

Report 105

Treaties tabled on 13 May, 25 June and 20 August 2009

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005)

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965)

Amendment, Adopted at Bergen in April/May 2009, to Annex 1 of the Agreement on the Conservation of Albatrosses and Petrels of 19 June 2001

Agreement to Amend the Agreement between Australia and the United States of America concerning Acquisition and Cross-Servicing of 9 December 1998, done at Washington on 30 July 2009

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Membership of the Committee

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of recommendations

2 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel

Recommendation 1

The Committee supports the *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel* and recommends that binding treaty action be taken.

3 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)

Recommendation 2

The Committee supports the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and recommends that binding treaty action be taken.

Introduction

Purpose of the Report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of two treaty actions tabled in Parliament on 13 May and 25 June 2009. These treaty actions are:
- the *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005)*;¹ and
 - the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (The Hague, 15 November 1965)*.²
- 1.2 One of the powers of the Committee set out in its resolution of appointment is to inquire into and report on matters arising from treaties and related National Interest Analyses (NIAs) presented. This report deals with inquiries conducted under this power, and consequently the report refers frequently to the treaties and their associated NIAs. Copies of each treaty and its associated NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:
- www.aph.gov.au/house/committee/jsct/13may2009/tor.htm
www.aph.gov.au/house/committee/jsct/25june2009/tor.htm

1 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 89, p. 1011; Australia, Senate 2008-09, *Journal*, No. 68, p. 1925.

2 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 106, p. 1194; Australia, Senate 2008-09, *Journal*, No. 78, p. 2221.

- 1.3 Copies of each treaty action and the NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at: www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's Review

- 1.4 The reviews contained in this report were advertised in the national press and on the Committee's website.³ Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Officers of parliaments and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A.
- 1.5 The Committee also received evidence at a public hearing on 17 August 2009 in Canberra. A list of witnesses who appeared at the public hearing is at Appendix B. Transcripts of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website at:
www.aph.gov.au/house/committee/jsct/13may2009/hearings.htm
www.aph.gov.au/house/committee/jsct/25june2009/hearings.htm

3 The Committee's reviews of the proposed treaty actions were advertised in *The Australian* on 27 May and 8 July 2009. Members of the public were advised on how to obtain relevant information both in the advertisement and via the Committee's website, and invited to submit their views to the Committee.

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel

Background

- 2.1 The *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel* (the Optional Protocol) is a supplementary treaty of the *Convention on the Safety of United Nations and Associated Personnel* (the Convention).¹
- 2.2 The Convention requires States Parties to criminalise attacks on United Nations (UN) and associated personnel engaged in peacekeeping operations or operations specifically declared to be of 'exceptional risk' by the UN Security Council or General Assembly.² States that are party to the Convention are required either to prosecute or extradite persons suspected of committing such acts within the jurisdiction of that State.³
- 2.3 The Convention came into force in Australia on 3 January 2001.⁴ In order to comply with the Convention, the Commonwealth Government amended the *Criminal Code Act 1995* to include Division 71, which prohibits the commission of, or the intention to commit, certain acts against UN personnel involved in peace keeping operations or operations specifically declared to be of 'exceptional
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1 National Interest Analysis (NIA), Para 3.

2 NIA, Para 4.

3 NIA, Para 4.

4 NIA, Para 3.

risk'. The acts criminalised include murder, manslaughter, assault, rape, theft and destruction of property.⁵

- 2.4 The Optional Protocol expands the protection of the Convention to personnel involved in additional types of UN operations, including personnel involved in delivering humanitarian, political or development assistance in peace building and delivering emergency humanitarian assistance.⁶ This includes for example personnel employed by the UN Development Programme; UN Children's Fund; the World Food Programme; and the UN High Commissioner for Refugees.⁷
- 2.5 Australia signed the Optional Protocol on 19 September 2006, and will lodge the instrument of ratification as soon as practicable after the completion of the treaty making process.⁸ The Optional Protocol will enter into force after 22 instruments of ratification have been lodged with the Secretary-General of the UN. The Optional Protocol is not yet in force.⁹
- 2.6 Article I of the Optional Protocol provides that the Convention and the Optional Protocol shall be interpreted as a single instrument.¹⁰

