Evidence, Documents and Preliminary Discovery in International Litigation

★

MARTIN DAVIES†

Whenever there is litigation in Australia about a case with an international aspect, there is the possibility that some or all of the material evidence will not be in Australia. For example, a crucial witness or vital documents may be overseas, apparently beyond the reach of the Australian courts. There are, however, means by which a litigant in Australia may gain access to the relevant information, and it is those means that are the subject of this paper.

A party to Australian civil litigation can gain access to some relevant, non-privileged documents outside Australia through the ordinary processes of discovery and inspection of documents. Any party to Australian proceedings, whether they are based in Australia or overseas, must discover and subsequently make available for inspection any documents within its possession, custody or power, whether those documents are in Australia or elsewhere. If, however, the documents which the Australian party wants to see are held by a non-party overseas, some other means of access to them must be found because that non-party has not submitted to the jurisdiction of the Australian court. Also, the rules about discovery and inspection of documents are of no assistance if the Australian party wants to obtain the oral testimony of a non-party witness who is outside Australia. Thus, this paper focuses mainly on obtaining evidence, whether oral testimony or documents, from non-parties outside Australia. I shall deal only with civil proceedings and will focus on the relevant rules of the Supreme Court of Western Australia and the Federal Court of Australia. I shall not deal with

† Harrison Moore Professor of Law, The University of Melbourne.

the special powers of the Australian Securities Commission under the memoranda of understanding it has with its counterparts abroad for reciprocal exchange of information.[1]

ORAL TESTIMONY

1. Subpoenas: general

Of course, the simplest means of trying to obtain oral testimony from a witness not present in Australia is to ask him or her to come to Australia to give evidence at the trial. Legal problems arise only if the witness is not willing or able to attend voluntarily.

The normal procedure for obtaining oral testimony from a reluctant witness is to serve him or her with a subpoena to attend and give evidence.[2] Can such a subpoena be served on a witness outside Australia? Order 10, rule 7 of the Supreme Court Rules (WA) ('SCR(WA)') permits service outside Australia of 'any summons, order or notice in any proceedings duly instituted', and order 8, rule 3 of the Federal Court Rules ('FCR') permits service outside Australia of 'a document other than originating process'.

The Western Australian form of words ('summons, order or notice in any proceedings') was considered by the Supreme Court of Queensland in *Ward v Interag Pty Ltd.*[3] Allen J concluded that a subpoena was not a 'summons, order or notice' for the purpose of the rules and so could not be served outside the jurisdiction. That conclusion may be viewed with some doubt in Western Australia in the light of observations made by Anderson J in *ANZ Grindlays Bank plc v Fattah.*[4] While stressing that order 10, rule 7 of the SCR(WA) applies only to the documents specified in it, Anderson J characterised them as 'documents which are intended to have coercive effect or are documents the service of which is to provide the foundation for some exercise of jurisdiction'.[5] That would seem to be an apt description of a subpoena, which would in turn suggest that a subpoena *is* the kind of document that can be served out of the jurisdiction under order 10, rule 7. Nevertheless, for reasons that will be stated shortly, even if the Supreme Court of Western Australia does have power to order service of a subpoena out of a jurisdiction, it is (or should be) unwilling to exercise that power.

The form of words in the FCR was considered by the Supreme Court

---

1. The powers of the ASC are considered by K Coleman 'The Foreign Evidence Act' (1995) 18 UNSWLJ 172.
2. SCR(WA) o 36, r 12; FCR o 27 r 6.
3. [1985] 2 Qd R 552.
4. (1991) 4 WAR 296.
5. Ibid, 302.

of New South Wales in *Arhill Pty Ltd v General Terminal Co Pty Ltd.*[6] Speaking of the equivalent New South Wales rule providing for service outside Australia of 'a document other than originating process', Rogers CJ (Comm Div) said:

> Part 10, rule 3 is in terms clear authority for the Court to give leave to serve a subpoena outside Australia. The fact that an order made pursuant to it could, in some instances, involve an infringement of the sovereignty of another country does not mean that it is a reason for holding the rule to be invalid. Nonetheless, the rule should be construed consistently with 'the established criteria of international law with regard to comity'.[7] Whichever way the rule is read down it will not authorise giving leave to serve a Japanese company in Japan.[8]

Rogers CJ went on to say that even if an order for leave could be made under the rule, there would be strong grounds for setting aside any order for service ex juris once service had been effected. His Honour based that view in part on the decision of the Chancery Division of the High Court in England in *Mackinnon v Donaldson, Lufkin and Jenrette Corp.*[9] In *Mackinnon*, the English plaintiff obtained an order ex parte against an American bank requiring the bank to produce books and other papers held at its head office in New York, which related to the account of one of the defendants, a Bahamian company. The plaintiff also issued a subpoena duces tecum (a subpoena to produce documents) against an officer of the London branch of the New York bank. Hoffmann J discharged the order and the subpoena on the grounds that they exceeded the jurisdiction of the court and infringed the sovereignty of the United States. He said:

> The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement on a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.... [I]t seems to me that the subpoena and the order in this case, taking effect in New York, are an infringement of the sovereignty of the United States.[10]

In summary, it can be said that if *Ward v Interag Pty Ltd*[11] is correctly decided, a subpoena is not the kind of document that can be served outside Australia under order 10, rule 7 of the SCR(WA). A subpoena may be served outside Australia under order 8, rule 3 of the FCR, but the court will (or

6. (1990) 23 NSWLR 545.
7. *Re Tucker* [1988] 1 All ER 603, 611.
8. *Arhill* supra n 6, 553.
9. [1986] Ch 482.
10. Ibid, 493-494.
11. Supra n 3.

should) decline to order service outside Australia because to do so would be to infringe the sovereignty of the country in which the witness is served with the subpoena. The same would be true of service ex juris under order 10, rule 7 of the SCR(WA) even if the observations of Anderson J in *Fattah*[12] were to lead the Supreme Court of Western Australia to the conclusion that *Ward*[13] was incorrectly decided.

In short, there is little if any scope for attempting to compel a witness outside Australia to appear and give evidence in Australia by serving him or her with an Australian subpoena.

2. Subpoenas: New Zealand

Part 2 of the Evidence and Procedure (New Zealand) Act 1994 (Cth) makes provision for the service of Australian subpoenas in New Zealand with leave of the relevant Australian court.[14] Section 8(1) provides that:

> Subject to the regulations and any applicable Rules of Court, the subpoena may be served in New Zealand if leave is given under section 9.

