



# **TAKING OF EVIDENCE IN AUSTRALIA FOR FOREIGN COURT PROCEEDINGS**

**IMPORTANT:** This material is provided as general information only, and on the understanding that the Australian Government is not providing professional legal advice on a particular matter. Before any action or decision is taken on the basis of any material contained in this information sheet, the user should consider obtaining appropriate independent professional legal advice.

There are a number of ways in which a foreign court may obtain evidence in Australia for use in proceedings before that court.

## **1. Applicable International Agreements**

There are a number of relevant agreements to which Australia is a party:

- *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970*, available at: <<http://hcch.e-vision.nl/>>
- Bilateral treaties with Korea and Thailand, available at: <[http://www.austlii.edu.au/au/other/dfat/treaty\\_list/bilist/](http://www.austlii.edu.au/au/other/dfat/treaty_list/bilist/)>
- Bilateral treaties between the United Kingdom and other European countries that have been extended to Australia by the UK. These bilateral treaties were concluded in the 1920s and 1930s and many of the countries extended the treaty to their external territories at the time. Even though those territories are now independent states, in many instances the treaty continues to operate. The relevant treaties are available at: <[http://www.austlii.edu.au/au/other/dfat/treaty\\_list/bilist/](http://www.austlii.edu.au/au/other/dfat/treaty_list/bilist/)>

### *Process to follow*

A Letter of Request is required for all requests for assistance with the taking of evidence under international agreements. A model Letter of Request is available at <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure\\_ModelLetterofRequest](http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure_ModelLetterofRequest)> which can be used as a template. The Letter of Request must comply with the requirements of the relevant agreement, but generally should:

- state the relevant agreement under which the request is made
- state the name of the requesting judicial authority (as the applicant)
- be addressed to the 'Competent Authority of Australia' (as the receiving authority)
- state the nature of the proceeding for which the evidence is required
- set out the names and addresses of the parties to the proceeding and their representatives (if any)
- set out the names and addresses of the witnesses or persons to be examined

- include a list of questions to be put to the witness or a statement of the subject-matter about which they are to be examined
- include a description of the documents or other property to be inspected, and
- set out any special procedure which the party wishes the Australian authorities to follow.

The request may also ask that the parties be notified of the time when, and the place where, the evidence will be taken. This allows parties to attend evidence proceedings, and request that the Australian authorities allow questions to be asked by the party or the party's representative who may be present.

The Letter of Request must be certified by the requesting judicial authority (usually by bearing the seal, stamp or signature of the authority), and should be accompanied by two certified copies in order to satisfy State and Territory court procedure rules.

## **2. What to do where no international agreement applies**

The diplomatic channel is used to transmit requests where there is no agreement or treaty in place between Australia and the foreign country. Requests for assistance in such cases will be considered and executed on the basis of comity.

### *Process to follow*

A Letter of Request is required whenever the diplomatic channel is used. The Letter of Request should be prepared in the same manner and include the same general information as a request made under an international agreement.

## **3. Where to send a request**

### *Hague Evidence Convention and the Korean and Thai bilateral treaties*

Requests made under the Hague Evidence Convention, or the Korean or Thai bilateral treaties should be sent to the Australian Attorney-General Department as the designated Central Authority under those agreements. The Attorney-General's Department will then refer the request to the relevant State or Territory authority for action. Once the relevant State or Territory law Department receives the Letter of Request, proceedings are usually commenced in the relevant 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.

Letters of Request should be sent to:

Private International Law Section  
 Access to Justice Division  
 Australian Attorney-General's Department  
 3-5 National Circuit  
 BARTON ACT 2600  
 Australia

## *UK Bilateral Treaties and when no treaty applies*

Where no treaty arrangements apply (requests made on the basis of comity), Letters of Request should be sent via the diplomatic channel to the foreign affairs ministry of the **requesting country**. Requests made under a UK bilateral treaty should be sent to the authority designated in the treaty. The request for the taking of evidence will be sent from the foreign affairs ministry or designated authority of the requesting country to the Australian Department of Foreign Affairs and Trade. The Department of Foreign Affairs and Trade will refer the request to the relevant State or Territory authority for action.

The contact details for the Department of Foreign Affairs and Trade are:

Administrative and Domestic Law Group  
Legal Branch  
Department of Foreign Affairs and Trade  
R G Casey Building  
John McEwen Crescent  
BARTON ACT 0221  
Australia

## **4. Translations**

If the request comes from a non English speaking country it should be accompanied by a certified English translation of the Letter of Request and any other documents. The translations provided must comply with the requirements of the relevant agreement (if one applies), but generally should include a certification by the translator attesting to the authenticity of the translation. The translator's certification and any certificates of authenticity should also be translated into English.

