

Documents tabled on 23 June 2009:

National Interest Analysis [2009] ATNIA 13

with attachment on consultation

**Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or
Commercial Matters, done at The Hague on 15 November 1965.**

[2009] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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

The Hague, 15 November 1965

[2009] ATNIF 10

Nature and timing of proposed treaty action

1. It is proposed that Australia accede to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Convention), done at The Hague on 15 November 1965.
2. Pursuant to Article 28, the Convention will enter into force for Australia, in the absence of any objection from a Contracting State, on the first day of the month following the expiry of six months after the date on which the instrument of accession is deposited with the Ministry of Foreign Affairs of the Netherlands.
3. Accession to the Convention will not affect Australia's existing bilateral arrangements on the service of documents abroad (see paragraph 11).
4. Article 21 of the Convention allows for declarations to be made on the designation of authorities competent to receive and execute requests for service of documents, methods of transmitting documents for service and the issuing of default judgments where an originating process has been transmitted for service but the defendant does not make an appearance in the court proceedings. A declaration is also permitted under Article 29 to extend the application of the Convention to Australia's external territories.
5. An outline of Australia's declarations under the Convention is at paragraph 26.
6. Australia does not propose to make any reservations to the Convention.

Overview and national interest summary

7. The service of documents is a particularly important step in litigation as it is necessary to establish a court's jurisdiction over a defendant. The Convention is designed to streamline and, to a large extent, harmonise processes for serving court documents between Contracting States in civil and commercial matters (the Convention does not apply to criminal matters). It does this by establishing a framework for the transmission of court documents from one Contracting State for service in another Contracting State. It does not provide substantive rules for the actual service of court documents (this is contained in State and Territory court rules).
8. The purpose of the Convention is to make the process for serving documents abroad as quick and simple as possible, while ensuring that the person on whom the documents are to be served has sufficient notice to enable him or her to defend proceedings. The Convention also provides means to prove that service is considered valid in the State in which the documents are served. This is important if a party wants to later enforce a judgment awarded in their favour in that State.

9. Accession to the Convention will assist Australians to enforce their legal rights in foreign jurisdictions, or against foreign nationals, more efficiently and cost effectively. The Convention will also help ensure that Australians are informed of legal proceedings abroad in which they have an interest, as well as assist authorities involved in processing requests for service by setting out accepted channels of transmission.

10. Accession to the Convention will also provide a foundation for Australia to strengthen international legal cooperation in other areas, including the recognition and enforcement of Australian judgments abroad.

Reasons for Australia to take the proposed treaty action

11. Accession to the Convention will simplify and harmonise the procedures for transmitting and serving Australian court documents overseas, as well as the procedures for serving foreign court documents in Australia. Current arrangements are complicated and inefficient. The current procedures for serving foreign court documents are not consistent across Australian jurisdictions.

12. In the absence of uniform rules for the conduct of litigation involving more than one legal system, transnational litigation is often uncertain, complex, slow and costly. With the rapid expansion of cross-border transactions and greater migration and mobility, there is an increasing need for clear and certain arrangements for conducting transnational litigation. The need for a comprehensive civil legal cooperation framework is even more essential in the current economic environment, with the global financial crisis likely to lead to an increase in the number of legal disputes with a cross-border aspect.

13. Presently, Australia is party to bilateral treaties with the Republic of Korea and Thailand on the service of process abroad. In addition, bilateral treaties with a number of countries made by the United Kingdom during the 1920s and 1930s have been extended to apply in Australia. Pursuant to Article 25, accession to the Convention will not affect the operation of these treaties. Outside these treaties, Australian court documents are often served via private agent or diplomatic or consular channels. The Convention provides for specified channels of transmission to be used when a court document is to be transmitted from one country for service in another. The main channel is via a single central authority for the receipt and execution of foreign requests for service. However, the Convention also allows for the use of alternative channels, such as by private agent or diplomatic or consular channels, which are preferred by some litigants.

14. The Convention currently has 59 Contracting States, including key trading partners such as the United States, the United Kingdom, Japan, the People's Republic of China and a number of European Community countries.

15. The Convention was negotiated through the Hague Conference on Private International Law (HCPIL), and has been widely ratified by HCPIL members. Australia has been a member of the HCPIL since 1973, and accession to the Convention would demonstrate Australia's ongoing commitment to the goals of the HCPIL, including the development of cross-border cooperation in civil and commercial matters.

