or government activity;
- . activities of statutory office holders and persons exercising powers under a law, including a foreign law; and
- . proceedings of the Parliament and other legislatures.

15. The definition includes a business not carried on for profit, and one carried on outside Australia.

Clause 5: References to examination in chief etc.

16. This clause defines examination in chief, cross-examination and re-examination.

17. It also provides that when a witness is recalled to give further evidence before cross-examination the party recalling the witness is not to be restricted by the rules governing re-examination.

Clause 6: References to civil penalties

18. This clause provides that for the purposes of the Act a person is liable to a civil penalty if he or she would be liable in proceedings, other than criminal proceedings, to a penalty including a penalty under foreign law.

Clause 7: Unavailability of persons

19. This clause states all the circumstances in which a person is taken not to be available to give evidence.

20. The occasions on which a person will be regarded to be unavailable are where:

- . the person is dead;
- . the person is not competent to give evidence;
- . it would be unlawful for the person to give evidence;
- . giving the evidence is prohibited under the Act;
- . the person cannot be found although all reasonable steps have been taken to find him or her;
- . the person's attendance cannot be secured although all reasonable steps have been taken to do so; and

- . the person cannot be compelled to give the evidence although all reasonable steps have been taken to do so.

21. The rules relating to the admissibility of hearsay evidence (Part 5 Division 1) depend to a large extent on whether the person who made the hearsay statement is available to give evidence.

Clause 8: Unavailability of documents and things

22. This clause states the circumstances in which a document or thing is taken to be unavailable. The rules relating to proof of contents of documents (Part 6 Division 2) and subclause 182(3) make special provision in relation to documents that are "unavailable".

23. A document or thing is taken to be unavailable to a party if:

- . the party cannot find it after reasonable inquiry and search;
- . it has been destroyed by the party otherwise with intent to deceive, to make it more difficult to ascertain the truth about a matter, or with reckless indifference about whether its production might be required;
- . it cannot be obtained by judicial process;
- . some other party has or had it and knows or ought reasonably to have known that it is or was likely to be relevant in the proceedings.

Clause 9: Representations in documents

24. This clause provides that a representation contained in a document is taken to have been made by a particular person if the person wrote, dictated or otherwise produced the document

or recognised the representation as his or her own by signing or otherwise marking the document.

Clause 10: Witnesses

25. This clause provides that a reference in the Act to a witness includes a party and, except in clause 120, a defendant in a criminal proceeding, who is giving evidence. Clause 120 provides for a privilege against self-incrimination.

PART 2 - APPLICATION OF ACT

Clause 11: Courts and proceedings to which Act applies

26. This clause provides for the application of the Act except for its provisions which are of extended application.

27. The Act is to apply in all proceedings in federal courts and, until a day to be fixed by proclamation, in courts of the Australian Capital Territory.

28. The Act is not to apply to a proceeding the hearing of which began before the commencement of the Act.

29. The Act, other than provisions of extended application, will cease to apply to proceedings in a court of the Australian Capital Territory on Proclamation. Responsibility for evidence law in the Australian Capital Territory will pass to the Australian Capital Territory Government on or before 1 July 1992. The Proclamation will enable evidence legislation enacted by the Australian Capital Territory Legislative Assembly to apply in ACT courts.

30. The Act, other than provisions of extended application, is not to apply to:

. appeals from a court in which the Act does not apply;

- . a review of a decision or order of a magistrate and any appeal from such a review.

31. In those cases, the evidence law that applied in the original proceeding will apply.

32. The clause does not affect the operation of Part 3 Divisions 4 and 5 (which relate to evidence taken abroad for Australian proceedings, and evidence taken in Australia for use in foreign proceedings) except that the Divisions do not apply in proceedings where the hearing has begun before the commencement of this clause.

Clause 12: Extended application of certain provisions

33. This clause provides for the application of provisions of the Act which are stated to be provisions of extended application. These provisions are to apply in all Australian courts, as defined in clause 3. The provisions listed in the footnote to the clause are provisions of extended application.

34. Provisions of extended application are not to apply in proceedings where the hearing has begun before the commencement of the clause.

Clause 13: Territories

35. This clause extends the Act to all the external Territories.

Clause 14: Act to bind Crown

36. This clause provides that the Crown in all its capacities is bound by the Act.

Clause 15: Effect of Act on enactments

37. This clause provides that, except as provided in clause 16, other Commonwealth Acts and prescribed laws of the

Australian Capital Territory are to prevail over the Act. This is to enable specific evidentiary provisions in other laws to continue to operate.

Clause 16: Effect of Act on other laws

38. At present, federal courts apply the evidence law of the State or Territory in which they are sitting, by virtue of the Judiciary Act 1903 sections 79, 80 and 80A.

39. This clause preserves the operation of State and Territory laws and the common law and equity rules applying by force of these sections where they are not inconsistent with the Act.

Clause 17: Parliamentary privilege preserved

40. This clause preserves the operation of any law relating to Parliamentary privileges.

Clause 18: General powers of the Court

41. This clause preserves, subject to the Act, the general power of courts to control proceedings before them.

PART 3 - WITNESSES

42. This Part concerns witnesses. Division 1 covers the competence of witnesses, and the extent to which they can be compelled to give evidence. Division 2 deals with oaths and affirmations. Division 3 sets out the rules to be followed in giving evidence. Division 4 sets out procedures for examination of witnesses abroad for proceedings in federal courts and other courts in the exercise of federal jurisdiction. It re-enacts Part IIIB of the Evidence Act 1905. Division 5 enables the Attorney-General by order to prohibit the giving of evidence in Australia where it would prevent prejudice to the security of Australia. It re-enacts Part IIIC of the Evidence Act 1905.

Division 1 - Competence and compellability of witnesses

Clause 19: Competence and compellability

43. This clause provides that, except as provided otherwise by the Act, everyone is a competent and compellable witness.

Clause 20: Competence: lack of capacity

44. This clause replaces existing law which requires that a witness understand the nature and consequences of an oath in order to be mentally competent to give evidence.

45. Instead, it provides that a witness must be:

- . capable of understanding that, in giving evidence, there is an obligation to give truthful evidence;
- . capable of giving rational replies to questions;
- . except where any incapacity can be overcome, capable of hearing or understanding, and communicating a reply to, a question.

46. The onus is to rest on the party asserting a witness lacks capacity to satisfy the court this is so.

47. If a witness lacks capacity, a witness may give evidence about a particular fact if the party wishing to adduce that evidence satisfies the court the witness can provide evidence of some probative value about that fact if asked questions he or she can understand. For example, a very young child may be able to give evidence of some probative value about some facts but not others.

48. Where a witness dies or becomes incompetent before finishing giving evidence the evidence given does not thereby become inadmissible.

49. The court may investigate questions of competence in any way it thinks fit.

Clause 21: Compellability: Reduced capacity

50. This clause provides that a person is not compellable to give evidence on a particular matter if the person is incapable of hearing or understanding, or of communicating a reply to, questions on that matter without substantial cost or delay, and other adequate evidence has been or will be given on that matter.

Clause 22: Compellability: Sovereign etc.

51. This clause provides that the Sovereign, the Governor-General, a State Governor, the Administrator of a Territory, a foreign sovereign and the Head of State of a foreign country are not compellable to give evidence.

52. It also provides that members of a House of the Parliament and members of the legislature of a State or Territory are not compellable if attending to give evidence would interfere with their attendance at a sitting of the House or legislature or a meeting of a committee of the House or legislature.

Clause 23: Competence and compellability: judges and jurors

53. This clause provides that judges and jurors are not competent to give evidence in the proceeding in which they are acting as judges and jurors. It also provides that a person who is or was a judge in a proceeding is not compellable to give evidence about the proceeding unless the court gives leave.

Clause 24: Competence and compellability: defendants in criminal proceedings

54. This clause provides special rules of competence and compellability for the accused in a criminal trial and persons being prosecuted for related offences.

55. An accused will not be competent to give evidence as a witness for the prosecution.

56. Persons who are being prosecuted for related offences are not to be competent to give evidence for the prosecution without the leave of the court. The matters that the court must take into account in determining whether to give leave include:

- . whether the witness has or appears to have a motive to misrepresent a matter on which he or she is to give evidence; and
- . whether the completion or termination of the prosecution for the related offence before the evidence can be given is reasonably practicable.

Clause 25: Compellability of spouses etc. in criminal proceedings

57. This clause provides that a spouse or de facto spouse of a defendant in a criminal proceeding is not compellable to give evidence in the proceeding unless the defendant is charged with certain offences against children or domestic violence offences. These are the same exceptions as those in subsection 66(3) of the ACT Evidence Ordinance 1971.

Clause 26: Comment on failure to give evidence

58. This clause applies only in criminal proceedings for an indictable offence. In such proceedings the clause permits comment by the judge and a co-defendant on a failure by a defendant, or his or her spouse or de facto spouse, to give evidence.

59. The comment, except when made by a co-defendant, must not suggest that the failure to give evidence was because the defendant was guilty of the offence, or the defendant or spouse believed the defendant was guilty of the offence.

60. Where comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.

Division 2 - Sworn Evidence

Clause 27: Evidence of witnesses to be on oath or affirmation

61. This clause requires all persons to swear an oath or make an affirmation before giving evidence to, or acting as interpreter in, a proceeding. The forms of oath and affirmation are set out in Schedule 1.

62. An affirmation is to have the same effect as an oath.

63. It is not to be necessary to use a religious text to swear an oath. Where a witness refuses to choose whether to swear an oath or make an affirmation, or it is not reasonably practicable for the witness to swear an appropriate oath, the court is to be able to direct the witness to make an affirmation.

64. An oath is to be effective even though the person who swears it does not have a religious belief and did not understand the nature and consequences of the oath.

65. A witness who merely produces a document or thing to the court but does not give any other evidence need not be sworn or make an affirmation.

Division 3 - Manner of giving evidence

Subdivision A - General rules

Clause 28: Court's power to call and question witnesses etc.

66. This clause sets out powers of the court in relation to witnesses. The court is to be able to question witnesses,

exclude non-party witnesses from the court and prohibit a person discussing evidence given in the proceedings with any witness yet to testify in the proceedings.

67. The clause also gives the court power, in exceptional circumstances, to call a witness.

Clause 29: Court to control questioning of witnesses

68. This clause states that the court may regulate the manner in which witnesses are questioned, the production and use of documents and things in connection with the questioning of witnesses, and the order in which the parties question witnesses.

Clause 30: Parties may question witnesses

69. This clause states the general principle that every party is entitled to question any witness who gives evidence (except as otherwise provided in Part 3 Division 3).

Clause 31: Order of examination in chief, cross-examination and re-examination

70. This clause provides the usual order in which parties may question a witness.

Clause 32: Manner and form of questioning witnesses

71. This clause states the general rule that, subject to the control of the court, it is up to the parties to determine how to question witnesses.

