



Foreign Entities in Commercial Litigation

COMMERCIAL LAW CPD DAY

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Foreign Entities in Commercial Litigation

Increasing cultural diversity in Australia = more diverse consumers of Court resources

Melbourne - 1.863m residents born overseas (6th highest world-wide), 36.7% of the population

Sydney - 2.272m residents born overseas (5th highest) 43.2% (*Per World Population Review*)

Communities in Victoria from non-English speaking countries include (per 2021 Census)

China – 171,447 born in China; 427,811 of Chinese ancestry - of whom 27% arrived 2016 to 2021

Vietnam – 93,598 born in Vietnam, 121,137 of Vietnamese ancestry

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VSC Commercial Court Judges – workshop on Asian cultural awareness

Facilitated by the Asian Law Centre

Legal perspectives from 3 jurisdictions – China, Vietnam and Indonesia

Recognised the need to ensure lack of cultural awareness does not compromise equality before the law for foreign-born litigants

Focus on developing practical tools for Judges and litigants

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Judicial Council on Cultural Diversity

Initiative of, and reports to, the Council of Chief Justices of Australia & New Zealand

Independent body established to assist Australian courts to positively respond to evolving community needs arising from Australia's increased cultural diversity

Publications include:

Cultural Diversity Within the Judicial Context: Existing Court Resources

Recommended National Standards for Working with Interpreters in Courts and Tribunals

The Recommended National Standards have been implemented in Victoria – r. 43.02.1, r.44A

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Working with parties and witnesses who do not speak English

Challenges in taking initial instructions, identifying the chronology and relevant issues

Foreign language documents

Chinese community – WeChat the dominant platform for voice and written messages

Messages typically saved locally to a particular device - usually a mobile phone

Fragmentation of documentary records across different devices

Loss of the device typically means loss of the message itself

The other party to the communications may or may not have retained it

Practical tip – change WeChat default storage settings – and secure all current devices

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Other issues with WeChat communications

How to discover the original messages, and present them Court?

Discovery of voice messages – as separate audio files?

Issues with translation of voice messages

Practical tip – presentation as electronic screenshot – with embedded audio files - requires co-operation between parties if different parties have messages from different periods

Different WeChat ‘groups’

Potential loss of privilege if a group includes a lawyer and a third party, such as an accountant

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Translations of foreign language documents

Informal translations - for internal / initial use, eg using online translation software

Accredited translations - for discovery, or for use in affidavits or at trial

An '*accredited interpreter*', is an interpreter who is accredited, registered or recognised as an interpreter for the relevant language by the National Accreditation Authority for Translators and Interpreters (**NAATI**) - Rule 44A.01

Practical tip – an interpreter is an expert, and having a good expert is important - retain the best possible interpreter at the start of the case!

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Rule 43.02.01 – Requirements for affidavits sworn through interpreters

Introduced by the *Supreme Court (Chapter I Interpreters Amendment) Rules 2020*

The stated object of those Rules is to “*provide for rules based on the Model Rules and Code of Conduct set out in the Recommended National Standards for Working with Interpreters in Courts and Tribunals developed by the Judicial Council on Cultural Diversity.*”

Rule 44A.06 - unless the Court otherwise orders, a party is not entitled to rely on a translated affidavit unless the affidavit complies with Rule 43.02.1.

Rule 43.02.1 - the interpreter for a translated affidavit must state, in the jurat or by a separate affidavit, that:

[a] before sight translating the affidavit, the interpreter:

[i] had read the code of conduct in Form 44AA and agreed to be bound by it; and

[ii] had been given an adequate opportunity to prepare to sight translate the affidavit;

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Rule 43.02.01 – Requirements for affidavits sworn through interpreters (cont'd)

Rule 43.02.1 also requires that the interpreter state, in the jurat or by separate affidavit that:

- [b] the interpreter sight translated the entire affidavit to the deponent and the deponent—
 - [i] informed the person before whom the affidavit is sworn or affirmed through the interpreter that the deponent had understood the interpreter and agreed with the entire contents of the affidavit; and
 - [ii] swore or affirmed the affidavit in the presence of the interpreter.

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Order 44A – Interpreters

This Order addresses the role and function of (accredited) interpreters.

An interpreter may be engaged if the Court is satisfied a witness cannot understand and speak English sufficiently to understand and make adequate reply to questions - r.44A.02(1).

The party calling the witness is responsible for engaging the interpreter - r.44A.02(1).

Interpreters must be accredited, must have read the Code of Conduct, and must take an oath or affirmation to interpret accurately to the best of their ability – r.44.03.(1).

Interpreters must comply with the Code of Conduct in Form 44A - r.44A.05.

A party may not rely on a translated affidavit unless r. 43.02.1 has been complied with – r.44A.06.

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Practical issues arising with interpreters

Representations in English language documents relied on by non-English speaking parties - how were the contents translated to the party, and was the translation accurate?

Considerations affecting whether a witness with reasonable, but not fluent, English should give evidence in English, or in their first language – advantages and disadvantages of each course.

References to translated extracts of documents in witness statements and affidavits – always use extracts from accredited rather than informal translations.

This again highlights the need to retain a good accredited interpreter / translator at an early stage.