

Article Information

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Applications for taking evidence in Australia for Foreign Courts: A tool for resolving proceedings

Piper Alderman recently made multiple applications across Australia in the Supreme Courts of Queensland, Victoria, Tasmania and Western Australia to facilitate depositions of witnesses residing in each of those states in relation to the matter of Spice Jazz LLC v Youngevity International [2021] before the United States District Court for the Southern District of California.

Piper Alderman acted as the nominated agent for a Plaintiff in US proceedings by locating Australian witnesses and bringing deposition applications in the relevant Australian courts.

Australia's States and Territories have each enacted legislation empowering their superior courts to make appropriate orders giving effect to a Letter of Request from a foreign court, made under the *Hague Evidence Convention*, for evidence to be taken within their jurisdiction. We have provided an overview of the current regimes in our previous Insights which can be found [here](#) and [here](#).

Actively Persuading your Deponent

But what is the position in relation to voluntarily obtaining evidence from deponents domiciled in and around Australia?

It is entirely open to parties to depose witnesses located in Australia by agreement and on their own terms without the need to commence any court process. In the ideal scenario, the location of the witness will be known to the parties, the witness will be willing to give evidence on a voluntary basis and the parties will be able to retain and exercise control over the proceedings. In our experience, the integration of flexible arrangements in court processes as a result of the Covid-19 pandemic has seen foreign courts increasingly willing to admit depositions that have been obtained privately and on electronic platforms. This can afford parties considerable leeway in terms of agreeing on the physical location of the witness and/or use of videoconferencing software to undertake depositions at a mutually convenient time from the comfort of their own homes.

As set out in our previous insights, once a court has made orders compelling a deponent to give evidence, the taking of that evidence is subject to the regime under each of Australia's State or Territory rules, including the use of local stenographic and video services (for the purposes of filing a copy with the relevant registry). These localised and accredited services are costly and can make up 50% of the costs in seeking depositions by way of Australian court order.

However, where parties are unable to agree to voluntary arrangements from the outset, or where a key witness is evading service or unwilling to give evidence voluntarily, taking the first steps to formalise the depositions through an Australian court process can be an effective strategy for obtaining evidence voluntarily without the need for costly local transcribing services.

In the Spice Jazz depositions several witnesses refused to be examined by the solicitors for the Plaintiff. We filed multiple applications and obtained orders requiring the examination of various parties across Australia. After filing and serving the applications, we were able to negotiate consent from those parties to be voluntarily examined. The courts were notified of the consents obtained and as the orders were not required to be enforced, the secondary steps usually required for the recording and the filing of those recordings with the various registries was bypassed. As has also occurred in other international matters Piper Alderman has been involved in, once certain depositions were on foot in Australia the Spice Jazz proceedings were settled before being formally heard in California.

Toolkit for Overseas Litigators

Involving an Australian court in the process will inevitably add expense and some degree of formality to a deposition. However, demonstrating that a party is prepared to commence and follow an Australian court process through to conclusion may offer the following strategic benefits:

1. deponents agreeing to less costly and informal arrangements for conducting the deposition once they become aware that a court summons will be issued which would include orders for attendance at a court or other location outside of their home; and
2. place pressure on the parties to settle proceedings once it appears inevitable that the court processes will result in the taking of evidence from witnesses seeking to avoid deposition by way of their location overseas.

The rules for the taking of evidence for overseas proceedings differs in each Australian State and Territory and the application and orders requiring the way deponents are to provide evidence vary. Careful consideration must be given before making an application as to how and where the depositions can be conducted. Piper Alderman has the experience in navigating the nuanced requirements for taking evidence in each Australian State and Territory and can provide you with the best strategies in obtaining evidence for your proceedings.