72. This clause also allows a witness to give evidence wholly or partly in narrative form, subject to any directions by the court, either generally or in relation to particular parts of his or her evidence, and allows evidence to be given in the form of charts, summaries or other explanatory material if that material would aid the court's comprehension of other evidence.

Clause 33: Manner of giving voluminous or complex evidence

73. This clause enables the court to direct a party that evidence be given in a particular form that would aid its assessment by the court, where the evidence is so voluminous or complex that it could not be conveniently assessed if given in narrative form. The court may require the party to give to the other parties, within a specified time, copies of the evidence in the form in which it is to be given.

Clause 34: Interpreters

74. This clause reverses the present rule that a witness is not entitled as of right to an interpreter. A witness is to be entitled to an interpreter unless he or she can speak and understand English sufficiently to understand and give adequate replies to questions.

Clause 35: Deaf and mute witnesses

75. This clause provides that deaf and mute witnesses can be questioned, and give evidence, in any appropriate way. The court may give directions on the manner in which such witnesses may be questioned and the means by which they may give evidence.

Clause 36: Attempts to revive memory in court

76. This clause provides that a witness may use a document to revive his or her memory about a fact where he or she cannot recall the fact adequately without using the document and it was written by, or checked by, him or her at a time when the events it records were fresh in his or her memory.

77. In other circumstances a witness must not use a document to revive his or her memory unless the court gives leave.

78. The witness may, with leave of the court, read the document aloud.

79. The court is to order so much of the document used to revive memory as relates to the proceedings be produced to another party if so requested by that party.

Clause 37: Attempts to revive memory out of court

80. This clause provides that where a witness has used a document or thing to revive his or her memory out of court the court may, at the request of another party, direct that so much of the document or thing as relates to the proceedings be produced to that party. If the direction is not complied with, the court may refuse to admit the evidence given by the witness.

Clause 38: Direction not to extend to certain documents

81. This clause provides that a direction may not be made under clause 37 where it would override client legal privilege in respect of a document.

Clause 39: Effect of calling for production of documents

82. This clause abolishes the rule known as the rule in Walker v. Walker (1937) 57 CLR 630. Under that rule, a document (which might otherwise be inadmissible) may be admitted in evidence if the party called on to produce it requires the party who called for and inspected the document to tender it.

Clause 40: Person may be examined without subpoena or other process

83. This clause is drawn from section 52 of the Evidence Ordinance 1971 of the Australian Capital Territory. It allows the court to order a person present at the hearing of a proceeding to give evidence or produce documents. A person so ordered is subject to the same liabilities as if he or she had been served with a subpoena.

Subdivision B - Examination in chief and re-examination

Clause 41: Leading questions

84. This clause provides that, unless each party to the proceeding consents or the court gives leave, leading questions may not be put to witnesses in examination in chief or re-examination.

85. Leave is not required where the question relates to an introductory matter or a matter not in dispute, or where the question is put to an expert witness for the purpose of obtaining his or her opinion about a hypothetical statement of facts.

86. Unless the court otherwise orders, leading questions may be put in civil proceedings to a witness relating to an investigation, inspection or report he or she made in the course of carrying out public or official duties.

Clause 42: Unfavourable etc. witnesses

87. This clause provides that a party may, with the leave of the court, cross-examine his or her own witness about evidence the witness has given that is unfavourable to the party, or about whether the witness has made a prior inconsistent statement.

88. A party may also cross-examine his or her own witness who appears not to be making a genuine attempt to give evidence on a matter of which the witness may reasonably be supposed to have knowledge.

89. To overcome the decision of the High Court in Vocisano v. Vocisano (1974) 130 CLR 267, a person acting in the name of a party (e.g. an insurer conducting an action in the name of an insured) is to be able, where the party is called as a witness, to cross-examine the party in the same circumstances as the person may cross-examine any other witness.

90. In determining whether to grant leave to a party to cross-examine his or her own witness, a court is to take into account whether the party gave notice at the earliest opportunity of his or her intention to seek leave and the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

Clause 43: Limits on re-examination

91. This clause provides that, unless the court gives leave, a witness on re-examination may only be questioned about matters arising out of, or related to, evidence given by the witness in cross-examination.

Subdivision C - Cross-examination

Clause 44: Witness called in error

92. This clause applies where a witness has been called in error. A party is not to cross-examine the witness unless he or she has given evidence in the proceeding.

Clause 45: Improper questions

93. This clause provides that a court may disallow, or inform the witness he or she need not answer, a question that is misleading or unduly annoying, harassing, offensive, oppressive or repetitive. In deciding whether to exercise its powers the court is to take into account relevant characteristics of the witness (such as age or education) and any mental or physical disability.

Clause 46: Leading questions

94. This clause provides that a party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it. Where the court is satisfied that the facts would be better ascertained if leading questions are not used, it must disallow the question or direct the witness not to answer it.

95. In deciding whether to disallow a question or give a direction, the court is to take into account, amongst other things, the extent to which the witness or his or her evidence is supportive of the cross-examiner.

Clause 47: Prior inconsistent statements of witnesses

96. This clause applies when a party, in cross-examination of a witness, asks him or her a question about a prior statement the witness has made that is inconsistent with his or her evidence. It is not to be necessary to put complete particulars of the statement to the witness or to show the witness a document that records the statement.

97. If the witness does not admit he or she made the statement, the prior statement cannot be proved unless the party informed the witness of enough of the circumstances of the making of the statement to identify the occasion on which it was made, and asked the witness whether he or she made the statement.

Clause 48: Previous representations of other persons

98. This clause applies when a party, in cross-examination of a witness, asks him or her about a previous representation by another person. Where the evidence of the representation has been or will be admitted in evidence, the party may cross-examine the witness on it generally.

99. Where the representation is recorded in a document which has not been, and will not be, admitted in evidence, the document may only be produced to the witness. When it is produced the witness may only be asked whether, having examined it, he or she still adheres to his or her evidence.

Clause 49: Production of documents

100. This clause provides for the production and examination of a document recording a prior inconsistent statement of the witness, or a previous representation made by a person other than the witness, that is raised in cross-examination.

101. The court, or a party other than the cross-examining party, may require the cross-examining party to produce the document, or such evidence of its contents as is available to him or her. The court may give directions about its use and may admit it. Production of the document to a witness in cross-examination does not require the cross-examining party to tender the document.

Clause 50: Effect of certain matters not being put to witness

102. This clause provides that a court may permit a party to recall a witness to be questioned about a matter where another party has adduced evidence which contradicts evidence given by that witness and the substance of which was not put to that witness in cross-examination.

103. Evidence contradicting evidence of a witness is not inadmissible merely because the party adducing the evidence did not cross-examine the witness about the matter to which the evidence relates.

Division 4 - Examination of witnesses abroad

Clause 51: Proceedings in superior courts

104. This clause enables a superior court in any civil or criminal proceeding before it to order that, in relation to a person outside Australia -

- (a) the person be examined on oath or affirmation at a place outside Australia before a judge, court officer or other person;
- (b) a commission be issued for the person to be examined on oath or affirmation at a place outside Australia; or
- (c) a letter of request be issued to the judicial authorities of a foreign country to take the person's evidence, or cause it to be taken.

105. The court may give directions about the procedure to be followed in relation to an examination. Where a court makes an order for the issue of a letter of request it may include a request about how the taking of evidence is to be conducted.

106. The court may permit a party to tender in the proceeding the evidence or a record of the evidence taken in an examination.

Clause 52: Proceedings in inferior courts

107. This clause permits specified superior courts to exercise the same power to order the taking of evidence, the issue of a commission or the issue of a letter of request in relation to proceedings before inferior courts as they can in relation to proceedings before themselves.

108. The superior courts specified are the State and Territory Supreme Courts for matters (other than family law matters in lower courts) before the inferior courts of the respective States or Territories, and for family law matters in lower courts in Western Australia, the Family Court of Western Australia, for such courts in the Northern Territory, the Supreme Court of the Northern Territory, and for lower courts elsewhere in Australia, the Family Court of Australia.

109. The clause gives to the inferior court the same powers given to the superior court by clause 51 in respect of the use of evidence taken pursuant to an order.

Clause 53: Other proceedings

110. This clause enables a superior court, when making an order for the obtaining of evidence abroad for a committal proceeding, to also order that the evidence obtained may be tendered in a trial resulting from the committal proceeding, or in a related civil proceeding. Similarly, it enables a superior court making an order for obtaining evidence abroad for a criminal proceeding to also order that the evidence may be tendered in a related civil proceeding.

111. In each case, the court hearing the resulting criminal proceeding or the related civil proceeding will have a discretion whether or not to accept the evidence, even if it is otherwise admissible.

112. "Related civil proceeding" is defined to mean a civil proceeding arising from the same subject matter as the criminal proceeding, particularly a proceeding under the Proceeds of Crime Act 1987, the Customs Act 1901, or for the recovery of any tax, duty, levy or charge owing to the Commonwealth.

Clause 54: Variation or revocation of orders

113. This clause enables a superior court to revoke or vary an order for the taking of evidence abroad. This power includes a power to add an order under clause 53.

Clause 55: Exclusion of evidence in criminal proceeding

114. This clause states that Division 4 does not affect the power of a court in a criminal proceeding to exclude illegally obtained evidence or evidence which would operate unfairly against a defendant.

Clause 56: Operation of other laws

115. This clause states that Division 4 is not intended to exclude or limit the operation of other laws providing for the examination of witnesses outside Australia.

Clause 57: Rules of court

116. This clause extends the power of an authority to make rules for the practice and procedure of a superior court, to make rules to give effect to the Division. The clause does not affect any power to make rules under any other law.

Division 5 - Taking of evidence for proceedings in foreign courts

117. This Division enables the Attorney-General to prohibit the giving of evidence in any Australian court for use in foreign civil or commercial proceedings, where the giving of such evidence would prejudice the security of Australia.

Clause 58: Application of Division

118. This clause applies the Division to proceedings before an Australian court for taking evidence for use in a foreign court relating to a civil or commercial matter.

Clause 59: Exercise of powers under this Division

119. This clause prohibits the Attorney-General from exercising a power conferred by the Division unless he or she is satisfied it is desirable to do so for the purpose of preventing prejudice to the security of Australia.

Clause 60: Orders

120. This clause enables the Attorney-General, by order in writing, to prohibit the production of a document or thing, or the giving of evidence or information. The order may be directed to a particular person, a class of persons, or persons generally. It may relate to particular proceedings, a class of proceedings or proceedings generally, and to particular documents, things, evidence or information or to classes of documents, things, evidence or information.