The Optional Protocol

- 2.7 UN personnel involved in delivering humanitarian, political or development assistance, or delivering emergency humanitarian aid are often exposed to a security environment of exceptional risk. For example, the Department of Foreign Affairs and Trade (DFAT) advised that, in the 2007-08 year, 25 civilian UN personnel lost their lives as a result of malicious acts while engaged in humanitarian work.¹¹
- 2.8 Despite UN personnel involved in humanitarian work being continually exposed to security environments of risk, a declaration of 'exceptional risk', which would extend the protections of the

5 *Criminal Code Act 1995*, Division 71.

6 NIA, Para 5.

7 NIA, Para 10.

8 NIA, Para 1.

9 NIA, Para 2.

10 NIA, Para 3.

11 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 1.

Convention to those UN personnel involved in humanitarian work, has never been made.¹²

- 2.9 It is not entirely clear why a declaration of 'exceptional risk' has never been made. DFAT speculate that this could be because either a State in which the UN was operating may feel that such a declaration reflects badly on its ability to protect UN personnel, or the process of obtaining such a declaration from the UN Security Council or General Assembly is too difficult.¹³
- 2.10 The Optional Protocol removes the requirement for a declaration of 'exceptional risk' before the Convention can apply to UN operations other than a UN peacekeeping operation.¹⁴

Obligations

- 2.11 The Optional Protocol obliges ratifying states to amend their laws to criminalise attacks on UN and associated personnel engaged in delivering humanitarian, political and development assistance, or delivering emergency humanitarian assistance. To meet the Optional Protocol's obligations, the Commonwealth Government will amend Division 71 of the *Criminal Code Act 1995* to extend its coverage to UN and associated personnel involved in delivering humanitarian, political or development assistance in peace building and delivering emergency humanitarian assistance within Australia's jurisdiction.¹⁵

Reasons for entering into the Optional Protocol

- 2.12 In the unlikely event that UN or associated personnel were involved in delivering humanitarian assistance within Australia's jurisdiction, any offences committed against them that would fall within the scope of Division 71 of the *Criminal Code Act 1995* would already be prohibited under applicable State or Territory law. In other words, Division 71 of the *Criminal Code Act 1995* does not prohibit anything that was not already prohibited in Australia.¹⁶

12 NIA, Para 4.

13 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 3.

14 NIA, Para 5.

15 NIA, Para 12.

16 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 6.

- 2.13 Nevertheless, there are good reasons for Australia to ratify the Optional Protocol. A large number of Australians are involved in working for the UN in humanitarian, political and development assistance, or delivering emergency humanitarian assistance, and it is in their interests for Australia to ratify the Optional Protocol.¹⁷
- 2.14 As indicated above, the Optional Protocol is not yet in force. This means that Australians involved in humanitarian work for the UN are not subject to the protections of the Convention. In order to come into force, 22 instruments of ratification need to be lodged with the Secretary-General of the UN. Eighteen instruments have so far been lodged.¹⁸ Ratification by Australia will bring the Optional Protocol closer to being in force; it will also encourage other nations to undertake the ratification process.¹⁹
- 2.15 In addition, while prohibiting attacks on UN and associated personnel involved in humanitarian work will not necessarily prevent such attacks from happening, doing so will strengthen the rule of law and create an additional sense of obligation on nations where humanitarian assistance is delivered.²⁰

Conclusions and recommendation

- 2.16 The Committee concludes that ratification of this treaty will send a message to the international community about Australia's commitment to the safety of UN and associated personnel involved in humanitarian, political and development assistance, or delivering emergency humanitarian assistance.
- 2.17 While the Committee believes that Division 71 of the *Criminal Code Act 1995* may never be used, if Australia's ratification of this treaty results in another country using similar provisions to prosecute someone who has attacked an Australian working for the UN, it will have been well worth the effort.

