

(c) SWEARING OF AFFIDAVITS

[195-8860] Who may take affidavits In all jurisdictions, people who hold particular offices are empowered to take affidavits, for example, judicial officers and justices of the peace; in addition, certain other persons may be authorised to take affidavits.¹ In some jurisdictions, it is expressly provided that an affidavit sworn or affirmed before a party to the proceedings may not be used.²

Notes

- (CTH) Evidence Act 1995 s 186 (affidavits for use in certain proceedings)
 (CTH) High Court Rules 2004 r 24.01.7
 (CTH) Federal Court of Australia Act 1976 s 45(1) (affidavits taken in Australia), 45(2), 45(3) (affidavits taken abroad)
 (ACT) Oaths and Affirmations Act 1984 s 11(1)(a) (affidavits taken in the Territory), 11(1)(b) (affidavits taken in another State or Territory), 11(1)(c) (affidavits taken abroad)
 (NT) Oaths Act 1939 ss 13 (affidavits taken in the Territory), 17 (who may be a commissioner for oaths), 27 (affidavits taken out of the Territory); (NT) Supreme Court Rules r 43.10(3)
 (NSW) Oaths Act 1900 s 26 (who may take affidavits), 27 (who may be authorised to take affidavits)
 (QLD) Oaths Act 1867 s 41 (who may take affidavits)
 (SA) Evidence (Affidavits) Act 1928 ss 2 (power of justice to take affidavits), 2A (power of proclaimed members of police force to take affidavits); (SA) Oaths Act 1936 s 28 (who may be commissioners for taking affidavits); (SA) Supreme Court Civil Rules 2006 r 163(1)
 (TAS) Supreme Court Rules 2000 rr 511(1) (affidavits taken in the State), 511(2) (affidavits taken interstate), 512 (affidavits taken abroad)
 (VIC) Evidence Act 1958 ss 123C (affidavits taken in the State), 124 (affidavits taken out of the State), 125 (where affidavits required to be taken before a justice, sufficient if affidavit is taken before a justice elsewhere than in the State);
 (WA) Oaths, Affidavits and Statutory Declarations Act 2005 ss 9(6), 9(8) (affidavits taken in the State), 10 (affidavits out of the State).
- (CTH) High Court Rules 2004 r 24.01.10
 (ACT) Court Procedures Rules 2006 r 6722
 (NT) Supreme Court Rules r 43.10 (affidavit sworn or affirmed before a party or his or her employee may not be used without leave of court)
 (QLD) Uniform Civil Procedure Rules 1999 r 441 (affidavit sworn or affirmed before a party may not be filed or received by the court)
 (SA) Supreme Court Civil Rules 2006 r 163(2) (affidavit sworn or affirmed before a party or his or her employee or agent is not sufficient)
 (TAS) Supreme Court Rules 2000 r 513 (affidavit sworn or affirmed before a party is not sufficient)
 (WA) Oaths, Affidavits and Statutory Declarations Act 2005 ss 8 ('experienced lawyer' means a legal practitioner who has held a practice certificate for at least two years and who holds a current practice certificate), 9(7) (experienced lawyer involved in the proceedings or in preparing the affidavit is not an authorised witness for the affidavit).

See also *Ross v Shearman* (1820) 2 Coop temp Cott 172; 47 ER 1109; *Duke of Northumberland v Todd* (1878) 7 Ch D 777. Compare *Bourke v Davis* (1889) 44 Ch D 110 at 126 per Kay J (duties of a person administering the oath).

[195-8865] Manner of taking affidavits In some jurisdictions, it is specifically provided that, when making an affidavit, the deponent may either

swear an oath or make an affirmation.¹ In all jurisdictions, it is generally provided that an affirmation may be used as an alternative to swearing an oath.²

In some jurisdictions, an affidavit may be used, whether it was taken before or after proceedings commenced.³

The person taking the affidavit should ensure that the affidavit is legible, and must not permit the swearing of an affidavit if:⁴

- (1) he or she is aware that the affidavit is false; or
- (2) he or she has reason to believe that the deponent does not understand the affidavit's contents or the nature of an oath or affirmation.

Notes

- 1. (ACT) Oaths and Affirmations Act 1984 ss 12 (swearing or affirmation), 13 (form of jurat to be altered for affirmation), 17 (manner of swearing or affirmation); (NSW) Oaths Act 1900 s 32 (person may make declaration if not competent to swear oath); (QLD) Uniform Civil Procedure Rules 1999 r 432 (swearing or affirmation); (SA) Supreme Court Civil Rules 2006 r 162(11); (VIC) Evidence Act 1958 s 102 (affirmation may be made instead of oath); (WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 9 (swearing or affirmation).

See *McShane v Higgins* [1997] 2 Qd R 373, CA(QLD) (requirements for an oath for an affidavit satisfied without physically touching a bible: all that is required is the form of oath employed should bind the conscience of the oath-taker to speak the truth).

- 2. See [195-7320], [195-7325]. See also (CTH) Acts Interpretation Act 1901 s 7 ('oath' includes 'affirmation').
- 3. (CTH) Federal Court Rules O 14 r 1; (ACT) Court Procedures Rules 2006 r 6714; (NT) Supreme Court Rules r 43.07 (affidavit may be used with leave of court); (SA) Supreme Court Civil Rules 2006 r 162(10); (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.07.
- 4. *Bourke v Davis* (1889) 44 Ch D 110 at 126. For the formal requirements for the oath where the deponent appears not to understand the contents of an affidavit see [195-8840]. A solicitor discovering that an affidavit is false after it has been filed may remedy the matter immediately if he or she continues to act: see [195-8855] note 7.

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Proof of Facts

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(5) REQUEST

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5) REQUESTS BY FOREIGN STATES OR COURTS

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[195-8920] Taking evidence for proceedings in foreign courts In all States and Territories, the Supreme Court (the 'court') may make an order giving effect to a request for evidence to be obtained within the jurisdiction to be used in proceedings elsewhere in Australia or overseas.¹ The order may extend to the production of documents.²

The court has a discretion whether to make the order.³ Generally, it will be granted. The court may not make the order where:

- (1) the witness has been charged with an offence before the foreign tribunal;⁴
- (2) the request involves the enforcement of a foreign revenue law;⁵
- (3) the foreign tribunal has no jurisdiction in the matter;⁶
- (4) the request is oppressive;⁷
- (5) the request infringes the privilege against self-incrimination;⁸
- (6) the witness is an expert who has not been previously connected with the matters in issue;⁹
- (7) the proceeding would constitute a contempt of existing proceedings in Australia;¹⁰
- (8) there is fishing for witnesses or evidence;¹¹ or
- (9) it would amount to a pre-trial discovery of documents.¹²

The court may need to look beyond the request which it has received to determine what the substance of the matter requested is, particularly to see if the request is for evidence to be used at a trial or whether it is for some other purpose.¹³

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