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EFFECTIVE USE OF DISCOVERY OBTAINED PURSUANT TO 28 U.S.C. § 1782 IN PROCEEDINGS BEFORE AUSTRALIAN COURTS

This *Commentary* is the latest in a Jones Day series that explores the availability of discovery mechanisms for obtaining evidence located within the United States for use in proceedings outside of the United States. In this *Commentary*, the issue is discussed from an Australian perspective.[1]

The Australian courts have specific rules of civil procedure, and processes available pursuant to international conventions, that may be utilized to obtain discovery in Australian proceedings from U.S.-based persons or corporations who are not party to those proceedings. However, as is the case in other jurisdictions, often a direct application to the U.S. courts for discovery pursuant to 28 U.S.C. § 1782 will be quicker and will give rise to a wider scope of discovery of evidence.[2]

PARTY DISCOVERY OBLIGATIONS IN AUSTRALIAN PROCEEDINGS

At its simplest, all parties to civil court proceedings in Australia must discover documents that are relevant to issues in the proceedings that fall within particular categories of documents requested by the opposing party or parties, even where those documents may adversely affect its own case or support or adversely affect another party's case. The

1 *See* related *Commentary* entitled "Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782" (hereinafter "Developments under Section 1782") by Robert W. Gaffey and Bridget A. Crawford; "Effective Use of Discovery Obtained Pursuant to 28 U.S.C. § 1782 in Proceedings Before the English Courts" (hereinafter "Effective Use of Discovery in the English Courts") by Sion Richards and Harriet Territt; "Effective Use of Discovery Obtained Pursuant to 28 U.S.C. § 1782 in Proceedings Before Dutch Courts" by Annet van Hooft.

2 See *Commentary* referred to in Note 1 above.

opposing party has a right of inspection of any discovered documents that are not privileged.

The obligation to discover documents, similar to that in English proceedings, extends to documents that are within a party's "possession, custody or power." This encompasses documents not only physically held by a party, but also where a party could obtain possession or control of documents from another person who ordinarily has those documents.

HOW TO OBTAIN EVIDENCE FROM A THIRD PARTY LOCATED ABROAD FOR USE IN AUSTRALIAN PROCEEDINGS

A party to Australian proceedings has available to it a number of options to obtain evidence from a third party located abroad for use in Australian proceedings. We consider briefly below each of those avenues and their scope and effectiveness of obtaining evidence for use in Australian proceedings.

A Letter of Request from an Australian Court to a Foreign Court, Pursuant to the Hague Evidence Convention. A party to Australian proceedings may request that a state or federal Australian court issue a letter of request to a foreign court to obtain oral evidence from a person or corporation located within that jurisdiction if that country is a party to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention). Signatories to the Hague Evidence Convention include Australia, the United States, and Great Britain.

Proceeding with a Hague Evidence Convention request for judicial assistance is not a straightforward process, and it can be time consuming. A letter of request must:

- Specify the nature of the proceedings for which evidence is required;
- Give a description of the evidence sought with reasonable particularity;
- Provide a statement as to the relevance of the evidence to the issues at trial, again with as much specificity as is possible; and
- Nominate a person to commence the necessary proceedings in the foreign jurisidction.

While there have been no reported Australian cases regarding the issue of a letter of request by an Australian court to a United States court, the decision of the High Court of Australia in *Hardie Rubber Co. Pty. Ltd. v General Tire & Rubber Co.* (1973) 129 CLR 521 offers some general guidance regarding what factors an Australian court may consider when deciding whether to issue a letter of request to a foreign court. In that case, the court considered the appropriateness of the scope of a letter of request to a Japanese court for the examination of witnesses in Japan. In doing so, the court considered whether the party seeking the issue of a letter of request had established that the witnesses whom it desired to examine in Japan could give evidence material to the issues in the action, and whether the attendance of the witnesses within Australia could not be procured. The court also noted that an application for the issue of a letter of request must not be made merely for the purpose of a search in the hope of finding evidence, or to fish for witnesses to examine.[3]

In relation to requests for documentary evidence, it appears that the Australian courts will refuse such requests.[4] The authorities provide that care needs to be taken to ensure the request is framed in precise language, if possible by referring to the person to whom interrogatories or depositions are to be administered, in order to demonstrate that the evidence will be used to prove or disprove an issue at trial rather than engage in a "fishing expedition."