Clause 61: Copies etc. of documents

121. This clause applies an order relating to a document to any copy, extract or summary of that document.

Clause 62: Intervention

122. This clause enables the Attorney-General to intervene in any proceedings in order to prevent a contravention of an order under clause 60. Where the Attorney-General intervenes, a certificate by the Attorney-General that the doing of an act prohibited by an order under clause 60 would be prejudicial to Australia's security is to be conclusive evidence of that fact.

123. Power is conferred on the court to order costs against the Commonwealth, if it thinks fit, where the Attorney-General intervenes.

Clause 63: Injunctions

124. This clause enables the Attorney-General to apply to the Federal Court for an injunction to restrain a contravention of an order.

PART 4 - ADMISSION OF EVIDENCE: RELEVANCE RULE

Clause 64: Relevant evidence

125. This clause states the principal rule concerning the admission of evidence, the relevance rule. Evidence is relevant if it could rationally affect (whether directly or indirectly) the assessment of the probability of a fact in issue.

126. Evidence which under the test would be admissible, although only marginally relevant, may be excluded under clause 127.

127. Evidence is not to be taken to be irrelevant only because it relates to the credibility of a witness, admissibility of other evidence, or a failure to adduce evidence.

Clause 65: Relevant evidence to be admissible

128. This clause states the basic rule of admissibility.

129. Evidence that is relevant is admissible unless excluded by one of the exclusionary rules set out in the Act. Evidence that is not relevant is not admissible.

Clause 66: Provisional findings about relevance

130. This clause enables a court to admit evidence provisionally.

131. Where the determination whether evidence is relevant depends upon the court making a finding on a matter, the court may find that the evidence is relevant if it is reasonably open to make the finding in question, or may find it is relevant subject to the admission of further evidence, as a result of which it will be reasonably open to make the finding in question.

Clause 67: Inferences as to relevance

132. This clause enables a court to examine a document or thing for the purpose of determining its relevance and to draw any reasonable reference from it.

PART 5 - ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

Division 1 - Hearsay evidence

133. This Division sets out an exclusionary rule for hearsay evidence and exceptions to that rule.

Subdivision A - The hearsay rule

Clause 68: Exclusion of hearsay evidence

134. This clause sets out the general exclusionary rule for hearsay evidence. This rule ('the hearsay rule') prevents evidence of a previous representation made by a person being admitted to prove the existence of a fact ('the asserted fact') that the person intended to assert by the representation.

Clause 69: Exceptions to the hearsay rule dependent on competency

135. This clause provides that nothing in Division 1 permits the use of a previous representation to prove an asserted fact if the person who made the representation was not, at the time, competent to give evidence.

Clause 70: Exception: evidence relevant for a non-hearsay purpose

136. This clause permits the use of evidence to prove the existence of an asserted fact if it is admitted because it is relevant other than as proof of the asserted fact (for example, if it is relevant to the credit of a witness).

Subdivision B - "First-hand" hearsay

Clause 71: Restriction to "first hand" hearsay

137. This clause provides that except in this clause 'previous representation' refers only to such a representation made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted in the representation, other than a report from some other person about the asserted fact. Such a representation is referred to below as 'first-hand' hearsay.

Clause 72: Exception: civil proceedings where maker not available

138. This clause provides an exception to the hearsay rule in civil proceedings where the maker of the "first-hand" hearsay representation is not available to give evidence.

139. In these circumstances, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or some other representation reasonably necessary to understand it, may be admitted.

140. A party will be required to give notice, under clause 76, of his or her intention to adduce the evidence.

Clause 73: Exception: civil proceedings where maker available

141. This clause provides for 2 exceptions to the hearsay rule in civil proceedings where the maker of the "first-hand" hearsay representation is available to give evidence.

142. First, where it would cause undue expense or undue delay or it would not be reasonably practicable to call the maker of the representation to give evidence, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or some other representation reasonably necessary to understand it, may be admitted. A party will be required to give notice of his or her intention to adduce the evidence (under clause 76).

143. Secondly, where the maker of the representation has been, or is to be, called to give evidence, evidence of the representation may be given by the maker, or by someone else who witnessed it, only if, when the representation was made, the occurrence of the asserted fact was fresh in the mind of the maker.

144. Documentary evidence of the representation is not to be tendered before the conclusion of the examination in chief of the maker unless the court gives leave.

Clause 74: Exception: criminal proceedings where maker not available

145. This clause provides for exceptions to the hearsay rule in criminal proceedings where the maker of the 'first-hand' hearsay representation is not available to give evidence.

146. First, evidence of the representation is to be able to be given if it:

- . was made in the course of a duty;
- . is admissible by virtue of the common law rules relating to res gestae;
- . is a dying declaration;
- . was made in the course of giving evidence in another proceeding where the defendant in the present proceeding cross-examined, or had a reasonable opportunity to cross-examine, the person who made it; or
- . was against the interests of the maker (for example, it would tend to damage the reputation of the maker, incriminate him or her, or show he or she is liable in an action for damages).

147. Broadly, hearsay evidence is admitted as being part of the res gestae when it is relevant to a fact in issue by reason of a close connection in time, place and circumstance with that fact.

148. A party will be required to give notice of his or her intention to adduce the evidence.

149. Secondly, a defendant is to be able to adduce evidence of a 'first-hand' hearsay representation, subject to being required to give notice of his or her intention to do so. Where evidence of that kind has been adduced by a defendant about a particular matter, the prosecution or another defendant may adduce evidence of a 'first-hand' hearsay representation in reply.

Clause 75: Exception: criminal proceedings where maker available

150. This clause provides for an exception to the hearsay rule in criminal proceedings where the maker of the 'first-hand' hearsay representation is available to give evidence.

151. If the maker has been or is to be called to give evidence, evidence of the representation may be given by the maker or by someone else who witnessed the representation, only if, when the representation was made, the occurrence of the asserted fact was fresh in the mind of the maker.

152. If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in a legal or administrative proceeding, the exception to the hearsay rule is not to apply to evidence adduced by the prosecutor unless the representation concerns the identity of a person, place or thing.

153. Documentary evidence of the representation is not to be tendered before the conclusion of the examination in chief of the maker unless the court gives leave.

Clause 76: Notice to be given

154. This clause requires a party adducing evidence of 'first-hand' hearsay where the maker of the representation is not available, or is not called, to give reasonable notice to each other party of his or her intention to adduce the evidence. The notice requirement may be waived, conditionally or otherwise, by the court.

155. In civil proceedings where the maker of the representation is available, another party may, within 7 days after the notice has been given, object to the tender of the evidence, or a specified part of it. If the objection is unreasonable the court may order that the party objecting pay the costs incurred by another party in relation to the objection and in calling the maker to give evidence.

156. Notice is to be given in accordance with any regulations or rules of court.

Subdivision C - Other exceptions to the hearsay rule

Clause 77: Exception: business records

157. Under this clause, the hearsay rule is not to apply to a representation in a document that is or was part of the records of a business, and was made in the course of, or for the purposes of, a business, if the representation was made by a person who might reasonably be supposed to have had personal knowledge of the asserted fact, or was made on the basis of information directly or indirectly supplied by such a person.

158. This exception is not to apply to a representation prepared in connection with possible legal or administrative proceedings.

159. Secondly, the hearsay rule is not to apply to evidence that there is no record in a business record keeping system of the happening of an event normally recorded in the system.

Clause 78: Exception: contents of tags, labels etc.

160. This clause excepts from the hearsay rule a document attached to, or writing placed on, an object in the course of a business for the purpose of describing the identity, nature, ownership or origin of the object, or of its contents (if any).

161. The exception is not to apply in a Customs prosecution under the Customs Act 1901 or an Excise prosecution under the Excise Act 1901.

Clause 79: Exception: telecommunications

162. This clause excepts from the hearsay rule a document recording a message that has been transmitted by facsimile telegraphy or a telegram, lettergram or telex. The document is to be able to be used to prove the identity of the person who sent the message, the place from where it was sent, the time it was sent, the identity of the person to whom it was sent and, in the case of messages transmitted over a telephone or telex network, any telephone or telex numbers that relate to the message's source or destination.

Clause 80: Exception: reputation as to certain matters

163. This clause provides for exceptions to the hearsay rule in relation to evidence of reputation about marriage, a person's age, family history or relationships and public or general rights. In criminal proceedings, the exception is limited to evidence adduced by a defendant, or by the prosecution to rebut evidence about reputation adduced by a defendant.

Clause 81: Exception: interlocutory proceedings

164. This clause provides for an exception to the hearsay rule for evidence adduced in interlocutory proceedings, provided the party who adduces it also adduces evidence of its source.

Division 2 - Opinion evidence

Clause 82: The opinion rule

165. This clause sets out the general exclusionary rule for opinion evidence. Evidence of an opinion is not admissible to prove a fact asserted by the opinion.

Clause 83: Exception: evidence relevant otherwise than as opinion evidence

166. This clause permits the use of evidence of an opinion to prove a fact asserted by the opinion if the evidence of the opinion is admitted because it is otherwise relevant.

Clause 84: Exception: lay opinions

167. This clause permits opinion evidence where it is based on the person's own perception of an event and evidence of the opinion is necessary to obtain an adequate understanding of the person's perception of the event.

Clause 85: Exception: opinions based on specialised knowledge

168. This clause permits opinion evidence that is wholly or substantially based on specialised knowledge. The person expressing the opinion must have specialised knowledge based on training, study or experience. It is not to be necessary for the person to be formally qualified. Relevant experience will suffice.

Clause 86: Ultimate issue and common knowledge rules abolished

169. This clause abolishes the common law rules known as the ultimate issue and the common knowledge rules.

170. The ultimate issue rule prevents a witness from giving evidence on an issue the court is to decide.

171. The common knowledge rule excludes expert opinion evidence on matters of common knowledge.

Division 3 - Admissions

172. This Division sets out exceptions to the exclusionary rules for hearsay evidence and opinion evidence relating to admissions.

Clause 87: Hearsay and opinion rules: exception for admissions

173. This clause excepts from the hearsay and opinion rules evidence of an admission and evidence of a representation made at or about the time of the admission that is reasonably necessary to understand the admission.

Clause 88: Exclusion of evidence of admissions that is not first-hand

174. This clause applies the hearsay rule to prevent evidence being given of an admission unless it is given orally by a person who witnessed it or it is contained in a document in which a person asserts he or she witnessed it.

Clause 89: Exclusion of evidence of admissions as against third parties

175. This clause restricts the use that can be made by the court of an admission. The hearsay rule and the opinion rule apply so that evidence of an admission cannot be used in relation to the case of a third party unless that third party consents. Consent cannot be given in respect of part only of the admission.

Clause 90: Exclusion of admissions influenced by violence etc.

176. This clause provides that an admission is not admissible unless the court is satisfied the admission was not influenced by violent, oppressive, inhuman or degrading conduct, or by a threat of such conduct.