16. Accession to the Convention will be welcomed by the States and Territories. In 1980 the Standing Committee of Attorneys-General (SCAG) agreed to Australia acceding to the Convention. However, disagreement about the appropriate model of its implementation led to the removal of the Convention from the SCAG agenda in 1987. In its Report on *Legal Risk in International Transactions* (No. 80), the Australian Law Reform Commission suggested that there would be significant gains in terms of costs and efficiency in transnational litigation if Australia became party to the Convention. The issue of Australia's accession to the Convention arose again in 2006 in the context of a range of possible harmonisation initiatives. In November 2006, Commonwealth, State and Territory Ministers agreed that Australia should take steps to accede to the Convention. Consequent consultation with State and Territory Ministers as well as key stakeholders indicated broad support for accession to the Convention (an outline of the consultation process is attached).

Obligations

17. The Convention sets out broad requirements (described below) for the arrangements that Contracting States must have in place to receive requests for service from other Contracting States. However, the Convention provides Contracting States with discretion as to how they will implement the arrangements established by the Convention.

18. The main channel of transmission established by the Convention is the Central Authority channel. Under Article 2, Contracting States are obliged to designate a Central Authority to receive and execute requests for service from other Contracting States in accordance with the terms of the Convention. Under the Convention, the designated Central Authority is primarily responsible for:

- receiving requests for service from foreign courts or authorities (Article 3)
- arranging for the service of documents (Article 5)
- returning a certificate of service or non-service to the requesting authority (Article 6), and
- informing a requesting State where it considers that the request does not comply with the Convention requirements (Article 4) or where compliance with the request would infringe Australia's sovereignty or security (Article 13).

19. The Convention allows the requesting State to determine who is competent to forward requests for service of documents abroad. In Australia, judicial authorities (such as courts) will be responsible for forwarding requests under the Convention, in accordance with existing practice in States and Territories.

20. Where an originating process has been transmitted abroad for service and the defendant does not appear, the Convention contains a number of obligations on the court to protect a defendant prior to a default judgment being issued (under Article 15) and after a default judgment is issued (under Article 16).

21. The Convention makes it clear that it does not affect existing channels of service. Therefore, service of judicial documents could still be effected through diplomatic or consular agents (under Article 8), postal channels (under Article 10), judicial officers (under Article 10), or private agents (under Article 10).

Implementation

22. The Convention will be implemented by a model involving a single Commonwealth Central Authority (the Attorney-General's Department) and an additional authority in each State and Territory to handle overseas requests made under the Convention.

23. Article 18 of the Convention allows a Contracting State to designate 'additional authorities' if desired. A Contracting State has authority under the Convention to determine the extent of the competence of any additional authority that it appoints. All States and Territories have nominated authorities to be designated as 'additional authorities' to receive and execute requests for service of documents under the Convention (Supreme Courts will be designated as additional authorities in all jurisdictions except Queensland where the Department of Justice will be the additional authority). Model Rules of Court have been developed by the Council of Chief Justices Rules Harmonisation Committee. Supreme Courts in each jurisdiction are working to adopt the model Rules by

1 July 2009. The Federal Court of Australia has also amended its Rules of Court to implement the Convention obligations in Australia.

24. The Commonwealth is responsible for developing domestic arrangements to implement Article 13 of the Convention, which allows a State Party to refuse to execute a foreign request for service if compliance would infringe its sovereignty or security. The power to refuse requests on these grounds is within the scope of the Commonwealth's executive power and can be exercised without legislative underpinning. Internal procedural guidelines for the assessment by Commonwealth authorities of foreign requests that raise issues under Article 13 have been developed by the Attorney-General's Department in consultation with the Department of Foreign Affairs and Trade.

25. As Central Authority under the Convention, the Attorney-General's Department is also responsible for the transmission of extrajudicial documents (documents not directly related to a court proceeding that still involve a judicial authority) under the Convention. The Commonwealth will arrange for the service of extrajudicial documents via private agent and costs for service will be the responsibility of the requesting State.

26. Taking into account the above model of implementation, Australia will make the following declarations pursuant to Article 21 of the Convention:

- Article 5 of the Convention provides that a Central Authority shall arrange to serve a document by a method prescribed by its domestic laws or a particular method requested by the forwarding authority. To assist in the timely processing of requests, Australia will declare that documents forwarded for service under Article 5(a) and (b) of the Convention must be written or translated into English. A translation will not be required in circumstances where an addressee voluntarily accepts service of documents in another language informally and the Central or Additional Authorities have no objection. As a safeguard, Australia will declare that a letter of request must confirm that documents forwarded for service are duly certified, in these circumstances.
- Article 6 requires a Central Authority or additional authority designated under the Convention to complete a Certificate in the form annexed to the Convention indicating the place, date and person to whom the document was delivered, once documents have been served. Australia will declare that the authorities designated under Articles 2 and 18 of the Convention, or persons authorised by those authorities, will be considered competent to complete a Certificate of Service under Article 6 of the Convention.
- Article 8 permits the transmission of documents by consular or diplomatic channels, as an alternative to transmission via the Central Authority. For the purposes of this article, Australia will declare that the Department of Foreign Affairs and Trade will be the competent authority for service by this method.
- Article 9 of the Convention allows documents to be forwarded for the purposes of service by a foreign consul to the appropriate authorities in Australia. Pursuant to this article, Australia will declare that its Central and Additional Authorities will be considered competent to receive requests for service transmitted by a foreign consul within Australia. Australia will declare that the requirements for translation of documents into English and use of the Model Form are to be applied for service via this method, in order for requests for service to be efficiently executed.