Part 2 applies to Federal Court subpoenas by virtue of section 7(a) of the Act. Section 7(b) provides that Part 2 applies to a subpoena that is issued in a proceeding in:

> A court of a State or Territory that is a court specified in regulations made for the purposes of this paragraph.

The Supreme Court of Western Australia has been specified as a court to which Part 2 of the Act applies by the Evidence and Procedure (New Zealand) Amendment Regulations, as from 12 December 1995.[15]

Thus, if a reluctant witness is to be found in New Zealand, a litigant in proceedings in the Supreme Court of Western Australia or the Federal Court may serve that witness with an Australian subpoena to appear and give evidence. If the New Zealand witness refuses to obey the subpoena, he or she may be compelled to do so under the Evidence Amendment Act 1994 (NZ). Section 16(1) of that Act provides that the High Court of New Zealand may issue a warrant for the arrest of the witness if it receives from the relevant Australian court a certificate stating that the witness has failed to comply with the subpoena.

---

12. Supra n 4.
13. Supra n 3.
14. The Act does not apply to criminal proceedings or family proceedings.
15. Pt 2 also applies to the WA District Court and Local Courts. Interestingly, Pt 2 does not yet apply in Victoria, Tasmania or the Northern Territory.

3. Letters of request

On the assumption that a witness outside Australia cannot be compelled by subpoena to appear and give evidence in Australia, the only available means of obtaining evidence from such a witness[16] is by application to the Australian court for a letter of request to be sent to the judicial authorities of the country in which the witness is to be found. Section 110(1)(c) of the Evidence Act 1906 (WA) provides:

> In any civil or criminal proceedings before a Superior Court, the Court may, in its discretion and where it appears in the interests of justice to do so, on the application of a party to the proceeding, make, in relation to a person outside the State, an order ...
>
> (c) for the issue of a letter of request to the judicial authorities of a place outside the State to take, or to cause to be taken, the evidence of the person.

The equivalent provision in relation to the Federal Court (or to State courts when exercising federal jurisdiction) is section 7(1)(c) of the Foreign Evidence Act 1994 (Cth).[17]

An order for the sending of a letter of request is a discretionary one and a litigant seeking access to the testimony of a witness outside Australia will have to persuade the court that the discretion should be exercised. Section 110(1)(c) of the Evidence Act 1906 (WA) and section 7(1)(c) of the Foreign Evidence Act 1994 (Cth) both provide that a letter of request may be sent 'where it appears in the interests of justice to do so'. Section 110(2) of the Western Australian Act and section 7(2) of the Commonwealth Act set out some of the matters which the court must take into account in determining whether it is in the interests of justice to make such an order. Those matters are:

> (a) whether the person is willing or able to come to Western Australia [Australia, in the Commonwealth Act] to give evidence in the proceeding;
> (b) whether the person will be able to give evidence material to

16. Except in the case of a witness in New Zealand: see 'Subpoenas: New Zealand' supra p 289.

17. The relevant provision was formerly s 7V of the Evidence Act 1905 (Cth). Pt IIIB of the Evidence Act 1905 (Cth), which included s 7V, was introduced into the Act in 1985 by the Evidence Amendment Act 1985 (Cth). It has since been repealed by the Foreign Evidence (Transitional Provisions and Consequential Amendments) Act 1994 (Cth) s 3 and replaced by Pt 2 of the Foreign Evidence Act 1994 (Cth), with effect from 9 Apr 1994.

any issue to be tried in the proceeding;

(c) whether, having regard to the interests of the other parties to the proceeding, justice will be better served by granting or refusing the order.

In *Hardie Rubber Co Pty Ltd v General Tyre & Rubber Co*,[18] the High Court held that the applicant for an order for a letter of request must satisfy the court that it cannot procure the attendance of material witnesses within the jurisdiction by other means. In *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 18)*,[19] Lindgren J in the Federal Court held that the court must be satisfied that the person to be examined in the foreign country would probably be able to give evidence material to the proceedings — it is not sufficient that the person might be able to identify material witnesses. Ultimately, the question is one for the judge's discretion: in *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd*,[20] Morling J said that even when previous decisions support the applicant's case that a letter of request be sent, the discretion still remains to refuse to make the order.

There is, however, an obstacle in the path of a litigant seeking to use oral testimony obtained via a letter of request to a foreign court. In order to understand the nature of the obstacle, it is necessary to understand the procedure that is followed when one court sends a letter of request to another. Simply put, the court issuing the letter of request tells the court receiving the request what information it requires, why and from whom.[21] Depending on the procedure laid down by the receiving court, the request often takes the form of a list of questions in the form of interrogatories, supplemented with requests for relevant supporting documentation. On receipt of the request, the receiving court takes the witness's evidence in accordance with its own procedures, compelling the witness to appear before it by local subpoena if the witness is unwilling to do so voluntarily and if such procedures are available. The witness's evidence is taken by deposition, which is forwarded to the issuing court, where the deposition is then received into evidence.[22]

In *La Baloise Compagnie d'Assurances Contre L'Incendie v Western Australian Insurance Co Ltd*,[23] the Full Court of the Supreme Court of Victoria held that where the credibility of the witness examined abroad is of great importance, the court may refuse to admit the whole or any part of the

18. (1973) 129 CLR 521.
19. (1995) 133 ALR 667.
20. (1990) 95 ALR 444, 449.
21. The procedure is considered in more detail below, in relation to documentary evidence.
22. See Evidence Act s 110(5).
23. [1939] VLR 363.

deposition of the witness's evidence. In other words, although all kinds of questions may be put to a foreign witness via the letter of request, the deposition containing his or her answers may not be admissible in evidence in toto if and to the extent that those answers depend upon the witness's credibility. The Evidence Act 1906 (WA) and (to a lesser extent) the Foreign Evidence Act 1994 (Cth) reinforce that proposition by providing, first, that the relevant Australian court can permit a party to tender the evidence taken abroad 'on such terms, if any, as it thinks fit';[24] secondly, that the evidence taken abroad is not admissible if it would not have been admissible if given at a hearing in Australia;[25] and thirdly, that the court may in its discretion exclude evidence that would otherwise be admissible 'where it is in the interests of justice to do so'.[26]

In *La Baloise*,[27] the court was concerned with the absence of cross-examination of the witness in the foreign jurisdiction, which was Cuba. The effect of the decision can thus be circumvented, at least to some extent, if the letter of request includes a specific request that the witness be cross-examined before the foreign court. Section 110(4) of the Evidence Act 1906 (WA) and section 8(2) of the Foreign Evidence Act 1994 (Cth) provide that where a court makes an order that a letter of request be sent to the judicial authorities of another country:

> The court may include in the order a request as to ['about' in the Commonwealth Act] any matter relating to the taking of that ['taking that' in the Commonwealth Act] evidence, including any of the following matters:
> (a) examination, cross-examination or re-examination of the person, whether the person's evidence is given orally, upon ['on' in the Commonwealth Act] affidavit or otherwise;
> (b) attendance of the legal representative of each party to the proceeding in question and participation of those persons in the examination in appropriate circumstances;
> (c) any prescribed matter ['any matter prescribed by the regulations' in the Commonwealth Act].

