

Article Information

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Fast tracking evidence for foreign proceedings

Obtaining evidence from persons residing in Australia for use in foreign proceedings can be complicated and time consuming. We share our experience of using unconventional channels to fast-track the process.

The need for the production of evidence from persons residing within Australia for foreign proceedings is becoming more prevalent, including the use of depositions for parties outside of the United States. While there are processes under international treaties which can assist parties to foreign proceedings in obtaining evidence from parties residing in Australia, the mechanisms provided for under these treaties can be complex and time consuming.

For example, the process under the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (**Hague Evidence Convention**) is traditionally lengthy and can take up to 6 months to be progressed by the Attorney General. The process requires a Letter of Request to be made to the AG and once approved, the matter is remitted to a court of competent jurisdiction in the relevant state for an order to take evidence. Unfortunately this means a majority of ongoing foreign proceedings may not get access in time to obtain crucial evidence.

In late March 2018, Piper Alderman was approached by the Plaintiff in proceedings before the Superior Court of the State of California to obtain evidence by way of deposition of a party residing in Australia. The catch – the Californian Court had made orders that all depositions were to occur by no later than May 2018.

Given the tight deadline, Piper Alderman sought orders directly from the State Court, bypassing the usual process through the AG's office. This approach was successful and an order for evidence by deposition was obtained within two months after receipt of the initial request from the US. In addition, Piper Alderman was able to conduct the deposition in its Melbourne office where US attorneys were able to be present both physically and through video link from the United States.

This article will focus on the approach undertaken by Piper Alderman in the Supreme Court of Victoria and how this process operates within each Australian jurisdiction.

The Hague Evidence Convention Process

In all instances where a foreign jurisdiction makes a request for assistance with the production of evidence from persons residing within Australia a Letter of Request is required. Requests made under the Hague Evidence Convention, or relevant treaties require a party to request and receive the consent of the Commonwealth Attorney-General as the designated Central Authority. Once that consent is obtained, the department will then refer the request to the relevant state or territory Court for orders to be made.

When the relevant state or territory authority receives the request, proceedings are usually commenced in that state or territory Supreme Court for an order to take the evidence. An overseas party may retain their own lawyer in Australia to commence proceedings to take the evidence. It is not unusual for a request to take 6 months or more to be executed.

The Fast Track Process

There is legislation in each Australian State which provides the relevant State Court the power to make an order giving effect to an application for assistance by a Court of a foreign jurisdiction. While each jurisdiction's legislation is slightly different, the effect of these statutes gives foreign parties a direct conduit to the Courts for orders compelling the giving of evidence by deponents.

In Victoria, section 9M(1) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) (**Evidence Act**) provides the Court the power to make an order for the taking of evidence in a foreign proceeding if it is satisfied that it has been requested to do so by a court or tribunal outside Victoria exercising its jurisdiction and that the request is made pursuant to proceedings which have been, or are contemplated to be, instituted.

The Act does not define who may apply for orders that the evidence be taken. This is covered in the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**). As per rule 81.01 an application may be made by (a) a person nominated for that purpose by the court or tribunal concerned or (b) if no person is so nominated, by the Victorian Government Solicitor with the consent of the Attorney General.

The traditional course of action would have been for Piper Alderman to follow the procedure proscribed in in rule 81.01(1)(b). This would require a request to the Attorney-General for consent that evidence to be taken. The Attorney-General would then refer the request to the Victorian Government Solicitor (**VGS**) for action. Once the VGS received the request, proceedings would be commenced in the Victorian Supreme Court for an order to take the evidence. Given the time taken to receive the Attorney-General's consent, the Californian parties would have been out of time in procuring the required deposition.

Alternatively, in April 2018 Piper Alderman filed an Originating Motion in the Supreme Court of Victoria seeking *inter alia* the following orders:

1. leave be granted to Piper Alderman as the Plaintiff's nominated person to make an application for an order under Division 1C of Part I of the Evidence Act; and
2. under 9N of the Evidence Act that the Deponent be summoned for oral examination by the solicitors for the Plaintiff and the solicitors for the Defendants for the Californian Case at the premises of Piper Alderman's Melbourne offices.

The Originating Motion was accompanied by an affidavit in support annexing a Letter of Request for International Judicial Assistance in the form prescribed by the Hague Evidence Convention (executed by the judge presiding over the California proceedings) and a summary of questions and subject matter which the Plaintiff intended to put to the Deponent during the course of the examination.

Within the Evidence Act there is no guidance as to the manner in which examinations are to be conducted. Accordingly, Piper Alderman made submissions to the Court that a deposition ought to be held at their Melbourne office given the significant costs to the parties and the ease by which a video link in the office could facilitate a deposition which accommodated both US and Australian time zones (which were to likely be out of the usual Court hours).

Piper Alderman were ultimately able to obtain the above orders and on 9 May 2018, the deposition of the Deponent was completed.

The ability for the evidence to be produced by deposition in a significantly reduced time will be crucial to claims on expedited timeframes.

The process Piper Alderman undertook in Victoria to expedite the production of evidence for foreign proceedings is available to be undertaken in all Australian jurisdictions (though varying processes apply). In bypassing the requirement to request and receive the consent of the Attorney-General, parties to foreign proceedings can avoid expense and delays which may have eventuated otherwise.

If you would like any further information about this process or assistance with your foreign proceedings please contact Piper Alderman.