17 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 2.

18 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 3.

19 NIA, Para 6.

20 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 17 August 2009, p. 3.

Recommendation 1

The Committee supports *the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel* and recommends that binding treaty action be taken.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)

Background

- 3.1 The service of documents involves providing a court authorised set of documents to a person or organisation, and is a particularly important step in litigation. It performs the function of advising a person that they are considered by a court to be a defendant in a matter before the court, and enables the court to establish its jurisdiction over the defendant.¹
- 3.2 Because of the importance of a person knowing that they are a defendant in a matter before a court, there are rules governing the service of documents. The rules are generally directed at ensuring that the defendant is aware that they are party to a matter before a court and have accepted the documents.²
- 3.3 Currently, the service of court documents abroad is administered through diplomatic channels, which regularly takes some months.³
- 3.4 This timeframe can have two significant consequences for the defendants being served the documents. The first is that they are not given enough time to prepare a defence. The second is that service

1 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 11.

2 National Interest Analysis (NIA), Para 7.

3 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 8.

has taken so long that the defendant may have a default judgement issued against them.⁴ Applicants can also be disadvantaged by delays in serving documents abroad. If a court cannot demonstrate that documents have been successfully served, it may not be able to continue with the action.⁵

- 3.5 Statistics on the number of attempts by courts to serve documents abroad are not collected, but officials of the Attorney-General's Department stated that the number of attempts in Australia's larger jurisdictions, such as New South Wales and Victoria, numbered about 100 in each jurisdiction.⁶

The Hague Service Convention

- 3.6 The *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Hague Service Convention) is designed to streamline and harmonise the process of serving court documents between countries that are party to it. To achieve this, the Hague Service Convention establishes a framework for the transmission of court documents between countries. It does not provide substantive rules for the actual service of documents, as these are contained in the relevant court rules of the country.⁷
- 3.7 The Hague Service Convention was first negotiated in 1965, and Australia became a member of the Convention's governing Conference, the Hague Conference on Private International Law, in 1973.⁸ Fifty-nine countries have ratified the Hague Service Convention to date, including Australia's key trading partners: the United States of America; the United Kingdom; Japan; and the People's Republic of China.⁹
- 3.8 Australia first considered ratification of the Hague Service Convention in 1980, when the Standing Committee of Attorneys-General (SCAG), a committee of the Commonwealth Attorney-General and the Attorneys-General of each State and Territory, agreed to Australia ratifying the Convention. However, the Convention was

4 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 11.

5 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 11.

6 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 10.

7 NIA, Para 7.

8 NIA, Para 15.

9 NIA, Para 14.

removed from SCAG's agenda in 1987 as a result of disagreements over the appropriate model of implementation.¹⁰

- 3.9 Commonwealth, State and Territory Ministers again agreed to ratification in 2006, resulting in the current proposal to ratify the Hague Service Convention. On this occasion:

Accession to the Hague Service Convention has received broad support from State and Territory Ministers as well as key stakeholders (such as State and Territory Courts, the Australian Law Reform Commission, Law Council of Australia, High Court of Australia and Federal Court of Australia).¹¹

- 3.10 The Hague Service Convention applies only to civil and commercial matters. It does not apply to criminal matters.¹² The Attorney-General's Department advised that the service of documents abroad not related to criminal matters mainly involves commercial and business disputes, consumer disputes and family disputes.¹³

- 3.11 The Hague Service Convention will:

- make the process of serving documents abroad as quick and simple as possible;
- ensure the person on whom the documents are to be served has sufficient notice to enable them to defend proceedings; and
- provide a means to ensure that service is considered valid in the country in which the documents are served so that a party to the matter can enforce a judgement in their favour in the country where the documents were served.¹⁴

Existing treaties

- 3.12 Australia has existing bilateral treaties on the service of documents abroad with the Republic of Korea and Thailand. In addition, a number of bilateral treaties negotiated by the United Kingdom in the 1920s and 1930s apply to Australia.¹⁵