Clause 91: Criminal proceedings: reliability of admissions by defendants

177. This clause provides that an admission made by a defendant in a criminal proceeding is inadmissible unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected. The matters the court is to take into account, in deciding whether those circumstances exist, include any relevant characteristic of the defendant, the nature of any questioning, and the nature of any threat or promise made.

Clause 92: Exclusion of records of oral questioning

178. This clause makes inadmissible in a criminal proceeding any document (other than a sound or video recording, or transcript of such a recording) purporting to be a record of interview with a defendant unless the defendant acknowledged the document as a true record by signing or otherwise marking it.

Clause 93: Admissions made with authority

179. This clause sets out the circumstances in which admissions made by other persons are treated as having been made by a party.

180. An admission made by another person is taken to be made by a party if:

- . the person had authority to make statements on behalf of the party in relation to the matter it concerned;
- . it was made by an employee or agent about a matter within the scope of his or her employment or authority; or
- . it was made in furtherance of a common purpose with the party.

181. The hearsay rule is not to apply, for the purposes of the clause, to evidence of a previous representation made by a person about his or her authority to make statements on behalf of a party, employment, authority to act or the existence of a common purpose.

Clause 94: Proof of admissions

182. This clause provides for the standard of proof that is to apply in determining whether an admission is admissible. The court is to find that a person made a representation if it is reasonably open so to find.

Clause 95: Evidence of silence

183. This clause prevents unfavourable inferences, including an inference of consciousness of guilt, being drawn in a criminal proceeding from a failure by a person to answer a question, or respond to a representation, during official questioning. Where the only use that could be made of such evidence would be to draw such an inference, the evidence is to be inadmissible. The clause does not apply where the failure to answer or respond is a fact in issue in the proceedings.

Clause 96: Discretion to exclude admissions

184. This clause provides that if, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit it, or refuse to admit it to prove a particular fact.

Division 4 - Evidence of judgments and convictions

185. This Division abolishes the rule known as the rule in Hollington v Hewthorn [1943] KB 587. In that case, evidence of a conviction was held to be inadmissible in civil proceedings to prove the facts on which it was based.

Clause 97: Exclusion of evidence of judgments and convictions

186. This clause provides that evidence of the decision or a finding of fact in a legal or administrative proceeding is not admissible to prove a fact in issue in that proceeding. Where evidence of the decision is otherwise relevant, it cannot be used for the purpose of proving that fact. This rule is subject to clauses 98 and 99.

Clause 98: Exceptions

187. This clause provides for exceptions to the hearsay rule, the opinion rule and the rule in clause 97.

188. The exceptions are evidence of a grant of probate or letters of administration to prove death, date of death or the due execution of a will and, in civil proceedings, evidence of a conviction of a party or a person through whom a party claims (other a conviction that has been quashed or set aside, in respect of which a pardon has been given, or which is under appeal).

Clause 99: Savings

189. This clause preserves existing law relating to the admissibility of convictions in defamation proceedings and the rules relating to judgments in rem, res iudicata and issue estoppel.

Division 5 - Evidence of conduct and character relevant to issues

190. This Division provides for the admissibility of evidence relating to conduct, reputation, character and tendency of parties and witnesses, which is relevant to a fact in issue in the proceedings. It does not apply where such reputation etc is a fact in issue or relates only to the credibility of witnesses. Such credibility evidence is dealt with in Part 5 Division 6.

Subdivision A - Preliminary

Clause 100: Application

191. This clause provides that Division 5 is not to apply to evidence that relates only to the credibility of a witness, evidence in a proceeding so far as it relates to bail, or evidence of character, reputation, conduct or a tendency of a person that is a fact in issue in the proceeding.

Clause 101: Use of evidence for other purposes

192. This clause provides that if evidence which, under Division 5, is not admissible to prove a particular matter is relevant for other purposes, it still must not be used to prove that particular matter.

Clause 102: Failure to act

193. This clause provides that a reference in Division 5 to the doing of an act includes a reference to failing to do that act.

Subdivision B - Tendency evidence

Clause 103: The tendency rule

194. This clause provides that evidence of a party's character, reputation, conduct or tendency is not admissible to prove that the party has or had a tendency to act in a particular way unless the party adducing it gives reasonable notice in writing to each other party. Notice is not needed of tendency evidence adduced by a party to explain or contradict tendency evidence adduced by another party.

Clause 104: Court may dispense with notice requirements

195. This clause enables the court to direct that a party need not give notice under clause 103 that he or she intends to adduce tendency evidence.

196. The application may be made ex parte, and either before or after the time the party would be required to give notice.

197. The direction may be subject to conditions.

Clause 105: Further restrictions on tendency evidence adduced by prosecution

198. This clause provides that the prosecution in a criminal proceeding is not to adduce tendency evidence, except to explain or contradict tendency evidence adduced by the defendant, unless:

- . the evidence tends to prove a fact in issue, otherwise than merely by tending to prove the defendant has committed another offence or has a predisposition to commit an offence, and its probative value outweighs its merely prejudicial effect on the defendant; and
- . where the evidence concerns the occurrence of 2 or more events disputed by the defendant, there is no rational view of the evidence inconsistent with the defendant being found guilty of any offence with which he or she is charged in the proceeding.

Subdivision C - Character evidence

199. This Subdivision sets out special rules relating to evidence of character adduced as being relevant to a fact in issue in a criminal proceeding. Part 5 Division 6 deals with character evidence relevant to the credibility of a witness.

Clause 106: Application of Subdivision

200. This clause provides that Subdivision C applies only in criminal proceedings.

Clause 107: Exception: character of accused

201. This clause provides an exception to the hearsay rule, the opinion rule and the tendency rule for evidence adduced:

- . by a defendant in a criminal proceeding about his or her own good character, either generally or in a particular respect; and

. to rebut such evidence.

Clause 108: Exception: character of co-accuseds

202. This clause provides an exception to the hearsay rule and the tendency rule for expert opinion evidence about a defendant adduced by another defendant.

203. The clause also provides an exception to those rules and to the opinion rule for evidence rebutting the opinion evidence adduced by a co-defendant.

Clause 109: Leave required to cross-examine etc. about character

204. This clause provides that a defendant cannot be cross-examined on matters arising out of evidence about his or her character unless the court gives leave. Also, where a defendant adduces character evidence in cross-examining a witness, rebuttal evidence cannot be given unless the court gives leave.

Division 6 - Credibility

Clause 110: The credibility rule

205. This clause provides the basic rule ('the credibility rule') that evidence which is relevant only to the credibility of a witness is not admissible to prove that the witness's evidence should or should not be accepted.

Clause 111: Exception: cross-examination as to credibility

206. This clause provides that evidence relevant only to the credibility of a witness adduced in cross-examination of the witness may be admitted if it has substantial probative value.

207. The matters a court takes into account in determining whether the evidence has substantial probative value must include:

- . whether the evidence tends to show that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth;
- . the period of time that has elapsed since the acts or events to which the evidence relates.

Clause 112: Further protections: cross-examination of accused

208. This clause applies, in addition to clause 111, to cross-examination of a defendant in a criminal proceeding.

209. The prosecution is to be able to cross-examine a defendant on a matter relevant only to the credibility of the defendant if the questioning is about:

- . whether the defendant is biased or has a motive to be untruthful;
- . the defendant's capacity to observe and recall the matters to which his or her evidence relates; or
- . whether he or she has made a prior inconsistent statement.

210. In other circumstances, the prosecution can only cross-examine the defendant on a matter relevant only to his or her credibility if the court gives leave.

211. Leave is not to be given unless the defendant has adduced evidence about his or her own good character or attacking the credit of a prosecution witness.

212. Leave is not to be given for a co-defendant to cross-examine the defendant on a matter relevant only to the credibility of that defendant unless the defendant has given evidence adverse to the co-defendant.

Clause 113: Certain credibility evidence admissible only to rebut denials

213. This clause provides that the credibility rule does not apply to evidence the substance of which the witness has denied and that has been adduced otherwise than from that witness if the evidence shows the witness:

- . is biased or has a motive to be untruthful;
- . has prior convictions;
- . has made a prior inconsistent statement;
- . cannot be aware of the matters to which his or her evidence relates, or
- . has knowingly or recklessly made a false representation when under a legal obligation to tell the truth.

Clause 114: Exception: application of certain provisions to makers of representations

214. This clause applies where hearsay evidence has been admitted and the maker of the representation has not been called to give evidence. It permits admission of credibility evidence about matters on which the maker of the representation could have been cross-examined if he or she had given evidence.

Clause 115: Exceptions: re-establishing credibility

215. This clause provides that the credibility rule does not prevent:

- . evidence being adduced in re-examination;
- . evidence explaining or contradicting evidence admitted under clause 114, if the court gives leave; or

. evidence of a prior consistent statement of a witness if:

- evidence of a prior inconsistent statement of the witness has been admitted; or
- it is suggested that evidence given by the witness has been fabricated or reconstructed, or is the result of a suggestion;

and the court gives leave.

Division 7 - Privileges

216. This Division sets out grounds on which a person can claim evidence should not be required because it is privileged and for the exclusion of evidence based on public policy considerations.

Subdivision A - Client legal privilege

Clause 116: Privilege in respect of legal advice and litigation etc.

217. This clause provides for client legal privilege.

218. If the client objects, evidence is not to be given that would disclose:

- . a confidential communication made between a client or his or her representative and a legal practitioner, two or more legal practitioners acting for the client or the employees or agents of those legal practitioners; or
- . a document prepared by the client, his or her representative or a legal practitioner;

for the sole purpose of the legal practitioner providing legal advice to the client.

219. If the client objects evidence is not to be given that would disclose:

- . such a confidential communication made;
- . a confidential communication made between a client, or his or her representative, or a legal practitioner acting for the client or an employee or agent of such a legal practitioner and some other person, or between 2 employees or agents of the client; or
- . a document prepared;

for the sole purpose of the client being provided with professional legal services in connection with litigation, or anticipated litigation, in which the person is or might be involved.

220. Thirdly, if a party who is not represented by a legal practitioner in litigation objects, evidence is not to be given that would disclose:

- . a confidential communication between the party or his or her representative and some other person; or
- . a document prepared by the party or his or her representative;

for the sole purpose of preparing for or conducting the litigation.