If the procedure of the receiving court permits cross-examination, the witness's testimony will then at least be subjected to the scrutiny of cross-examination. If, however, the receiving court does not permit cross-examination, the position will be the same as in *La Baloise*[28] itself, even if

24. Evidence Act s 110(5); Foreign Evidence Act s 9(1).
25. Evidence Act s 110(6); Foreign Evidence Act s 9(2).
26. Evidence Act s 110(7). There is no equivalent provision in the Foreign Evidence Act.
27. Supra n 23.
28. Ibid.

the letter of request includes a specific request for cross-examination.

Cross-examination of the witness in the foreign country may be enough to distinguish the decision in *La Baloise* itself, but it may not be enough to overcome the underlying principle of that decision.[29] The witness's demeanour under examination and cross-examination will have been seen by the foreign court but not by the relevant Australian court. The Australian court may take the view that it can only form a reliable view of the witness's credibility if it itself has seen the witness give evidence because, as Kirby P (with whom Handley and Sheller JJA agreed) said in *Seagulls Rugby League Football Club Ltd v Superintendent of Licences*:

> Conventionally, it is accepted within our system of jurisprudence that tribunals of fact are better able to resolve such conflicts [between witnesses' testimony] when they have the advantage of seeing the witnesses in conflict before them.[30]

For that reason, Hunt CJ said in *DPP v Alexander*[31] that the rule should not be applied when the witness's evidence is videotaped in the foreign country where it is taken, because the local court can then still form a view of the witness's credibility.

Thus, to be completely sure of obtaining *admissible* evidence from a witness outside Australia by means of a letter of request, a litigant should apply to the relevant Australian court to send a letter of request to the foreign court to videotape the taking of the witness's evidence. As we have seen, section 110(4) of the Evidence Act 1906 (WA) and section 8(2) of the Foreign Evidence Act 1994 (Cth) provide that, at the court's discretion, a letter of request for evidence may include a request about 'any matter relating to the taking of that evidence'. It would seem that those words are broad enough to encompass a request that the witness's testimony be videotaped in the foreign country. The standard form letter of request in the SCR(WA) (Form 28) is certainly flexible enough in format to encompass a request for the videotaping of evidence.[32]

---

29. *La Baloise* is not the only authority for the rule in question, but merely the the most senior Australian authority. See also *Bangkok Bank Ltd v Swatow Lace Co Ltd* [1963] NSWR 488, 490; *Walt Disney Productions v H John Edwards Publishing Co Ltd* (1952) 69 WN(NSW) 281, 282; *Berdan v Greenwood* (1880) 20 Ch D 764, 766, 768; *Lawson v Vacuum Brake Co* (1884) 27 Ch D 137, 142-143.
30. (1992) 29 NSWLR 357, 377.
31. (1993) 33 NSWLR 482.
32. ¶ 5 of form 28 stipulates a request 'that the evidence be taken in the following manner...' and leaves a blank to be filled in, with a cross-reference to s 110(4) of the Evidence Act 1906 (WA) which is, as we have seen, in very broad terms. There is no standard form letter of request in the FCR.

4. Australian examiners abroad

Section 110(1)(a) of the Evidence Act 1906 (WA) provides that the Supreme Court of Western Australia 'may, in its discretion and where it appears in the interests of justice to do so' make an order for:

> Examination of the person on oath or affirmation at any place outside the State before a judge of the court, an officer of the court or such other person as the court may appoint.

The equivalent provision in relation to the Federal Court (and to State courts when exercising federal jurisdiction) is section 7(1)(a) of the Foreign Evidence Act 1994 (Cth).

The grounds for exercise of the court's discretion to order that evidence be taken by an examiner are the same as for the discretion to order the sending of a letter of request.[33] In practice, however, an Australian examiner will only be able to obtain evidence from a witness abroad if the witness is prepared to give evidence before the examiner. If the witness refuses to give evidence before the examiner, he or she cannot be compelled to do so by subpoena.[34] Thus, the taking of evidence by an Australian examiner abroad is only effective for witnesses who are unwilling or unable to come to Australia to give evidence, but who are willing to give evidence before an Australian examiner in the country in which they reside.

Even if the Australian court is prepared to order that evidence be taken abroad by an examiner, and even if the witness is willing to attend and give evidence before that examiner, there may yet be a further reason why that procedure is ineffective. The law of the foreign country in question may not permit the examiner to take the witness's evidence within its territory. There are several grounds on which a country could conceivably object to a foreign court official taking evidence within its territory.[35] One of those is the foreign law about the administering of oaths. It may well be that the law of the country in question would preclude an Australian examiner from administering a valid oath to the witness before taking his or her evidence. For example, in *National Mutual Holdings Pty Ltd v Sentry Corp.*,[36] Northrop J raised but did not decide the question whether an examiner appointed by a Wisconsin court could validly administer an oath to a witness in New South Wales for the purposes of taking a deposition. If a foreign country were to

33. See 'Letters of request' supra pp 290-293.
34. See 'Subpoenas: general' supra pp 287-289.
35. Eg *Park v Citibank Savings Ltd* (1993) 31 NSWLR 219, where Powell J was unable to hear evidence on commission in Korea because the requisite permissions had not been given by the Korean authorities.
36. (Unreported) Fed Ct 30 May 1990.

take a similar view, there would be no alternative but to send a letter of request to that country's judicial authorities, requesting that they take the witness's evidence according to their own procedures.