10 NIA, Para 16.

11 NIA, *Attachment on Consultation*, Para 45.

12 NIA, Para 7.

13 Attorney-General's Department, *Transcript of Evidence*, 17 August 2009, p. 8.

14 NIA, Para 8.

15 NIA, Para 13.

- 3.13 The bilateral treaties with the Republic of Korea and Thailand will not be affected by the Hague Service Convention because neither of these countries are party to it.¹⁶
- 3.14 Outside of Australia's bilateral treaties, Australian court documents are served via private agent or diplomatic or consular channels. A similar process is used to serve judicial documents from courts in other countries to Australian residents.¹⁷

Operation of the Convention

- 3.15 The Hague Service Convention establishes general requirements for administering the service of documents abroad. Within these general requirements, countries that are party to the Convention have some discretion as to the implementation of the Convention.
- 3.16 In Australia, there will be two channels for the transmission of judicial documents to be served. The Hague Service Convention requires a Central Authority channel, which in Australia's case will be the Commonwealth Attorney-General's Department, which will be responsible for:
- receiving requests for service from foreign courts or authorities;
 - arranging for the service of documents;
 - returning a certificate of service or non-service to the requesting authority; and
 - informing a requesting country where it considers that a request does not comply with the Convention or where compliance with the request would infringe Australia's sovereignty or security.¹⁸
- 3.17 The Convention permits countries to nominate 'additional authorities' to receive and execute requests for service. Australian states and territories have nominated their respective Supreme Courts as 'additional authorities', with the exception of Queensland, which has nominated its Department of Justice.¹⁹
- 3.18 In terms of initiating documents to be served on persons abroad, all judicial authorities in Australia will be permitted to generate requests

16 NIA, Para 3.

17 NIA, Para 13.

18 NIA, Para 18.

19 NIA, Para 23.

for the service of judicial documents in countries party to the Hague Service Convention.²⁰

- 3.19 Where documents have been served abroad and the person on whom the documents were served does not appear at the relevant proceedings, the Hague Service Convention places a number of obligations on the court to protect the defendant prior to and after a default judgement has been issued.²¹ A signatory State can specify a period during which a person who has had a default judgement awarded against them can appeal the judgement. Australia has specified this period as 12 months.²²

Conclusion and recommendation

- 3.20 The Committee concludes that support for ratification by the Commonwealth, States and Territories comes at a time when cross border transactions and greater mobility mean there is an increasing need for certainty in arrangements for conducting transnational litigation. The Hague Service Convention has the potential to replace a slow, complex process with a transparent and timely procedure more appropriate to the globalised world in which we live.

Recommendation 2

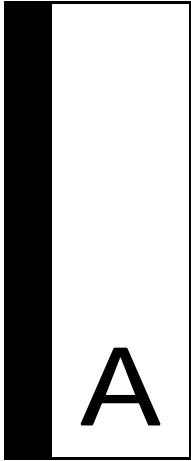
The Committee supports the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and recommends that binding treaty action be taken.

Kelvin Thomson MP
Chair

20 NIA, Para 19.

21 NIA, Para 20.

22 NIA, Para 26.



Appendix A — Submissions

Treaties tabled on 13 May 2009

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel

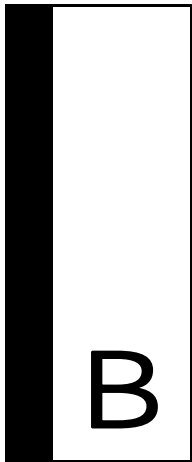
1.2 Australian Patriot Movement

3 Dr Ben Saul

Treaty tabled on 25 June 2009

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

1 Australian Patriot Movement



Appendix B — Witnesses

Monday, 17 August 2009 - Canberra

Attorney-General's Department

Ms Catherine Fitch, Acting Assistant Secretary, Access to Justice Division

Ms Julia Thwaite, Acting Principal Legal Officer, Private International Law Section, Access to Justice Division