Clause 117: Loss of client legal privilege

221. This clause sets out the circumstances in which clause 116 does not prevent evidence being adduced. Evidence may be given, despite clause 116, where:

- . the person to whom the privilege belongs consents;
- . the evidence concerns the intentions or competence of a client or party who has died;

- . if the evidence were not given, it could reasonably be expected to prevent the court enforcing an order of an Australian court;
- . a defendant is giving evidence in a criminal proceeding except when his or her evidence would disclose:
 - a confidential communication between a person being prosecuted for a related offence, or his or her employee or agent, and a legal practitioner acting for that person in connection with that prosecution; or
 - a document prepared by such a person, his or her employee or agent, or a legal practitioner acting for such a person in connection with that prosecution;
- . the evidence affects a right of a person;
- . the person to whom the privilege belongs or his or her representative has knowingly and voluntarily disclosed the evidence except where:
 - the disclosure was made in the course of making a confidential communication or preparing a confidential record, as a result of duress or under compulsion of law; or
 - in the case of a disclosure by an employee or agent of the client or of his or her legal practitioner he or she was not authorised to make it;
- . the document containing the evidence has been used by a witness in court to refresh his or her memory;

- . the substance of the evidence has been disclosed, with the express or implied consent of the client or party, to some other person, except where the disclosure is to:
 - his or her representative;
 - a legal practitioner acting for him or her;
 - another person for whom the legal practitioner is acting in relation to the same matter; or
 - in the case of a disclosure by a statutory body or a statutory office holder, the responsible Minister administering the law under which the body is established or the office is held;
- . where a legal practitioner was retained by 2 or more parties in connection with the same matter, one of them gives evidence of a communication made by one of the parties or his or her representative to the legal practitioner, or a document one of the parties or his or her representative prepared, in connection with the matter;
- . the evidence would disclose a communication made or document prepared in furtherance of a fraud, an offence, an act that renders a person liable to a civil penalty or a deliberate abuse of a statutory power; or
- . if the evidence were not given, a person would be reasonably likely to be at greater risk of physical harm.

222. Where client legal privilege is not to apply in relation to a communication or a document, it is also not to apply to another communication or document reasonably necessary to enable a proper understanding of the first communication or document, or where it would be unfair or misleading for evidence of the second communication or document not to be adduced.

Clause 118: Representatives

223. This clause defines "representative", where it is used in Part 5 Division 7 Subdivision A, to include an employee, an agent, a manager of a person of unsound mind, a personal representative of a deceased person and a successor in title of a right or obligation in relation to which a confidential communication was made.

Subdivision B - Other privileges

Clause 119: Exclusion of evidence of representations made to clergy etc.

224. This clause provides that evidence is not to be given of a confidential communication between a minister of religion and another person, made in the course of that other person making a confession in accordance with the religion or seeking spiritual advice or comfort, except where:

- . the other person consents to the giving of the evidence;
- . the evidence would disclose a communication made in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty;
- . if the evidence were not given, a person would be reasonably likely to be at greater risk of physical harm.

Clause 120: Privilege in respect of self-incrimination in other proceedings

225. This clause provides a general rule that a court must not require a witness to give particular evidence if the witness objects that the evidence may tend to prove he or she has committed an offence or is liable to a civil penalty, and the court is satisfied there are reasonable grounds for the objection.

226. Where the court finds there are reasonable grounds for the objection, the witness must be given the option either to not give the particular evidence or to give the evidence and to receive a certificate. The certificate will have the effect that evidence given by the witness to which it relates, and any information or document or thing obtained as a direct or indirect consequence of the person having given evidence, is not admissible in any legal or administrative proceeding, except a criminal proceeding in respect of the falsity of the evidence.

227. A certificate also must be given where the witness gives evidence after his objection has been overruled and, after the evidence is given, the court finds there were reasonable grounds for the objection.

228. The court is to have a discretion to require the witness to give the evidence, except in the case of self-incrimination with respect to an offence or civil penalty arising under foreign law, if the interests of justice require the witness to give the evidence. In such a case a certificate must be given.

229. This clause does not apply in relation to evidence that a defendant did an act which is a fact in issue, or had a state of mind which is a fact in issue.

230. The clause provides that a corporation does not have a privilege against self-incrimination.

Subdivision C - Evidence excluded in the public interest

Clause 121: Exclusion of evidence of reasons for judicial etc. decisions

231. This clause provides that evidence of the reasons for a decision, or of the deliberations, of a judge or arbitrator, may not be given by the judge or arbitrator, or by a person under his or her direction or control, in another legal or administrative proceeding. This does not apply to published reasons for a decision.

232. The clause also prevents evidence of the reasons for a decision or the deliberations of a member of a jury being given by a jury member in another legal or administrative proceeding.

233. The clause does not apply to:

- . an offence under Part III of the Crimes Act 1914;
- . embracery;
- . attempting to pervert the course of justice;
- . offences related to these offences;
- . contempt of court;
- . appeal and judicial review proceedings (including judicial review of an arbitral award);
- . civil proceedings in respect of the act of a judicial officer or arbitrator beyond his or her jurisdiction, and known by him or her to be beyond his or her jurisdiction.

Clause 122: Public interest immunity

234. This clause preserves the operation of the common law rules relating to public interest immunity.

Clause 123: Exclusion of evidence of settlement negotiations

235. This clause provides that evidence may not be adduced of a communication made between persons in dispute, or a document prepared, in connection with an attempt to settle the dispute.

236. It also provides that evidence may not be adduced of a communication made between one of the persons in dispute and some other person in connection with an attempt to settle the dispute.

237. The clause is not to apply where:

- . the persons in dispute have consented to the evidence being adduced;
- . the substance of the evidence has already been disclosed with express or implied consent of all the persons in dispute;
- . the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute and full disclosure is reasonably necessary to enable a proper understanding of the other evidence or to avoid unfairness;
- . the communication or document included a statement to the effect that it was not to be treated as confidential;
- . the issue in dispute to which the communication or document relates has been settled or determined;
- . the evidence contradicts or qualifies evidence already admitted about an attempt to settle the dispute;
- . the communication affects the right of a person; or
- . the communication was made or document prepared in furtherance of a fraud, an offence, an act that renders a person liable to a civil penalty or an abuse of statutory power.

238. The clause is not to apply to parts of a document that do not concern an attempt to negotiate the settlement of a dispute, if it would not be misleading to adduce evidence of only those parts of the document.

Subdivision D - General

Clause 124: Court to inform of rights etc.

239. This clause provides that the court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under Division 7 where it appears that he or she may have a ground for making an objection or application under the Division.

Clause 125: Court may inspect etc. documents

240. This clause enables the court to call for and examine any document in respect of which a claim for privilege is made under Division 7.

Clause 126: Inadmissibility of evidence that must not be adduced etc.

241. This clause provides that if, because of a provision in Division 7, evidence may not be adduced or given in a proceeding, it is not admissible in the proceeding.

Division 8 - Discretions to exclude evidence

Clause 127: General discretion to exclude

242. This clause provides a discretion to exclude relevant evidence where its probative value is substantially outweighed by the danger it might be unfairly prejudicial, misleading or confusing, or cause undue waste of time.

Clause 128: General discretion to limit use of evidence

243. This clause enables the court to limit the use to be made of evidence if there is a danger it might be unfairly prejudicial, misleading or confusing, or cause undue waste of time.

Clause 129: Discretion to exclude prejudicial evidence in certain criminal proceedings

244. This clause enables the court, in a criminal proceeding where there is a jury or in a committal proceeding, to exclude evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant.

Clause 130: Discretion to exclude improperly obtained evidence

245. This clause provides for exclusion of evidence obtained improperly, unlawfully or in consequence of an impropriety or breach of the law. It applies in both civil and criminal proceedings.

246. Such evidence is to be excluded unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained.

247. The court is to take into account, amongst other things, the importance of the evidence, the gravity of the impropriety and the nature of the proceedings.

PART 6 - OTHER ASPECTS OF PROOF

Division 1 - Judicial notice

Clause 131: Matters of law

248. This clause provides for judicial notice to be taken in all Australian courts of Commonwealth, State and Territory laws, including any Commonwealth, State and Territory subordinate legislation that is published or notified in a government gazette.

Clause 132: Matters of common knowledge etc.

249. This clause makes it unnecessary to tender evidence about knowledge that is not reasonably open to question and is common knowledge, either generally or in the locality where the proceeding is being held, or can be verified by consulting authoritative sources.

250. Each party is to be able to make submissions and to refer to information about knowledge covered by the clause.

Clause 133: Certain Crown certificates

251. This clause continues the rules of the common law and equity relating to the effect of a conclusive certificate with respect to a matter of international affairs.

Division 2 - Documents

Clause 134: Interpretation

252. This clause defines 'document in question' for the purposes of Part 6 Division 2 and will permit a document to be taken to be a copy of another document, even if it is not an exact copy of the other document, provided it is identical in all relevant respects.

Clause 135: "Best evidence" rule abolished

253. This clause abolishes relevant aspects of the 'best evidence' rule which, in relation to documentary evidence, limits the manner in which the contents of a document can be proved. The rule provides that a document, except in certain limited circumstances, must be proved by production of the original document.

Clause 136: Proof of contents of documents

254. This clause sets out the ways in which the contents of a document can be proved.

255. The contents may be proved by tendering:

- . the original document;
- . an admission by another party about its contents;
- . a document produced by a device that reproduces the contents of documents (for example, a photocopier or multiple copies of a document produced by a word processor);
- . where the contents of the document are not in visible form (for example, a tape-recording) or are in a code (for example, shorthand notes), a transcript;
- . where the document is an article or thing on which information is stored in such a way that it cannot be used unless a device is used to retrieve, produce or collate it, a document produced by the device (for example, computer output or a document produced by an optical laser disk reader);
- . a business record that is an extract from, or a summary or copy of, the document;
- . where the document is a public document, an official printed copy of the document.

256. Where the document is unavailable, or where its existence or contents are not in issue in the proceeding, its contents may be proved by tendering a copy or summary of, or extract from, the document or by adducing oral evidence of the contents.

Clause 137: Documents in foreign countries

257. This clause provides that the contents of a document in a foreign country cannot be proved under clause 136, except by tendering the original document or adducing evidence of an admission by another party, unless either a copy of the

document that is to be tendered is served on each other party in the proceeding not less 28 days (or other prescribed period) beforehand, or the court makes a direction to the contrary.

Division 3 - Facilitation of proof

Clause 138: Evidence produced by machines etc.

258. The clause applies to evidence produced wholly or partly by a device or process. In general, the clause will enable that evidence to be given without calling a person to prove that the device or process was working correctly on the occasion the evidence was produced and that no mistake was made in its production.

259. First, where a party tenders a document or thing and claims that it was produced by a device or process, and it is reasonably open to find that when properly used the device or process ordinarily does what the party asserts it to have done, evidence that the document or thing was produced by the device or process is to be evidence that the device or process did what the party asserts it to have done when it produced the document or thing.

260. Secondly, where a party tenders a business record and claims that it was produced by a device or process used for the purposes of a business, evidence that the document was produced by the device or process is to be evidence that the device or process did what the party asserts it to have done when it produced the document. This does not apply to documents produced for the purposes of a legal or administrative proceeding.