If an Australian examiner is appointed and can take the witness's evidence in the foreign country in question, there still remains the problem of the exclusion of part or all of the deposition of the witness's testimony to the extent that it turns on his or her credibility. This problem may be solved by videotaping the examination and cross-examination of the witness before the examiner.[37] Order 38A, rule 6 of the SCR(WA) provides that in the absence of specific directions in an order under section 110 of the Evidence Act 1906 (WA), order 38, rules 6, 8, 11, 12, 13 and 14 apply. Order 38, rule 8(1) provides that where evidence is taken on commission by an examiner, the witness may be examined, cross-examined and re-examined in the ordinary way, and order 38, rule 11(1)(b) provides that the deposition of a person examined before an examiner shall 'be recorded in the presence of the examiner on tape or by other mechanical means'. In *Hyslop v Australian Paper Manufacturers Ltd (No 2)*,[38] Nicholson J said that the equivalent words in the Supreme Court Rules (Vic) give the court power to permit the recording of the examination on videotape.

Alternatively, any problem concerning the admissibility of the witness's deposition because of questions of credibility may be solved by the judge appointing himself or herself as the examiner, which is the practice in New South Wales.[39]

5. Video conferencing facilities

In some cases, the witness in the foreign country may be willing to give evidence, but unable to attend the trial in Australia. For example, a key member of a foreign corporation may be an important witness in proceedings in Australia, but his or her testimony might occupy only an hour or so. In these circumstances, it would be most inconvenient to require the witness to come to Australia to give evidence. It may be possible for an Australian examiner to travel to the witness's country to take his or her evidence.[40] To some extent, however, this merely replaces one kind of inconvenience with another. It would be far more convenient for all concerned (and more often than not cheaper) to take the witness's evidence by video-link via satellite.

---

37. See 'Letters of request' supra pp 290-293.
38. [1987] VR 309, 315.
39. In NSW there is a procedure which requires the concurrence of the Chief Justice, the Chief Judge of the Division as well as the trial judge, before the trial judge can be appointed as an examiner or commissioner: see Young J's case comment on *Garcin* infra n 54. For references to this procedure by Powell J: see *Park v Citibank Savings Ltd* supra n 35.
40. See 'Australian examiners abroad' supra p 294.

Order 24, rule 1A of the FCR provides:

> The Court may in its discretion take evidence from a witness by telephone or video-link or other similar means in accordance with such procedures as the Court directs.

Because this rule is in general terms, it may enable the Federal Court to take evidence from a witness in another country by telephone or video-link. Because there is no equivalent in the SCR(WA), the question whether the Supreme Court of Western Australia may take evidence by video-link is rather more complex, as we shall shortly see.

In *Federal Commissioner for Taxation v Grbich*,[41] the Federal Court held that the Administrative Appeals Tribunal could take evidence by video-link with Hong Kong under section 35A of the Administrative Appeals Tribunal Act 1975 (Cth), which authorises the tribunal in the hearing of a proceeding to allow a person to participate by closed-circuit television or other means of communication. Judicial proceedings may, however, be in another category, because of the need for sworn testimony.[42] There may be some difficulty in administering a valid oath to a witness in a foreign country.[43] Even if a valid oath can be administered to the witness in the foreign country, the Australian court still has little or no power to sanction the witness for failing to answer a question or for breaching the oath in other ways.

Nevertheless, video-link evidence from abroad has been taken in several court cases in Australia. In *Bayer AG v Minister for Health*,[44] Young J of the Supreme Court of New South Wales took evidence from an expert witness by closed-circuit television link from the United States. At the end of a very long and detailed judgment, Young J said:

> Finally, I should note that the evidence of one witness, Professor Antman, was taken by closed-circuit television using the facilities of the Overseas Telecommunications Commission with the witness being in the United States and the court sitting in Sydney. The witness was sworn according to the law of Massachusetts where he was. I have some doubt as to whether had perjury been committed (which I am sure was not), there could have been a successful prosecution in New South Wales, the place where the perjury was heard, but leaving that theoretical problem aside, I thought that the procedure was employed successfully in this case. Not only could one assess the demeanour of the witness quite satisfactorily but the massive disruption that is caused by taking evidence on commission overseas or by bringing the witness to Australia was avoided.[45]

---

41. (1993) 25 ATR 516.
42. In *Grbich* ibid, the Federal Court held that, if necessary, the AAT could proceed on the basis of unsworn evidence.
43. See 'Australian examiners abroad' supra pp 294-295.
44. (1988) 13 IPR 225.
45. Ibid, 296.

Similarly, in *Jones v Mortgagee Acceptance Nominees Ltd*,[46] Davies J of the Federal Court took evidence from an expert witness by video-link from the United States.

The comments made by Young J in *Bayer*[47] suggest that the taking of evidence by video-link is probably most appropriate when the witness is one (such as an expert witness, for example) whose credibility is not of central significance to the case before the Australian court. In such a case, both parties to the litigation may consent to the order that the witness's evidence be taken by video-link. Nevertheless, in *Laporte Group Australia Ltd v Vatselias*,[48] Young J ordered that evidence be taken by video-link to a witness in the United States, even though the other party to the litigation did not consent, and even though the credibility of the witness might possibly have been called into question. Young J said:

> The decisions under Part 27 of the Rules dealing with evidence on commission[49] are relevant on a consideration of this motion, but not decisive. This is because although the video system may mean the judge misses out on some of the feel of the witness' personality in much the same way as the difference between live theatre and the movies, the other aspects of demeanor are present to assess the witness' credit. This is a case where the witnesses' evidence and their cross examination is material. Although the witnesses are overseas, they are, in a commercial sense, part of the plaintiff's organization and they would be in Sydney at the trial if the plaintiff insisted. These factors are relevant to my decision, though the ultimate question is whether the interests of justice in a fair, cheap and speedy trial will be served.[50]

This seems to be the high water mark of the taking of evidence by video-link under the present rules of court. Notwithstanding Young J's apparent unconcern about these matters in *Vatselias*, it is surely significant that no valid oath could be administered to the witness in the foreign country and/or that the court would have no power to sanction the witness for failing to answer or for breaching the oath (if administered) in other ways. A more cautious approach is to be found in *Park v Citibank Savings Ltd*,[51] where Powell J of the Supreme Court of New South Wales considered an application for evidence to be taken by video conferencing link to Korea. Having distinguished *Grbich*[52] (and having implicitly disagreed with *Bayer* and *Vatselias*) on the ground that there were no specific provisions in the

---

46. (1995) 13 ACLC 1781.
47. Supra n 44.
48. (Unreported) NSW Sup Ct 15 Nov 1991 no BC 9101405.
49. This is presumably a reference to the decisions considered in 'Letters of request' supra pp 290-293; 'Australian examiners abroad' supra pp 294-295.
50. *Vatselias* supra n 48, 3-4.
51. Supra n 35.
52. See supra n 41. Powell J also distinguished *Garcin*'s case infra n 54.