## **5. Fees and Charges**

Fees may be charged for executing a request for the taking of evidence in Australia. Whether a fee will be charged will depend on the provisions of the relevant agreement (if one applies), and which State or Territory executes the request. Some agreements allow for fees to be charged in certain circumstances, for example for use of translators or any special procedures. Requests made via the diplomatic channel may also attract a fee.

Some States and Territories impose charges for the use of government lawyers in Supreme Court proceedings for the taking of evidence. These costs may be sought to be recovered from the requesting country. The relevant State or Territory authority should be contacted directly for further information regarding fees for the execution of evidence requests. The contact details for each State or Territory authority can be accessed at <  
[http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure\\_StateandTerritorycontactlist-serviceevidenceandenforcementrequests](http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure_StateandTerritorycontactlist-serviceevidenceandenforcementrequests)>

## 6. Important information

### *Delays*

The time taken to process a request for assistance with the taking of evidence will vary in each case and it is difficult to estimate the time a request may take. However, it is not unusual for requests to take six months to execute.

Requests which do not comply with procedural requirements, or do not include properly certified translations, may not be able to be executed and will be sent back to the requesting authority for amendment. This may lead to further delays in executing a request.

### *Pre trial discovery*

Australia has made a declaration under Article 23 of the Hague Evidence Convention in relation to pre trial discovery of documents. This means that Letters of Request requiring a person to state what documents relevant to the proceedings are or have been in their possession, or produce any documents, other than particular documents specified in the Letter of Request, which the requested Court believes are, or are likely to be, in their possession, will not be accepted by Australian authorities.

A party preparing a Letter of Request should seek further information from the Central Authority about this declaration if the evidence sought could be characterised as pre trial discovery.

### *Taking evidence on commission (without compulsion)*

Where a witness is willing to give evidence, private arrangements can be made for the evidence to be taken. Parties should ensure that evidence is taken in a manner which is consistent with the rules of both the Australian jurisdiction and the foreign court for which the evidence is required.

Where evidence is to be taken by a person other than a judge (including by foreign judicial personnel, lawyers or diplomatic officials), or on oath, the permission of the State or Territory government Minister may be required under the relevant State or Territory legislation. A party who wishes to obtain evidence through this procedure without the assistance of Australian authorities should ensure the law of the relevant jurisdiction is not breached.

The Hague Evidence Convention also provides for the taking of evidence without compulsion. Articles 15 and 16 provide for evidence to be taken by a diplomatic officer or consular agent. However, the permission of the Secretary of the Australian Attorney-General's Department is required. The Secretary may impose conditions on permission granted under Article 16. A Letter of Request seeking permission for evidence to be taken in this manner should be sent to the Australian Attorney-General's Department.

### *Taking evidence by video or audio link*

Evidence can be taken from a witness in Australia by a foreign court using video or audio link. Australia does not consider the taking of evidence in Australia by video or audio link during the course of foreign proceedings to be an incursion on its territorial sovereignty.

The laws of most Australian jurisdictions do not prevent a person from voluntarily appearing in a foreign court via video link without involvement of Australian authorities. However, a party who wishes to obtain evidence by video or audio link in Australia without the assistance of Australian authorities should ensure they comply with relevant laws. If in doubt a party should seek information from the relevant State or Territory law Department. The contact details for each State or Territory authority can be accessed at <  
[http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure\\_StateandTerritorycontactlist-serviceevidenceandenforcementrequests](http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure_StateandTerritorycontactlist-serviceevidenceandenforcementrequests)>

Where evidence is to be taken by a person other than a judge the permission of the State or Territory government Minister may be required under the relevant State or Territory legislation.

### *Taking of Evidence for New Zealand courts*

Legislation in Australia and New Zealand provides for subpoenas issued by certain New Zealand courts to have effect in Australia, and evidence to be taken by New Zealand courts from persons in Australia by video link or telephone.

Parties should refer to the *Evidence and Procedure (New Zealand) Act 1994* and corresponding New Zealand legislation for more information.

## **7. Further information**

### *Attorney-General's Department contact details*

Any further queries relating to this information, or correspondence relating to private international law matters, should be directed to:

Private International Law Section  
Access to Justice Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600  
Australia

Telephone: +61 (0)2 6141 3055  
Facsimile: +61 (0)2 6141 3248