Clause 139: Attestation of documents

261. This clause provides that it is not necessary to call a witness who attested a document to give evidence that the document was signed or attested. This does not apply to evidence of a testamentary document.

Clause 140: Attestation etc. before a justice

262. This clause presumes, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace if a Commonwealth or State or Territory law requires or authorises or permits it to be so attested etc and it purports to have been so attested etc.

Clause 141: Gazettes etc.

263. This clause provides for the proof in all Australian courts of gazettes and certain other documents. It presumes, unless the contrary is proved, that a document purporting to be the Gazette, a State or Territory gazette, to have been printed by a government printer of, or by authority of, the government of the Commonwealth or a State or Territory is what it purports to be and was published on the day it purports to have been published.

264. Where such a document notifies the doing of an official act, it is also to be presumed, unless the contrary is proved, that the act was duly done and, if the date of the act appears on the document, that it was done on that date.

Clause 142: Gazettes etc. of foreign countries

265. This clause presumes, unless the contrary is proved, that a document purporting to be an official gazette of a foreign country or to have been printed by a government printer of, or by authority of, the government of a foreign country is what it purports to be and was published on the day it purports to have been published.

266. Where such a document notifies the doing of an official act, it is also to be presumed, unless the contrary is proved, that the act was duly done and, if the date of the act appears on the document, that it was done on that date.

Clause 143: Seals and signatures

267. This clause sets out presumptions to apply in all Australian courts in relation to official documents that have been sealed or signed. It is to be presumed, unless the contrary is proved, that:

- . a document has been duly sealed which is purportedly sealed by a Royal Great Seal, the Great Seal of Australia, another Commonwealth seal, a State or Territory seal or the seal of a body established by Commonwealth or Territory law;
- . a document has been duly sealed which is purportedly sealed by the Sovereign, the Governor-General, a State Governor or a person holding any other office under the Constitution, or Commonwealth, State or Territory law.
- . a document purportedly signed by the Sovereign, the Governor-General, a State Governor, or a person holding any other office under the Constitution, or a Commonwealth, State or Territory law has been duly signed by that person acting in his or her official capacity.

Clause 144: Seals of bodies established under State law

268. Under this clause it is presumed, unless the contrary is proved, that a document purportedly sealed by a body established by the law of a State has been duly sealed.

Clause 145: Seals etc. of foreign countries

269. This clause presumes, unless the contrary is proved, that:

- . a document purportedly sealed by a seal of a foreign country, a seal of a body established by the law of a foreign country or by the seal of a person holding office under a law of a foreign country; and

- . a document purportedly signed by a person holding office under a law of a foreign country;

has been duly sealed or signed as it purports to have been sealed or signed.

Clause 146: Signatures of justices of the peace

270. This clause presumes, unless the contrary is proved, that a person who signs as a justice of the peace is a justice of the peace. It also provides that it is not necessary to adduce evidence of the signature of a justice of the peace if it is attached or appended to a document and the place where it was attached or appended is shown.

Clause 147: Comparison of disputed writing

271. This clause provides, in the case of disputed authorship of writing or a signature, that evidence of a comparison of the writing or signature in dispute with any other writing or signature proved to be genuine is admissible as evidence.

Clause 148: Evidence of proceedings in the Parliament

272. This clause provides for the proof of official papers of the Parliament, by production of certain documents purportedly printed by the Government Printer, in all Australian courts. It substantially re-enacts section 7 of the Evidence Act 1905.

Clause 149: Evidence of federal proceedings

273. This clause provides for the proof in all Australian courts, by production of examined, sealed or certified copies of documents, of acts, process and other documents of a federal court.

Clause 150: Evidence of foreign proceedings

274. This clause provides for the proof, by production of examined, sealed or certified copies of documents, of acts, process and other documents of a foreign court.

Clause 151: Evidence of Commonwealth commissions and orders

275. This clause provides for the proof in all Australian courts of a commission issued by the Governor-General or an order made by or under the authority of a Minister by production of a certified copy or extract. It partly re-enacts section 5 of the Evidence Act 1905. The rest of section 5 is covered by subclause 141(3).

Clause 152: Evidence of Commonwealth public books and documents

276. This clause provides methods of proof, to apply in all Australian courts, of a Commonwealth document or book that under the common law is admissible in evidence on its mere production from proper custody. It re-enacts section 6 of the Evidence Act 1905.

Clause 153: Proof of public documents

277. This clause provides a presumption that a copy of, or an extract from or summary of, a public document purporting to be sealed or certified as such by a person who might reasonably be supposed to be the custodian of the document is a true copy, extract or summary of the document.

Clause 154: Proof of documents produced from proper custody

278. This clause provides that a document more than 20 years old produced from proper custody is presumed, unless the contrary is proved, to be what it purports to be and to have been duly executed or attested.

Clause 155: Contents of tags, labels etc.

279. This clause presumes, unless evidence sufficient to raise real doubt is adduced, that a document attached to, or writing placed on, an object in the course of a business for the purpose of describing the identity, nature, ownership or origin of the object, or of its contents (if any), correctly describes that identity, nature, ownership or origin.

280. The presumption is not to apply in a Customs prosecution under the Customs Act 1901 or an Excise prosecution under the Excise Act 1901.

Clause 156: Posts and telecommunications

281. This clause presumes, unless the contrary is proved, that:

- . a postal article sent by pre-paid post to a person at an address in Australia or an external Territory was delivered to that address at the time the postal article would be delivered in the ordinary course of post;
- . a document purporting to contain a record of a message transmitted by facsimile telegraphy or a telegram, lettergram or telex was:
 - so transmitted;
 - sent by the person from whom or on whose behalf it purports to have been sent, when and from where it purports to have been sent; and
 - received at its destination -
 - . in the case of a facsimile or telex, when its transmission was concluded;
 - . in the case of a telegram or lettergram, when it would be delivered in the ordinary course of business.

Clause 157: Official statistics

282. This clause provides for the proof of statistics published by the Australian Statistician in all Australian courts. It substantially re-enacts section 10A of the Evidence Act 1905.

Clause 158: Proof of convictions etc.

283. This clause provides for evidence of a conviction, acquittal, sentencing or order by, or another judicial proceeding before, an Australian court or a court of a Commonwealth country to be given by a certificate signed by the Registrar or other proper officer of the court concerned.

Clause 159: Proof of identity of convicted persons

284. This clause provides for evidence of the identity of a person alleged to have been convicted of an offence in Australia to be given on the basis of fingerprints by an affidavit by a police officer who is a fingerprint expert.

Clause 160: Proof of service of statutory notices etc.

285. This clause provides for proof of the service, giving or sending, under Commonwealth, State or Territory law, of a written notice or order.

286. Service etc may be proved by the oath of the person who served etc the notice, or by affidavit. If by affidavit, the person who made the affidavit may be required to attend for cross-examination.

Clause 161: Evidence of foreign laws etc.

287. This clause is drawn from section 47 of the Evidence Ordinance 1971 of the Australian Capital Territory. It provides for proof of a statute, proclamation, regulation, by-law, treaty or act of state of a foreign country.

288. Evidence may be given by producing -

- . a book or pamphlet containing the statute etc, that purports to have been printed by the government printer of, or by authority of the government of, the foreign country;

- . a book or pamphlet containing the statute etc that appears to be reliable or that would be admissible as evidence in the courts of the foreign country; or
- . an examined or certified copy of the statute etc.

Clause 162: Evidence of law reports of foreign countries

289. This clause is drawn from section 48 of the Evidence Ordinance 1971 of the Australian Capital Territory. It provides for proof of the unwritten or common law of a foreign country.

290. Evidence may be adduced by producing law reports of the foreign country that are published by authority of the appropriate person, authority or courts.

Clause 163: Questions of foreign law to be decided by judge

291. This clause provides, in proceedings where there is a jury, for any question of foreign law to be decided by the judge.

Division 4 - Evidence of certain New Zealand matters

292. This Division re-enacts most provisions of Part VA of the Evidence Act 1905.

293. Of Part VA, sections 11L, 11M, 11N, 11P and 11Q and parts of sections 11F and 11G are not being re-enacted because they are covered by other provisions of the Bill (clauses 142, 150 and 161).

Subdivision A - Preliminary

Clause 164: Interpretation

294. This clause contains definitions for the purposes of Division 4.

Clause 165: Application of Division

295. This clause applies Division 4 to proceedings in which a matter arises for determination under section 46A, 155A or 155B of the Trade Practices Act 1974 ('TPA'), or a provision of Part VI or XII of the TPA so far as it relates to section 46A, 155A or 155B of the TPA, or Part IIIA of the Federal Court of Australia Act 1976. This includes proceedings relating to an alleged contravention of section 46A of the TPA, proceedings for judicial review of relevant decisions under the TPA, and enforcement proceedings.

Clause 166: Facsimiles

296. This clause applies Division 4 so that, subject to any Federal Court Rules, a facsimile of an instrument, document or thing can be received in evidence in the same way as the instrument, document or thing from which the facsimile is produced. This is intended to enable proceedings to go ahead on the basis of facsimile evidence in cases of urgency.

Subdivision B - Judicial notice of certain New Zealand matters

Clause 167: New Zealand Acts etc.

297. This clause provides for judicial notice to be taken of all New Zealand Acts and subordinate legislation. This differs from section 11D of the Evidence Act 1905 which applies only to Acts.

Clause 168: Official New Zealand signatures, seals and stamps

298. This clause provides for judicial notice to be taken of the official signature of a person who holds or has held an office of Judge, Master, Registrar or Deputy Registrar of the High Court of New Zealand or an office in New Zealand to which this clause is applied by a declaration by the Governor-General, in the Gazette, where the signature is on a judicial or other official document.

299. This clause also provides for judicial notice to be taken of the imprint of the official seal or stamp of such persons or of a seal of the High Court of New Zealand where the imprint is attached or appended to a judicial or other official document.

Subdivision C - Evidence of certain New Zealand instruments

Clause 169: Evidence of New Zealand official instruments

300. This clause provides for evidence to be given of an official instrument issued by the Governor-General of New Zealand, or by or under the authority of a New Zealand Minister. The expressions "official instrument" and "New Zealand Minister" are defined in clause 164.

301. Under the clause, evidence of an official instrument made by the New Zealand Governor-General in Council may be given by producing a copy or extract purporting to have been certified to be a true copy or extract by the Clerk of the Executive Council of New Zealand. Evidence of other official instruments within the clause may be given by producing a copy or extract purporting to have been certified as a true copy or extract by a New Zealand Minister.

Clause 170: Evidence of New Zealand acts of state

302. This clause enables evidence of an act of state of New Zealand to be given by producing a copy which purports to be sealed with the seal of New Zealand.