Supreme Court Act 1970 (NSW) or the Supreme Court Rules (NSW) authorising the taking of evidence by video-link, Powell J continued:

> But, let it be assumed that the Court has power to make an order that the evidence of a particular witness be given by VCF [meaning video conferencing facility], the question then is whether, in the present case, the Court ought to make an order that the evidence of Mr Lee [the Korean witness] be given in this way. Even if — contrary to what I believe to be the case — one is to proceed upon the basis that such little evidence as there is discloses a sufficient explanation for Mr Lee's inability, or unwillingness, to come to Sydney to give evidence, I would remain to be satisfied that justice demands the making of the order sought. Far from that being so, I would remain to be satisfied that the making of the order sought would advance the cause of justice. In this respect, the following points might be noted:
>
> 1. as I have previously noted, there is no guarantee that, even if the order sought were made, it would be possible to arrange a VCF for the period suggested as necessary to permit Mr Lee to give his evidence;
> 2. even if the order sought were made, and even if it were possible to arrange a VCF for the period suggested as necessary, the Court would have no power:
>   (a) to compel Mr Lee to attend at the appropriate venue for the purpose of giving evidence;
>   (b) to compel Mr Lee to answer any questions;
>   (c) otherwise to control the manner in which Mr Lee might give evidence;
> 3. nor, in that event, would Mr Lee be subject to any sanction for refusing to give evidence, refusing to answer any particular question, or for giving false evidence;
> 4. this is important since it is clear that this is a case in which Mr Lee's credibility as a witness is very much in issue; the more so now that it appears that, in addition to the statement which he earlier provided to Ms Lee's advisers, Mr Lee has since provided a statement to Ms Park's advisers.
>
> These matters suggest to me that the only way in which Mr Lee's evidence might satisfactorily be taken and tested is by having that evidence given at the trial in Sydney, or, at the least — if it be possible, as it appears not to be — given before the trial judge sitting as a commissioner in Korea.[53]

As we have seen, the FCR specifically provide for the taking of evidence by video-link. By contrast, there is no such specific provision in the SCR(WA), the Supreme Court Act 1935 (WA) or the Evidence Act 1906 (WA). The lack of any specific provision in New South Wales did not deter Young J in *Bayer* and *Vatselias*, although it did give Powell J some cause for doubt in *Park*. In *Garcin v Amerindo Investment Advisors Ltd*,[54] the English High Court ordered that evidence of a witness in the United States be taken by video-link from the court in London. In making this order, Morritt J relied on order 38, rule 3 of the English Supreme Court Rules, which provide that 'the court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial, in such manner as may be specified by the order'. In the absence of such a rule in the SCR(WA), it must be regarded as doubtful whether the Supreme Court

53. *Park* supra n 35, 225-226.
54. [1991] 1 WLR 1140. For a case comment by Young J: see (1992) 66 ALJ 230.

of Western Australia has power to order that a witness's evidence be taken by video-link to a foreign country. As we have seen, that was the opinion of Powell J about the powers of the Supreme Court of New South Wales in similar circumstances in *Park*, although Young J obviously took a different view in *Bayer* and *Vatselias*.

As noted above, the taking of video-link evidence is probably only practicable either when both parties have consented to the taking of evidence in this way or when the witness's evidence is not of central importance. It is definitely only practicable when the witness is willing to give evidence but unable to come to Australia. If the witness is unwilling to give evidence by video-link, he or she cannot be compelled to do so by subpoena.[55]

DOCUMENTARY EVIDENCE

1. Subpoenas

If a litigant in Australian proceedings seeks access to relevant documents that are held by a non-party, he or she may compel production of those documents by serving the holder with a subpoena for the production of documents (also known as a subpoena duces tecum). A subpoena of this kind either cannot or should not be served on a non-party outside Australia.[56] Indeed, several of the cases considered above in relation to the service of subpoenas were concerned with subpoenas for the production of documents, rather than subpoenas seeking to compel appearance for oral testimony.

Order 15A, rule 8 of the FCR makes provision for discovery and inspection of documents held by a non-party. There are similar provisions in many state jurisdictions,[57] but there are none in the SCR(WA). Even where discovery is available from a non-party, the relevant orders of the court cannot be served outside Australia.[58] Thus, if a litigant in Australia seeks access to documents held by a non-party in another country, he or she must apply to the court for a letter of request to be sent to the judicial authorities of the country in question.

2. Letters of request for documentary evidence: preliminary matters

The Hague Convention on the Taking of Evidence Abroad 1970 creates the principal international mechanism for enabling litigants in one country to obtain evidence from persons in another. That mechanism is the system

55. See 'Subpoenas: general' supra pp 287-289.
56. Ibid.
57. Eg r 32.07 Supreme Court Rules (Vic).
58. See 'Subpoenas: general' supra pp 287-289.

of letters of request sent by the court where the litigation is taking place to a designated 'central authority' in the country from which evidence is sought. Article 23 of the Convention allows a Contracting State to declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents 'as known in common law countries'. Obviously, any attempt to obtain documentary evidence from another country will require consideration of that country's attitude to pre-trial discovery, as embodied in the position it has taken under Article 23. In general, civil law countries are reluctant to allow requests for documentary evidence, because the inquisitorial nature of the process in those countries is resistant to the idea that fact-finding (particularly of relevant documents) is the task of the parties themselves rather than of the court.

3. Letters of request for documentary evidence

Even if the foreign country in question is receptive to letters of request for documentary evidence, a litigant in Australian proceedings may yet face several obstacles in obtaining the evidence it seeks.

Section 110(1)(c) of the Evidence Act 1906 (WA) and section 7(1)(c) of the Foreign Evidence Act 1994 (Cth) authorise the sending of a letter of request to the judicial authorities of another country 'to take, or to cause to be taken, the evidence of [the identified witness]'.[59] In *Elna Australia Pty Ltd v International Computers Pty Ltd*,[60] Gummow J, then of the Federal Court, held that 'evidence' for these purposes does not include documents on their own.