Ms Anne Sheehan, Principal Legal Officer, Office of International Law

Department of Defence

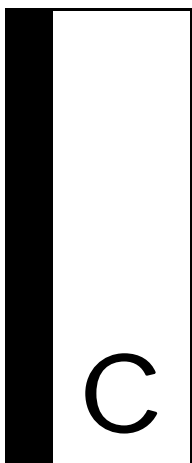
Mr Benjamin Burdon, Assistant Secretary, Americas, North & South Asia and Europe

Department of Foreign Affairs and Trade

Mr Bassim Blazey, Acting First Assistant Secretary, International Organisations and Legal Division

Ms Sue Robertson, Acting Director, International Law Section

Mr Andrei Seeto, Acting Director, United Nations and Commonwealth Section



Appendix C — Minor treaty actions

Minor treaty actions are identifiably minor actions, generally technical amendments to existing treaties, which do not impact significantly on the national interest. Minor treaty actions are tabled with a one-page explanatory statement. The Joint Standing Committee on Treaties has the discretion to formally inquire into these treaty actions or indicate its acceptance of them without a formal inquiry and report.

The following minor treaty actions were considered by the Committee on the date indicated. The Committee determined not to hold a formal inquiry into either treaty and agreed that binding treaty action may be taken in both cases.

Minor treaty actions tabled on 20 August 2009

Considered by the Committee on 8 September 2009:

- Amendment, Adopted at Bergen in April/May 2009, to Annex 1 of the Agreement on the Conservation of Albatrosses and Petrels of 19 June 2001.
- Agreement to Amend the Agreement between Australia and the United States of America concerning Acquisition and Cross-Servicing of 9 December 1998, done at Washington on 30 July 2009.

Annex 1 of the *Agreement on the Conservation of Albatrosses and Petrels* ('the Agreement') lists all species to which the Agreement, including conservation measures as adopted by the Meeting of the Parties to the Agreement, applies. The Amendment adds three northern hemisphere albatross species to the Annex.

The Committee notes that it was advised of the Government's intention to propose amendments to Annex 1 of the Agreement in correspondence dated 19 January 2009 from the Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP. The Minister advised that, should the proposed amendment be

adopted at the Meeting of the Parties, the tacit consent provisions of the Agreement provide that the amendment would automatically enter into force 90 days after adoption – 29 July 2009 – that is, before the Committee had an opportunity to conduct its review.¹ The Committee indicated its endorsement of the Government's proposed course of action in *Report 98*, which was tabled on 12 March 2009.²

The *Agreement to Amend the Agreement between Australia and the United States of America concerning Acquisition and Cross-Servicing* would extend the existing Agreement between Australia and the United States of America (US) concerning Acquisition and Cross-Servicing (ACSA) by one year.

The Department of Defence advises that such Agreements are the normal means through which the provision of reciprocal logistic support, supplies and services are facilitated between the US and its defence partners. The current ACSA between Australia and the US provides for logistics cooperation between the Parties' military forces during combined exercises, training, deployments, operations or other cooperative efforts, and for unforeseen circumstances or exigencies.

The ACSA entered into force on 22 September 1999 and under Article VIII of the current Agreement, it will remain in force for 10 years from the date of entry into force unless terminated earlier by the Parties. The current ACSA will therefore expire on 22 September 2009. Defence advises that while negotiations are underway for a new agreement to replace the current ACSA, due to delays with the negotiations, it will not be possible to complete the replacement Agreement before the current ACSA expires. The proposed Agreement extends the operation of the current ACSA until 22 September 2010.

Other than to extend by twelve months the current ACSA's duration, while the follow-on treaty is being negotiated, the proposed Agreement makes no other changes to the ACSA.³

1 Explanatory Statement 11 of 2009, p. 1.

2 Joint Standing Committee on Treaties, *Report 98: Treaties tabled on 26 November 2008 and 4 December 2008*, p. 15, viewed 25 August 2009, <<http://www.aph.gov.au/house/committee/jsct/26november2008/report/appendixd.pdf>>.

3 Explanatory Statement 7 of 2009, p. 1.