Clause 171: Evidence of public documents admissible in New Zealand under New Zealand Acts

303. This clause provides that where a public document is admissible in evidence in New Zealand under a New Zealand Act, the document is admissible to the same extent and for the same purpose if it purports to be sealed, stamped, signed, signed and sealed or signed and stamped in accordance with the New Zealand Act. A certified copy of, or extract from, such a document is also admissible.

Clause 172: Evidence of other New Zealand public documents

304. This clause allows public documents admissible in evidence in New Zealand to any extent or for any purpose without proof of the seal, stamp or signature that authenticates it, or of the judicial or official character of the person who appears to have signed it, to be admissible in the same way.

Clause 173: Evidence of New Zealand documents of a public nature

305. This clause enables a New Zealand document, which is of such a public nature as to be admissible in evidence in New Zealand on its mere production from proper custody, to be proved by an examined copy or extract, or a copy or extract purported to be certified to be a true copy or extract by a New Zealand officer who certifies that he or she has the custody of it.

Subdivision D - Miscellaneous

Clause 174: Division not to derogate from existing Australian laws

306. This clause provides that Division 4 does not derogate from other provisions of the Act or any other law (so that it does not affect any other means of giving evidence of matters referred to in the Division).

Division 5 - Corroboration

Clause 175: Corroboration requirements abolished

307. This clause provides that evidence need not be corroborated. However, this clause does not affect any rule of law requiring corroboration with respect to perjury or similar offences. It also abolishes, subject to the other

provisions of the Bill, any rules of law or practice that require warnings or directions to be given to a jury about the absence of corroboration.

Division 6 - Warnings

Clause 176: Warnings to juries about certain kinds of evidence

308. This clause provides that, where there is a jury, the judge is to give a warning to the jury about the possible unreliability of, and the need for caution in determining what weight to give to:

- . hearsay evidence;
- . evidence of an admission;
- . evidence the reliability of which may be affected by age, ill health or injury;
- . in a criminal proceeding - evidence of a prosecution witness criminally concerned in the events giving rise to the proceeding and evidence of an admission made by a defendant in police custody which the defendant disputes;
- . in a proceeding against the estate of a deceased person - evidence given by a person seeking relief about a matter on which the deceased could have given evidence if he or she were alive.

309. The need to give a warning in relation to evidence of a disputed admission made by a defendant in police custody is not to apply if:

- . the admission was tape-recorded;
- . evidence of the admission has been given by a person who was present when it was made other than in an official capacity; or

- . the defendant has voluntarily adopted the admission and the adoption has been tape-recorded or evidence of the adoption has been given by a person who was present at the adoption other than in an official capacity.

310. A warning need not be given if there are good reasons for not doing so or, except in the case of a disputed admission made by a defendant in police custody, if none of the parties asks for a warning to be given.

311. No particular form of words need be used by a judge to give a warning. Other powers of the judge to give a warning to, or to inform, a jury are not affected.

PART 7 - MISCELLANEOUS

Clause 177: Inferences

312. This clause allows a court to examine a document or thing in respect of which questions have arisen about the application of the Act and to draw reasonable inferences from it.

Clause 178: Admissions by defendants in criminal proceedings

313. This clause is drawn from section 67 of the Evidence Ordinance 1971 of the Australian Capital Territory. It provides that a defendant in a criminal proceeding may, if advised to do so by his or her counsel or solicitor, make any admission concerning matters of fact and give any consent that a party to a civil proceeding may make or give.

Clause 179: Proof of certain matters by affidavit etc.

314. This clause provides for evidence in relation to documents or things to be given (including evidence by affidavit, or a statement in writing if it relates to a public document) by persons responsible for the making or

keeping of the documents and things. Where it is not reasonably practicable or would be unduly expensive for such a person to give that evidence, an authorised person may give the evidence.

315. The clause applies for the purposes of clauses 72, 73 and 74 (exceptions to the hearsay rule for first hand hearsay), 77 (business records), 78 (tags and labels) or 79 (telecommunications), or a provision of Division 2 or 3 of Part 6 (proof of contents of documents or facilitation of proof) or section 183 (Commonwealth records).

316. Evidence may be given on information or knowledge and belief, but must set out the source of the information or knowledge or basis for the belief.

317. An affidavit or statement must be served on the other parties a reasonable time before the hearing, and the maker of the affidavit or statement must attend for cross-examination if another party so requests.

Clause 180: Swearing of affidavit before Justices of the Peace

318. This clause substantially re-enacts section 12 of the Evidence Act 1905. It enables affidavits for use in court proceedings involving the exercise of federal jurisdiction to be sworn before any Justice of the Peace.

Clause 181: Depositions of persons who are dangerously ill

319. This clause is drawn from section 72 of the Evidence Ordinance 1971 of the Australian Capital Territory. It enables a magistrate to take the evidence of a dangerously ill person who may be unable to give evidence at a trial for an indictable offence. Any person who has been or may be charged with an indictable offence to which the evidence relates and, if practicable, the Director of Public Prosecutions, where the evidence is on behalf of a person charged, must be notified, and is entitled to be present and to cross-examine the person giving evidence.

320. The record of evidence is admissible as if given orally at the trial if the court is satisfied the person who gave the evidence is dead, or unable to attend because of illness, and if either the person charged or his or her counsel or solicitor was present when the evidence was taken, or reasonable notice of the time and place fixed for taking the evidence had been given.

Clause 182: Request to produce documents or call witnesses

321. This clause enables a party against whom evidence is, or is to be, led:

- . to request production of documents and things or permission to examine, test or copy them;
- . to request the tendering party to call witnesses to give evidence about the production or maintenance of a document or thing;
- . to be permitted to examine and test certain documents and the manner in which they have been produced and kept;
- . where hearsay evidence is tendered - to request the tendering party to call the maker of the hearsay representation;
- . where evidence of a conviction is tendered to prove facts on which it is based - to request the tendering party to call a person who gave evidence at the trial where the conviction occurred.

322. Where a reasonable request has been made to another party, for the purpose of determining a question relating to:

- . a previous representation;
- . conviction of a person for an offence;

- . the authenticity, identity or admissibility of a document or thing;

and the other party has, without reasonable cause, failed to comply with the request, the court may refuse to admit the evidence in relation to which the request is made or make orders:

- . directing the other party to comply with the request;
- . directing the other party to produce a particular document or thing or to call a particular witness;
- . adjourning the proceedings;
- . with respect to costs.

Clause 183: Application of certain sections in relation to Commonwealth records

323. This clause provides that the provisions of the Act:

- . relating to the admissibility as evidence of business records, labels and telecommunications;
- . relating to the proof of the contents of a document;
- . providing for the proof, by tendering a document, of the proper operation of a device or process;
- . providing for the proof of a public document or a document produced from proper custody; and
- . providing presumptions relating to the transmission and delivery of documents;

apply in all Australian courts in relation to documents that are or were Commonwealth records.

Clause 184: Impounding documents

324. This clause is drawn from section 88 of the Evidence Ordinance 1971 of the Australian Capital Territory. It enables the court to direct that a document tendered or produced before it (whether or not admitted in evidence) be impounded and kept on such conditions as the court thinks fit.

Clause 185: Views etc.

325. This clause enables the judge to order that a demonstration, experiment or inspection be held and sets out the matters the judge must take into account in deciding whether to make an order. These include whether the parties will be present, whether the demonstration etc might be unfairly prejudicial, misleading or confusing, or waste time and whether a demonstration of an event will properly reproduce the event.

Clause 186: Views etc. to be evidence

326. This clause provides that the court may draw any reasonable inference from what it sees, hears or otherwise notices at a demonstration, experiment or inspection.

Clause 187: The voir dire

327. This clause provides for a preliminary hearing of a question whether certain evidence should be admitted or whether a witness is competent or compellable.

Clause 188: Waiver of rules of evidence

328. This clause allows the court, with the consent of the parties, to waive the rules relating to the manner of giving evidence, the exclusionary rules and the rules relating to the method of proof of documents.

329. The clause also enables the court to make such orders in civil proceedings without the consent of the parties if the matter to which the evidence relates is not genuinely in dispute, or if the application of those rules would cause unnecessary expense or delay.

Clause 189: Leave etc. may be given on terms

330. This clause complements provisions of the Bill enabling a court to give leave, permission or direction. It enables the court to do so on such terms as it thinks fit and sets out matters it must take into account (namely, the effect on the duration of the hearing, any unfairness, the importance of the evidence, the nature of the proceedings, and the court's other powers).

Clause 190: Additional powers

331. This clause provides that a court may make such order as it thinks fit to ensure that a party can adequately inspect documents that require interpretation by a qualified person, from which sounds, images or writing can be reproduced or on which information is recorded or stored mechanically or electronically.

332. The clause also extends the power of a person or body to make rules of court to make rules in relation to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called to give evidence in a proceeding.

Clause 191: Regulations

333. This clause enables the Governor-General to make regulations for the purposes of the Act.

PART 8 - REPEAL, CONSEQUENTIAL AMENDMENTS
AND TRANSITIONAL PROVISIONS

Clause 192: Repeal

334. This clause repeals the Evidence Act 1905.

Clause 193: Consequential amendments of other Acts

335. This clause amends the Acts specified in Schedule 2 as set out in Schedule 2.

336. It also deems Federal Court Rules made under paragraph 59(2)(u) or (v) of the Federal Court of Australia Act 1976 to have been made, after the commencement of this clause, under those paragraphs as amended by this Act.