In *Elna*,[61] the applicant applied to the Federal Court by notice of motion seeking an order that a request be issued by the court to the High Court in England for evidence to be obtained in the United Kingdom by an order for production of certain documents by ICL Computers Ltd. (ICL Computers Ltd was a company associated with the respondent (International Computers (Aust) Pty Ltd) in Australian proceedings instituted by the applicant.) The applicant argued that the Federal Court had power under section 7V(1)(c) of the Evidence Act 1905 (Cth) to make an order that such a request be sent.[62] Section 7V(9) of the Act of 1905 provided as follows:

---

59. See 'Letters of request' supra pp 290-293.
60. (1987) 14 FCR 461. This decision should not be confused with *Elna Aust Pty Ltd v Int'l Computers Pty Ltd (No 2)* (1987) 16 FCR 410, which is a decision of some significance in relation to the measure of damages available under s 82 of the Trade Practices Act 1974 (Cth).
61. Ibid.
62. Section 7V(1)(c) was in the same terms as s 110(1)(c) of the Evidence Act. It has now been repealed and replaced by s 7(1)(c) of the Foreign Evidence Act.

> In this section, a reference to evidence taken in an examination includes a reference to
> (a) a document produced at the examination; and
> (b) the answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.[63]

The applicant argued that the Federal Court had power to issue a letter of request under section 7V(1)(c) for production of the documents in question because they constituted the 'evidence of' ICL Computers Ltd by virtue of section 7V(9)(a). Gummow J held that the court did not have power under the Act to make such a request because section 7V(1)(c) only authorised the court to issue a request for production of documents if those documents were ancillary to the oral testimony of a witness. He said:

> The reference [in section 7V(9)] to production of documents at an examination is plainly to production at a proceeding for the taking of evidence: see the definition of 'examination' in section 7T, and subsections (5) and (6) of section 7V.[64]

Thus, Gummow J held that a letter of request could only be sent requesting that oral testimony be taken from a witness and that documents ancillary to that testimony be produced. A letter of request could not be sent under the Act if it sought only the production of documents by a person not a party to the action.

In the alternative, the applicant in *Elna*[65] argued that the Federal Court had power to send a letter of request to the English court in exercise of its inherent jurisdiction. Gummow J rejected this argument too, saying that the Federal Court had no inherent powers other than those expressly or impliedly conferred upon it by the legislation that governs it. Although the Federal Court had been conferred by statute with the powers that equity courts had had in the 19th century to issue letters of request, those powers were limited in the same way as the court's powers under the Evidence Act 1905 (Cth): they could be used only for requesting oral evidence and documents in support, not for documents alone.

Elna is undoubtedly a conservative decision. Although it will govern applications for letters of request in the Federal Court unless and until it is overturned, it is not, of course, binding on the Supreme Court of Western Australia. The Supreme Court may seek to distinguish *Elna*, drawing support from the doubts cast on that decision by Rogers J in *Westpac Banking Corp.*

---

63. Section 110(8) of the Evidence Act and s 4 of the Foreign Evidence Act are in the same form.
64. *Elna* supra n 60, 465.
65. Ibid.

v Halabi.[66] In *Halabi*, an application was made for letters rogatory[67] to be sent to the Supreme Court of California under part 27 rule 1(b) of the Supreme Court Rules (NSW), which was in virtually identical terms to those used in section 110(1)(c) of the Evidence Act 1906 (WA) and the old section 7V(1)(c) of the Evidence Act 1905 (Cth) (the section considered by Gummow J in *Elna*). Part 27 rule 1(b) provided:

> The Court may for the ... purpose of proceedings in the Court make orders ... (b) for the sending of a letter of request to the judicial authorities of another country to take, or cause to be taken, the evidence of any person.

The plaintiff, Westpac, claimed that it had been defrauded of large sums of money by a former employee named Naji Halabi. Westpac alleged that Halabi had diverted the money to a Panamanian company, Sonal Finance Ltd, by means of fraudulent foreign exchange transactions conducted with the Swiss Banking Corporation in San Francisco. Westpac's application was for letters rogatory to be sent to the Supreme Court of California seeking production of any documents that might be relevant to the fraudulent transactions in question, and to the operation of Sonal Finance's trading account with the Swiss Banking Corporation. Rogers J refused to make an order for letters rogatory until Sonal Finance had been given an opportunity to appear and to make submissions opposing the order.

One of the grounds on which Halabi opposed Westpac's application was that Westpac was seeking the production of documents by a non-party, Swiss Banking Corporation. Relying on *Elna*, Halabi argued that the court had no power to make an order for such a request. Rogers J did not find it necessary to reach a decision on this point because, as noted above, he refused the application on other grounds. However, after referring to Gummow J's historical analysis of the system of letters rogatory in *Elna*, he continued:

> Whatever may be the powers of the Federal Court, the essence of the Supreme Court Act 1970 and of the Rules made thereunder was to create an entirely new structure for the regulation of the business of the Supreme Court of New South Wales. The powers and practice of the Court were defined afresh. It is inappropriate to restrict the evident width of the Rules by reference to historical developments. The words used in the Rules should, generally speaking, be given their full meaning. Documents are as much evidence as is oral evidence. The tender of documents is the taking of evidence. In those circumstances, in my view, a letter of request, in requiring the production of documents, does provide for the taking of evidence. Thus, assume for the sake of discussion that the documents sought to be produced

66. (Unreported) NSW Sup Ct 22 Dec 1987 no BC8700813. An appeal to the NSW Court of Appeal on another part of Rogers J's decision (the question of the modern application of the felony-tort rule) is reported: see (1989) 17 NSWLR 26.

67. 'Letter rogatory' is the old name for letter of request.

> are business records within the meaning of the New South Wales Evidence Act. They can be tendered in the course of the hearing and thereby constitute evidence in every sense of the word. They are in truth evidence from the makers of the documents of the matters set out in the documents. Having expressed this tentative view, I will, of course, listen to any submissions that may be advanced on behalf of Sonal if and when the time for that arrives.[68]

Unlike Gummow J's view in *Elna*, which depended on the intepretation of the definition section in the Evidence Act 1905 (Cth),[69] Rogers J's 'tentative view' in *Halabi*[70] depended solely on the ordinary meaning of the word 'evidence'. The definition section certainly cannot be taken to *narrow* the broad view tentatively taken by Rogers J, because it is only inclusive. If documents 'constitute evidence in every sense of the word',[71] as Rogers J suggests, they do not cease to do so because section 110(8)(a) of the Evidence Act 1906 (WA) and section 4(a) of the Foreign Evidence Act 1994 (Cth) now provide that 'evidence' *includes* 'a document produced at the examination'.