Application to an Australian Court for an Order for the Examination of a Witness Who Is Located Abroad, Pursuant to the Foreign Evidence Act. An alternate method to obtain evidence from a third party located abroad for use in Australian proceedings is to apply to the Australian court for it to exercise its jurisdiction to examine a witness who is located outside of Australia, pursuant to the Foreign Evidence Act 1994 (Cth).[5] Such an order is made where it appears to the

3 *Hardie Rubber Co. Pty. Ltd. v General Tire & Rubber Co.* (1973) 129 CLR 521 at 537.

4 *Re Elna Australia Pty. Ltd. v. International Computers (Australia) Pty. Ltd.* [1987] FCA 156.

5 Where a court in New South Wales is exercising state jurisdiction, a similar procedure to conduct examinations overseas is provided for by section 6 of the Evidence on Commission Act 1995 (NSW).

court to be "in the interests of justice" to do so.[6] In deciding whether it is in the interests of justice to make such an order, the court will take into consideration:

- Whether the person is willing or able to come to Australia to give evidence in the proceeding;
- Whether the person will be able to give evidence material to any issue to be tried in the proceeding; and
- Whether, with regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.[7]

This process is generally even more cumbersome and less effective than a foreign court issuing a letter of request to an Australian court pursuant to the Hague Evidence Convention.

PURSUANT TO THE LEGISLATION OF THE FOREIGN JURISDICTION: UNITED STATES CODE TITLE 28 § 1782

A party to Australian proceedings may rely upon the legislation of a foreign jurisdiction to obtain evidence from a third party located abroad for use in Australian proceedings.

For example, United States Code Title 28 § 1782 states that an application for a discovery order can be made in two ways, either indirectly, "pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal," or directly, "upon the application of any interested person."

To invoke the statute, three basic requirements must be met:

- The person or entity from whom the discovery is sought must reside or be found in the issuing court's district;
- The discovery must be for use in a proceeding in a foreign or international tribunal; and
- The application must be made by a foreign or international tribunal, or by an "interested person."

A party to proceedings in Australia could utilize § 1782 and obtain judicial assistance from a United States court for the purpose of discovery in Australian proceedings. For example, where a third party is in possession of nonprivileged documentary evidence located in New York that is relevant to the Australian proceedings, the party to the Australian proceedings could make a petition to the United States District Court for the Central District of New York for an order directing the third-party witness to produce documents to the Australian court. For a more detailed analysis of the operation of § 1782, please see the *Commentary* by our U.S. colleagues entitled "Developments under Section 1782."

As our English colleagues noted in their *Commentary*, "Effective Use of Discovery in the English Courts," there can be important tactical advantages in making an application under § 1782 directly to the U.S. court, given the broader scope of discovery in the U.S. As described above, if a party issues a letter of request seeking discovery, then the party must give a description of the evidence sought with reasonable particularity and provide a statement as to the relevance of the evidence to the issues at trial. In contrast, the scope of available discovery under the U.S. Federal Rules of Civil Procedure is considerably broader, which provides:

... Unless otherwise limited by court order Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defenses—including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the Court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[8]

Therefore, the documents sought to be produced under a direct application to a U.S. court under § 1782 may be wider in scope than the alternative methods listed above, unless, as our United States and English colleagues have noted, the federal court in question has adopted a relevant "discoverability" requirement, *i.e.*, that no § 1782 order can be issued

6 Section 7(1) of the Foreign Evidence Act 1994 (Cth).

7 Section 7(2) of the Foreign Evidence Act 1994 (Cth).

8 Federal Rules of Civil Procedure 26(b)(1).

unless the material sought would also be discoverable in the jurisdiction in which it is to be used.[9]

The Australian courts have recognized that U.S. courts may make an order pursuant to § 1782 for a third party located in the U.S. to give evidence for use in Australian proceedings—*Allstate Life Insurance Co & Ors v Australia and New Zealand Banking Group Ltd & Ors* (No. 29) (1996) 64 FCR 61. In that case, the Federal Court of Australia noted the availability for evidence gathering of § 1782 for use in Australian proceedings but granted an injunction restraining a person in Colorado from giving oral evidence for use in the Australian proceedings by order of the United States District Court for the District of Colorado under § 1782. This was because the court found that it would be oppressive for the party to act on the order in circumstances where other parties were wishing to participate in the deposition of the potential witness. To do otherwise, it found, would interfere with the other party's preparation for or conduct of the trial.