Clause 194: Transitional

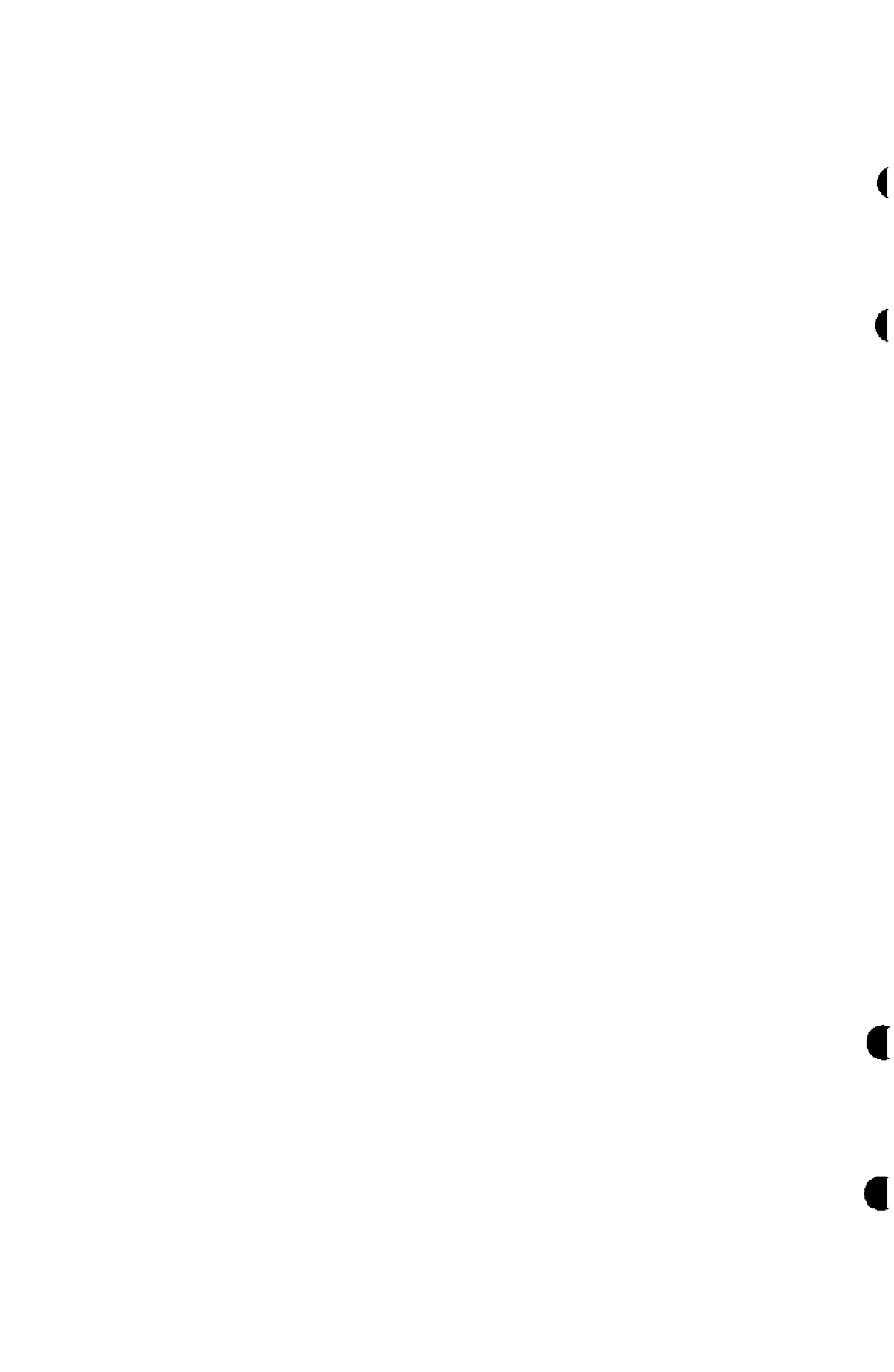
337. This clause provides for the Evidence Act 1905, rather than the Act, to apply after the commencement of the Act to a proceeding the hearing of which began before the commencement of this clause.

SCHEDULE 1

338. Schedule 1 sets out the form of oaths and affirmations required to be sworn or made by a person who is to give evidence or act as an interpreter.

SCHEDULE 2

339. Schedule 2 makes consequential amendments of other Acts.

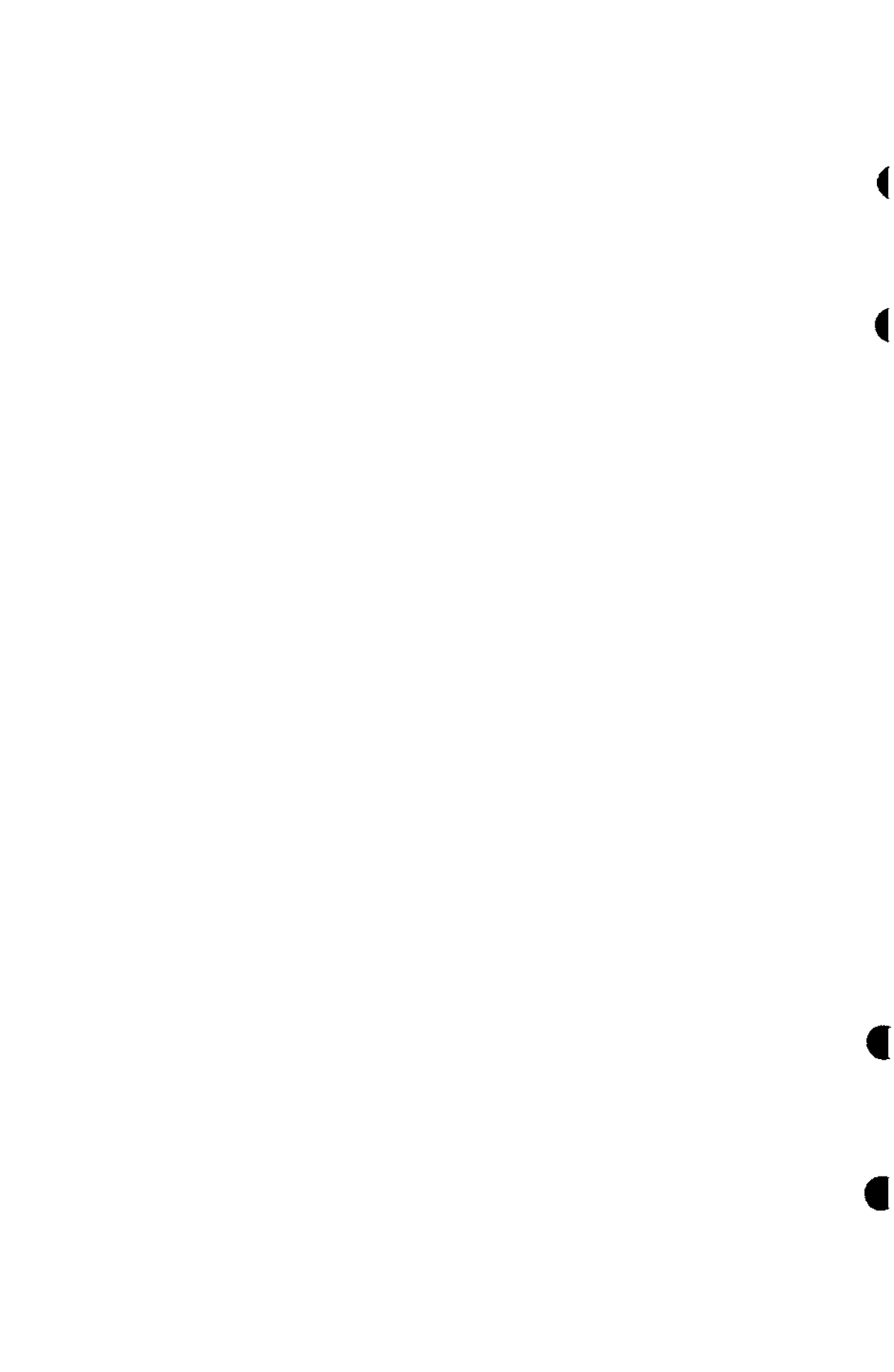


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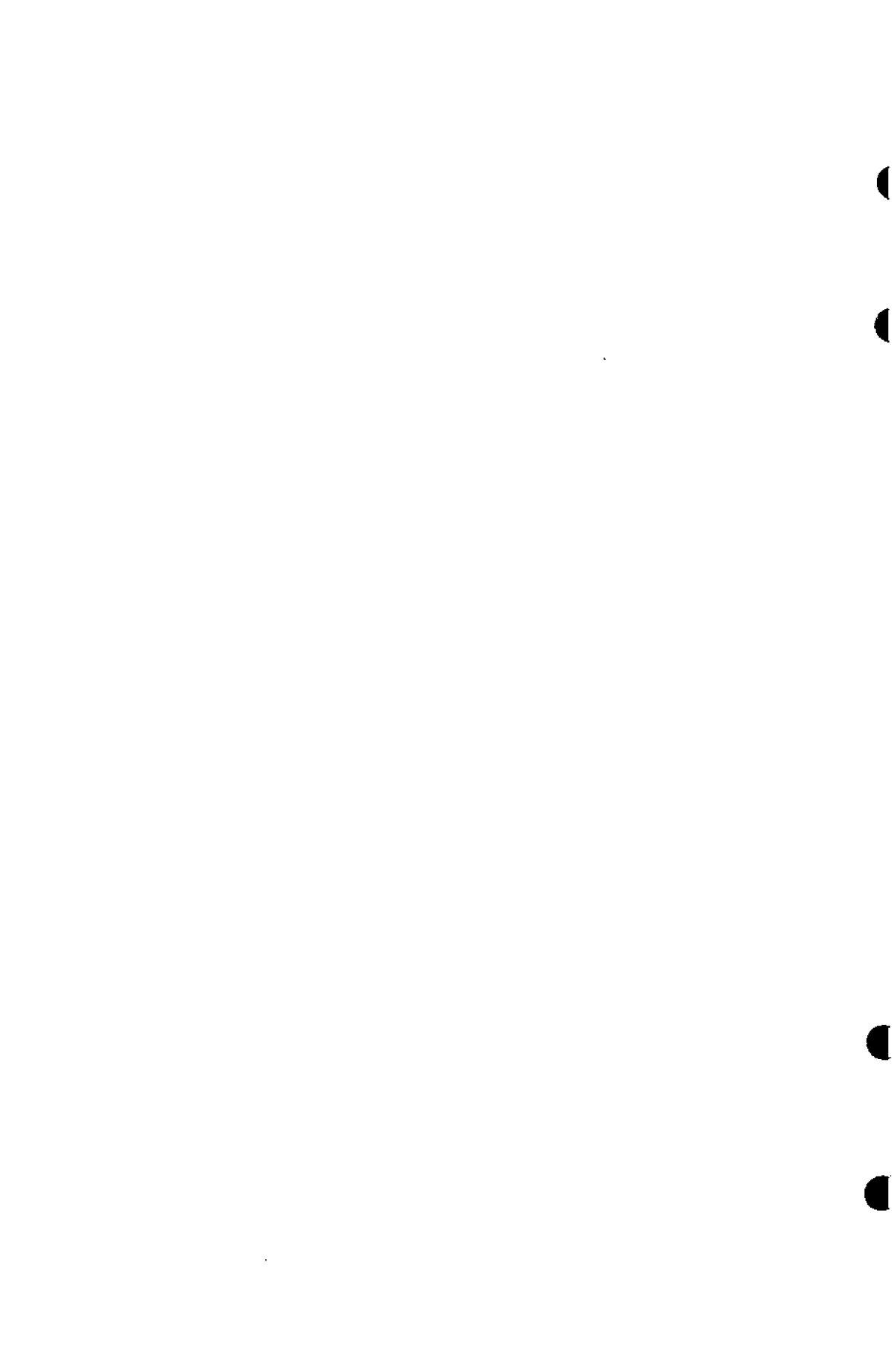


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