

Worldwide witnesses

Full Federal Court approves overseas video evidence.

Sovereignty issues have been a concern in cases involving the taking of video evidence from witnesses overseas, but a recent decision clears the way for greater use of this practice.



by Shane Monks and Josh Henderson

Video links are increasingly being used to eliminate the tyranny of distance between Australian courts and witnesses overseas.

Though pragmatism has sometimes outpaced principle, the recent decision of the Full Federal Court in *Joyce v Sunland Waterfront (BVI) Ltd*¹ marks the first time that an intermediate appellate court has seriously addressed the legal issues arising from taking video link evidence from overseas. The result was a robust approval of the practice, which swept aside concerns identified previously in several first instance decisions.

The sovereignty issue

Issues of sovereignty arise from a court's order that evidence be taken by video from a person who is within the territory of a foreign country. This is because the order takes effect in that country, and so may impinge on that country's exercise of authority within its borders to the exclusion of all other nations.²

Previous Australian judgments have lacked a uniform approach. While some recognised that the issue arose, others assumed there was no issue,³ and others did not consider the issue at all.

A number of judgments in relation to various countries accepted the proposition that it would be an infringement of foreign sovereignty to take evidence by video link without the foreign government giving prior consent.⁴ Indeed, the Commonwealth Attorney-General's Department publishes a fact sheet, 'Taking of evidence in Australia for foreign court proceedings', which says: "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." Also, there are two bilateral treaties with mechanisms enabling an Australian court and a foreign court to obtain consent from the other country's government prior to foreign video link evidence being taken.⁵

In other cases in which overseas video link evidence was taken, no mention was made of consent being obtained from the relevant foreign government, or whether the issue was considered when the relevant directions were made.⁶

The *Sunland* case

In *Joyce v Sunland*, the trial directions provided for Logan J to travel to Dubai to take evidence on commission from Mr Joyce. Mr Joyce was on bail in Dubai pending trial on criminal charges arising out of the transaction which was the subject of the Australian proceedings. Those directions were made following the receipt of communications from the relevant United Arab Emirates (UAE) authorities that the UAE government consented to Logan J doing so.

Subsequently that permission was apparently revoked and Mr Joyce sought an order that his evidence be taken by video link instead, pursuant to section 47A of the *Federal Court of Australia Act*.⁷ Logan J held it would violate UAE sovereignty to make such an order in the absence of permission from that government.⁸

The Full Court heard an expedited appeal and delivered a unanimous joint judgment that reversed Logan J.⁹ The Full Court took a very different approach and found that:

- Section 47A authorised the taking of evidence by video from a foreign country. Because the Act did not contain any express requirement that consent be obtained, it overrode any obligation that Australia may have had as a matter of international law or comity to obtain consent from the foreign government (at [60]).
- If a witness giving evidence by video would breach an express prohibition under that country's domestic law, then "problems might arise". But because there was no UAE law prohibiting the evidence being given, even if the UAE government did object (the evidence was unclear on this), that was no ground for refusing a section 47A order (at [61]).

- Apart from circumstances where the law of the foreign country prohibited the witness giving video link evidence to Australia, questions of sovereignty and comity are irrelevant considerations (at [62]). However, at [64] the Full Court added the intriguing caveat that in some cases "there may be reason to believe that there are aspects of foreign law or of the relationship between the Australian and foreign governments which make it desirable that DFAT [the Department of Foreign Affairs and Trade] be involved", and that whether to do so will be a matter for the judge in question to decide.

The Full Court reaffirmed at [63] the conventional position that it would infringe foreign sovereignty for a judge or examiner to travel to a foreign country to take evidence in person, without permission. The court said that it did not wish to derogate from the practice of approaching DFAT in order to obtain consent through diplomatic channels, although only one month later, Practice Note CM19 was issued which provides for the Chief Justice to write to their "Counterpart in Overseas Jurisdiction" seeking "permission for the judicial officer to examine witnesses in that jurisdiction".

Space constraints prohibit exploration of the interesting issues that could arise if the executive government of a foreign country took a different view to that country's judicial branch about an Australian judge exercising the judicial power of the Commonwealth on their soil.

Implications

The direct consequence of the Full Court's decision is that it will be quicker and easier to obtain orders for the taking of evidence by video link from witnesses overseas.

There will be no delays resulting from the parties and the court seeking consent from the foreign country. (In the *Sunland* litigation, it took months for DFAT to exchange communications with its counterparts in the UAE and report back to Logan J.)