Rogers J's 'tentative view' was expressed with some force in *Halabi* and it has obvious attractions, given the ordinary modern meaning of the word 'evidence'. However, Rogers J may have retreated from it somewhat in *Arhill Pty Ltd v General Terminal Co Pty Ltd.*[72] As we have already seen, the plaintiff in *Arhill* applied to the Supreme Court of New South Wales for leave to serve out of the jurisdiction a subpoena for the production of documents. Although Rogers CJ held that there could be service ex juris of such a subpoena with leave, he refused to give leave and held that the Deputy Registrar's order permitting service out should be set aside. In considering the factors relevant to the exercise of the discretion to give leave in such a case, Rogers CJ quoted with apparent approval an opinion of the Solicitor-General of New South Wales.[73] That opinion referred to *Elna* as authority for the proposition that 'the production of documents to a court in compliance with a subpoena or order in the nature of a subpoena is not the taking of evidence of the person producing the documents'[74] for the purposes of part 7 of the Evidence Act 1898 (NSW) (the equivalent New South Wales legislation). By apparently basing his decision in part on that opinion, Rogers CJ can be taken to have endorsed the *Elna* view and to have resiled from the position that he himself had stated in *Halabi*. However, His Honour did then go on to say:

---

68. *Halabi* supra n 66.
69. Section 7V(9).
70. Supra n 66.
71. *Halabi* supra n 66, 28.
72. Supra n 6.
73. See *Arhill* supra n 6, 554.
74. *Elna* supra n 60, 435.

> In the result, in my view, the order granting leave to serve Japan [meaning the Japanese company] is required to be set aside. However, in all the circumstances of this case, that could bring about an intolerable situation. In the particular circumstances of this case the court may not be entirely powerless. If Japan is unwilling to accept service of a proper subpoena, necessary for the just determination of the dispute between the parties, the Court may have weapons in its armoury to ensure that Japan does produce the documents.[75]

Rogers CJ did not expand on this rather delphic reference to 'other weapons' in the court's armoury. It may be an oblique reference to the court's power to send a letter of request for the production of documents, in which case it may be that His Honour did not change his views between *Halabi* and *Arhill* after all. Although Rogers CJ was unwilling to give leave for service ex juris of an ordinary subpoena for documents, he might have been willing to make an order that a letter of request be sent to the Japanese courts seeking production of those documents. In other words, Rogers CJ's oblique reference to 'other weapons' might indicate that he would have been willing to make the order that he had considered making in *Halabi*.

The fact remains, however, that the only authority that can be found to oppose *Elna* is an obiter passage in an unreported decision. As against that, *Elna* was cited with implicit approval by Hunt CJ in *DPP v Alexander*.[76] Indeed, Hunt CJ added another case[77] to the list of authorities cited by Gummow J in *Elna*.

Alternatively, the Supreme Court of Western Australia might seek to distinguish *Elna* on the grounds that, unlike the Federal Court, it has inherent powers which extend to the sending of a letter of request seeking the production of documents only. In *Panayiotou v Sony Music Entertainment (UK) Ltd*,[78] Sir Donald Nicholls V-C held that the inherent powers of the Chancery Division of the English High Court did extend to the sending of a letter of request for documents only, notwithstanding the fact that the relevant rule of the English Rules of the Supreme Court ('RSC') refers (as do the relevant Australian provisions) to 'the evidence of [a] person' and notwithstanding the fact that the Court of Appeal had previously held that 'evidence' for the purposes of that rule means oral testimony.[79] Nicholls V-C said:

---

75. *Arhill* supra n 6, 554-555.
76. Supra n 31, 499.
77. *Cape Copper Co v Comptoir d'Escompte de Paris* (1890) 38 WR 763.
78. [1994] Ch 142. The first plaintiff, Georgios Panayiotou, is better known as the singer, George Michael.
79. For the Court of Appeal decision: see *Cape Copper Co v Comptoir d'Escompte de Paris* supra n 77, which was the case to which Hunt CJ referred in *DPP v Alexander* supra n 31, when agreeing with *Elna* supra n 60.

> The jurisdiction of the High Court to make a request to the court of another country for assistance in obtaining evidence does not derive from statute, or even from the Rules of the Supreme Court. These rules regulate and prescribe 'the practice and procedure' to be followed in the Supreme Court.... They regulate the exercise by the court of its jurisdiction; they cannot extend the court's jurisdiction or confer a jurisdiction which, in the absence of the rules, the court would otherwise lack. In my view the court's power to issue a letter of request stems from the jurisdiction inherent in the court.... [T]he process by which the court compels the attendance of witnesses, or compels the production of documents as evidence is a process whose source is the court's own inherent powers. RSC Order 38, rules 14 to 19 regulate the form of subpoenas and the way they should be issued and served and so forth; those rules do not create the jurisdiction.... What then of the decision in the *Cape Copper* case?... I do not think this should be taken to exclude the exercise by the court of its inherent jurisdiction to issue a letter of request to the judicial authorities of a foreign country seeking their aid in the production of documents. The point seems not to have been argued in that case. RSC, order 39, rules 1 and 2 cannot be read as impliedly ousting that jurisdiction if, so read, the consequence would be as unfortunate as mentioned above.[80]

Even if the Supreme Court of Western Australia can be persuaded to depart from the decision in *Elna*, and to send letters of request for the production of documents simpliciter, one further hurdle remains. It is unlikely that the court will be willing to make such an order ex parte, for the reasons identified by Rogers J in *Halabi*. Alternatively, if an order is made ex parte, the court is likely to vacate the order on the application of the affected parties. It will be recalled that Rogers J refused to make an order in *Halabi* for letters rogatory to be sent to the Supreme Court of California unless and until Sonal Finance had been given an opportunity to appear and to contest the making of the order. He said:

> There is a more fundamental reason why I am not prepared to make the order sought, at least at the present time and certainly in the form of the draft. It is true that applications for letters of request may be made ex parte. However, it is equally clear that, once an order for the issue of letters rogatory has been made, a person affected may apply to have the order vacated. That, indeed, was the procedure followed in *Hardie Rubber Company Pty Limited v General Tyre & Rubber Company*.[81] It seems to me far preferable that, rather than grant the order ex parte, I should defer any further consideration until Sonal has an opportunity of making its submissions should it desire to do so. In *Hardie Rubber*, Gibbs J, sitting at first instance, expressed the view that: 'I incline to the view that an application for the issue of a letter of request should ordinarily be made on notice and this seems to be the usual practice in England'.[82] Because the enforcement of any order for evidence pursuant to letters of request issued by this Court appears to be susceptible to challenge in the courts of California, it is essential that a full opportunity be given to anyone who may have an entitlement to take objection before an order for the issue of letters of request is made.[83]

---

80. *Panayiotou* supra n 78,149-151.
81. Supra n 18.
82. Ibid, 541.
83. *Halabi* supra n 66.