Evidence Gathering in Insolvency Proceedings. Other potential avenues of gathering foreign evidence are available in cross-border insolvencies, particularly for countries that have enacted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency. Australia, the United States, the United Kingdom, and Japan are some of the more significant countries that have enacted the Model Law. This law encourages, and provides for, greater cooperation between jurisdictions when dealing with cross-border insolvencies. That encouragement will extend to evidence gathering across jurisdictions.[10]

WHAT USE CAN BE MADE OF EVIDENCE OBTAINED FROM ABROAD IN AUSTRALIAN PROCEEDINGS?

If you have obtained evidence from abroad, then that evidence may prima facie be used in Australian proceedings. In all Australian jurisdictions, there is relevant legislation governing the use of a "document" as evidence in proceedings, including for example the Evidence Act 1995 (NSW) in respect of proceedings in New South Wales courts and the Evidence Act 1995 (Cth) in respect of proceedings in federal courts.

The Evidence Acts are highly prescriptive and are beyond the scope of this *Commentary*. At their simplest, they provide a framework to establish what evidence is relevant and admissible, which party has the burden of proof, and what facts may be proved. A document is broadly defined by the Evidence Acts as any record of information, including anything on which there is writing; marks, figures, symbols, or perforations (having a meaning for persons qualified to interpret them); anything from which sounds, images, or writings can be reproduced; or a map, plan drawing, or photograph (and includes any copy, reproduction, or duplicate of such).[11] A document is subject to tests of admissibility under the relevant Evidence Act, including in relation to relevance, hearsay, and opinion.[12]

Evidence from a witness deposed abroad that is sought to be tendered as evidence in proceedings in an Australia court must satisfy the requirements of the relevant Evidence Act. Where a transcript is taken overseas, the party seeking to adduce evidence of the contents of the transcript in the Australian proceedings must serve on each other party a copy of the transcript within 28 days before the evidence is to be adduced.[13]

9 As our colleagues note in "Developments under § 1782," however, the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 259-60 (2004), appears to have rejected the notion, previously followed by some lower U.S. courts, that § 1782 has such a "foreign discoverability requirement." Since the *Intel* decision, the lower U.S. courts do not appear to be imposing a discoverability requirement when considering applications under § 1782.

10 This power already exists in Australia under section 581 of the Corporations Act 2001 (Cth) (which provision has successfully been applied in the United Kingdom): *Re HIH Casualty and General Insurance Limited* (2005) EWHC 2125 (Ch).

11 Sections 3 of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

12 Chapter 3 of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

13 Sections 49(a) of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW). A court has a discretion to direct that service need not be undertaken, per sections 49(b) of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

A transcript of an examination is generally admissible as evidence in proceedings in federal and New South Wales courts.[14] Although useful, a transcript cannot be used to prove the existence of facts recorded in the transcript.[15] A transcript is also subject to the tests of admissibility under the relevant Evidence Act referred to above.

CONCLUSION

The increasing incidence of cross-border litigation in an increasingly connected world has highlighted the importance of obtaining evidence from a third party located abroad for use in Australian proceedings. There are a number of avenues to go about obtaining such evidence, whether that be pursuant to specific Australian rules of civil procedure, international conventions to which Australia is a party, the laws of the relevant foreign jurisdiction, such as United States Code Title 28 § 1782, or more recently the UNCITRAL Model Insolvency Law. The use of that evidence in Australian proceedings will generally be subject to the relevant Australian legislation governing the use of evidence in proceedings.

14 Sections 48(1)(c) of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

15 Sections 59 of the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

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