Instead, the party seeking to call an overseas witness by video should bring an application supported by evidence on the following three matters – first, that the witness is willing to give evidence without compulsion, secondly that the law of the country in question does not prohibit the witness from giving evidence by video to an Australian court, and thirdly, whether the law of the country in question would permit or forbid the witness to take an oath or affirmation under Australian law (which goes to whether an order should be made under section 47A(2) dispensing with the need for an oath or affirmation). Foreign law is a question of fact, and therefore affidavit evidence will be needed from a suitably qualified expert in the law of that jurisdiction.

There may also be indirect consequences in that the Full Court's decision may foreshadow a more robust attitude in other areas where respect for foreign sovereignty impacts on the gathering of evidence from overseas, such as the exercise of discretion to grant leave to serve subpoenas overseas, or to make orders for discovery from persons overseas.¹⁰

Shane Monks is a Brisbane barrister. Josh Henderson is a senior associate at Thomsons Lawyers. The authors continue to act as part of Sunland's legal team in the principal proceedings, and their analysis has been confined accordingly. Their opinions are personal and not expressed on behalf of the Sunland companies.

Notes

¹ (2011) 281 ALR 54 per Keane CJ, Dowsett and Greenwood JJ.

² "A state is not allowed to ... carry out official investigations on foreign territory ... or to exercise an act of administration or jurisdiction on foreign territory, without permission": Sir Robert Jennings QC and Sir Arthur Watts QC, *Oppenheim's International Law* (9th ed.), Vol.1 at p386.

³ *Volksbank Schwabish Gmund eG v Werner*, unreported QSC 27.10.98, BC9805654, at [11], [14]-[15].

⁴ *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2004) 208 ALR 491 at [54], [60], [118] and [122]; *Yamouchi v Kishimoto* [2002] NTSC 36 at [10], [16]-[18]; *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 at [9]; *Flore v NSW Department of Education and Training* [2006] NSWSC 1227 at [11]; *R v Winfield*, unreported SASC 26.7.96, BC9603396, at pp 6-8.

⁵ Article 19 of the *Australia-Thailand Agreement on Judicial Assistance* [1998] ATS 18; articles 24 and 25 of the *Australia-Korea Treaty on Judicial Assistance* [2000] ATS 5.

⁶ Including *Australian Pork Ltd v Director of Animal and Plant Quarantine* (2005) 216 ALR 548 at [120], [124] and [147]; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QSC 4 at [231]-[233]; *Gersten v Law Society of NSW* [2001] NSWSC 748 at [26], [309] and [461]; *Schnabel v Lui* [2002] NSWSC 15 at [15]; *Australian Securities and Investments Commission v Rich* (2004) 49 ACSR 578 at [54] and [84]; *Sheahan v Joye*, unreported FCA 1.6.95, BC9507841 at 11-12; *Traci Kwai Fong Fung v Hertz Australia Pty Ltd*, unreported NSWSC 10.10.96, BC9606850.

⁷ That provision states:

(1) *The Court or a Judge may, for the purposes of any proceeding, direct or allow testimony to be given by video link, audio link or other appropriate means.*

(2) *The testimony must be given on oath or affirmation unless:*

(a) *the person giving the testimony is in a foreign country; and*

(b) *either:*

(i) *the law in force in that country does not permit the person to give testimony on oath or affirmation for the purposes of the proceeding; or*

(ii) *the law in force in that country would make it inconvenient for the person to give testimony on oath or affirmation for the purposes of the proceeding; and*

(c) *the Court or the Judge is satisfied that it is appropriate for the testimony to be given otherwise than on oath or affirmation.*

⁸ *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 9) [2011] FCA 832 at [50].

⁹ *Joyce v Sunland Waterfront (BVI) Ltd* (2011) 281 ALR 54.

¹⁰ See *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558.

Legal costs law issues?

Formerly  DG Thompson

DGT Costs Lawyers. Approachable. Efficient. Progressive. Our experienced team of lawyers and consultants work together to deliver the best possible results for you and your clients in a wide range of matters. Now located in Spring Hill. Call to find out how we can help your practice.

BRISBANE | SYDNEY | CANBERRA



DGT Costs
Lawyers

BRISBANE: Suite 48, Level 4, Silvertown Place, 101 Wickham Tce, Spring Hill, 4001

E costing@dgt.com.au

P (07) 3834 3359

www.dgt.com.au