If this aspect of the *Halabi* decision is to be followed, no order can be made for a letter of request to be sent to any foreign court unless and until any affected parties have been given the opportunity of appearing and making submissions.

4. Applying for a letter of request for oral testimony supported by documentary evidence

On the assumption that *Elna*[84] is either correctly decided or cannot be distinguished, a litigant seeking documentary evidence from overseas must cast the draft letter of request in such terms that the court is able to make an order under section 110(1)(c) of the Evidence Act 1906 (WA) or section 7(1)(c) of the Foreign Evidence Act 1994 (Cth) without offending against the *Elna* principle. That may be easier said than done, however, for the reasons outlined by Rogers J in *Halabi*.[85] In considering the American approach to administering letters of request received by the United States courts, Rogers J said:

> According to note 27.2.1 to the Supreme Court Practice [meaning the US Supreme Court Practice], dealing with letters of request, in 1970 the United States Department of State laid down the following requirements for requests for taking of testimony through letters rogatory: 'Letters rogatory should be accompanied by written interrogatories which can be posed by the Commissioner who is appointed to elicit the information. In lieu of written interrogatories, letters rogatory should include a comprehensive summary of the case and explain *exactly* what information is desired by the court.' In the present case, written interrogatories would be quite inappropriate. At present it is not really known what questions may need to be answered. The precise questions may well depend on exactly what documents are produced by SBC. Therefore, in purported compliance with the requirements of the Department of State, the plaintiff's legal advisers have prepared Schedule A to the draft letters rogatory. If I may say so, the statement can hardly be described as a 'comprehensive' summary of the case. The statement in item 4 of information sought, 'Any other relevant information or documents or both concerning the above matters within the knowledge, custody, care or control of Mr Plattner', hardly satisfies the call of 'exactly' describing the information sought.[86]

Even if other countries do not take exactly the same position as the United States of America, a litigant may face much the same problem as that outlined by Rogers J. It is, in effect, a Catch-22. In order to know exactly what questions to ask to elicit the relevant documents, the litigant would have to be able to see the documents. Without being able to see the documents, the litigant may not be able to ask questions with sufficient specificity (a) to be acceptable to the court that will have to administer them,

---

84. Supra n 60.
85. Supra n 66.
86. *Halabi* supra n 66, 23-24 (Rogers J's emphasis).

and (b) that will elicit answers that will need to be supported by the relevant documentation.

PRELIMINARY DISCOVERY

The previous paragraphs have outlined some of the problems faced by a litigant in Australian proceedings seeking access to documents held overseas. Those problems are even more acute if proceedings have not yet been instituted, and if a prospective litigant in Australia seeks access to documents held overseas in order to determine whether it has an actionable case at all and/or whether it has correctly identified the prospective defendant.

Before 28 October 1996 there was no provision for preliminary discovery in the SCR(WA), so the question did not arise in relation to prospective proceedings in the Supreme Court of Western Australia.[87] However, the FCR do make provision for discovery from a person for the purposes of identifying the appropriate respondent to proposed proceedings[88] and also for discovery from a prospective respondent in order to determine whether the applicant has enough of a case to commence proceedings against that respondent.[89]

Any order for preliminary discovery of documents held overseas must, of course, be served on the person who has possession of those documents. If that person is also outside Australia, the applicant would have to seek leave of the court under order 8, rule 3 to serve the order for preliminary discovery on that person. The Federal Court should be reluctant to order service of an order for preliminary discovery on a person outside the jurisdiction because to do so would be to infringe the sovereignty in which that person is to be found.[90]

CONCLUSION

A paper as long as this deserves a short conclusion. My conclusion is simple and (sadly) trite. It is that reform is necessary, given the increasing extent to which disputes litigated in Australia involve a foreign element. There are obstacles — some small, some large — reducing the effectiveness of each of the available methods of acquiring relevant information from overseas. Many of those obstacles can be removed by fairly straightforward, technical reforms to legislation or the rules of court. Others, such as the attitude of the foreign country from which information is sought, cannot be changed by unilateral action in Australia and must be regarded as immutable

87. Discovery from a potential party is now allowed under SCR (WA) o 26A.
88. FCR o 15A, r 3.
89. FCR o 15A, r 6.
90. See 'Subpoenas: general' supra pp 287-289.

unless and until there is reform brought about by bilateral or multilateral international agreement.[91] Some of the shortcomings of this area of the law can be avoided by parties to international contracts if they agree that disputes between them should be settled by some means other than litigation. That is only a partial solution, however, not least because not all international disputes arise out of contracts. What is needed is action by the Australian courts to modify their procedures so as to facilitate access by litigants to relevant information outside Australia.

It would not be chauvinism or arrogance to reform the Australian law in this way. It would not be an attempt to extend the long arm of Australia's exorbitant jurisdiction because, as Sir Donald Nicholls V-C pointed out in *Panayiotou v Sony Music Entertainment (UK) Ltd*:

> It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make a *request* to a foreign court for assistance. It is not making an order. It is not making an order addressed to a foreign court or to witnesses. Further, the subject matter on which assistance is sought, the obtaining of evidence, is one over which the court has long exercised close control. This is a subject peculiarly within the court's own control.[92]

A litigant in Australian proceedings seeking evidence from abroad is always ultimately at the mercy of the law of the place where the evidence is to be found. There is no good reason why Australian courts should add to the difficulties faced by litigants if assisting them does not infringe the sovereignty of other countries. The border between Australia and the rest of the world should be completely permeable from the Australian side, even if it is less than permeable from the other side.

---

91. That is one of the approaches under consideration by the ALRC in its reference entitled 'Cross Border Civil Remedies'.

92. *Panayiotou* supra n 78, 150.