- Article 10(a) of the Convention allows service by postal channel where it is already allowed by the Australian jurisdiction in which the documents are to be served. Australia does not object to service by post where it is permitted in the jurisdiction where the documents are to be served. Australia will make a declaration to this effect, but will require documents forwarded via post to be sent by registered mail to allow for acknowledgement of receipt.
- Where an originating process has been transmitted abroad for service and the defendant does not appear, Article 15 of the Convention contains a number of obligations on the court to protect a defendant prior to a default judgment being issued. However, the Convention allows a Contracting State to declare that a default judgment may be awarded against a defendant even if no evidence of service has been provided so long as all of the conditions outlined in the second paragraph of Article 15 are satisfied. Australia considers that these requirements achieve an appropriate balance between the interests of the parties and will make a declaration under this Article.
- Article 16 of the Convention allows a defendant who has not appeared, and against whom a default judgment has been entered, an opportunity to apply to the Judge in that forum to relief from the effects of the expiration of a time period for appeal if certain conditions are fulfilled. However, a Contracting State may declare that such an application will not be considered if it is filed after the expiration of a specified time period. Australia will make a declaration that an application cannot be filed more than one year after the date of the judgment, except where the relevant Court decides to allow the appeal.
- Article 17 allows for extrajudicial documents to be served under the Convention. Australia will declare that the Central Authority is competent to receive requests for service of extrajudicial documents within Australia. To avoid confusion and delay, Australia will declare that costs for the service of these documents will be the responsibility of the requesting State. Australia does not consider that Article 12 of the Convention (prohibiting the reimbursement of costs for the service of judicial documents) applies in relation to the service of extrajudicial documents.
- Article 29 allows a Contracting State to declare that the Convention extends to all the territories for which it is responsible. Australia will declare that the Convention shall extend to all the States and Territories of Australia including external territories.

Costs

27. Accession to the Convention will not result in significant financial implications for the Federal or State and Territory governments, business or industry. Accession to the Convention will give State and Territory Supreme Courts primary responsibility for the receipt and execution of requests for service of documents under the Convention (currently State and Territory justice departments, diplomatic and consular authorities and private process servers are also involved in this process). These new arrangements may result in minor increase in workload for courts designated as additional authorities under the Convention. Article 12 of the Convention provides that service of judicial documents shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by authorities in the State addressed. However, costs for the employment of a judicial officer, competent person or for a particular method of service must be borne by the requesting State.

28. Accession to the Convention may result in a minor reduction in workload for diplomatic and consular authorities. It may also result in a minor reduction in business for private process servers. However, this would be in part balanced by a slight positive impact on business where Australia receives a foreign request for service of extrajudicial documents. In these circumstances, the Attorney-General's Department will arrange for service of documents via private agent and costs for engaging an agent will be borne by the requesting State.

Regulation Impact Statement

29. The Office of Best Practice Regulation (Department of Finance) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

30. Article 21 of the Convention requires a Contracting State to inform the Ministry of Foreign Affairs of the Netherlands of any modifications to the designation of authorities, opposition to the use of certain methods of transmission and declarations under the Convention.

31. Article 20 of the Convention permits the negotiation of future agreements between any two or more Contracting States to dispense with certain requirements of the Convention, including the number of required copies of transmitted documents and language requirements. Article 11 of the Convention permits Contracting States to make agreements to provide for channels of transmission of documents other than those provided for in the Convention, including for the direct transmission of documents between their authorities.

32. Any future treaty action would be subject to Australian domestic treaty process.

Withdrawal or denunciation

33. The Convention entered into force on 10 February 1969. Article 30 of the Convention provides that the Convention shall remain in force for five years from the date of its entry into force and shall be renewed tacitly every five years. Article 30 requires a State Party to notify the Ministry of Foreign Affairs of the Netherlands of any denunciation at least six months before the end of the five year period. Denunciation would only affect the denouncing State and the Convention would remain in force for other Contracting States.

34. A decision to denounce the Convention would be subject to Australian domestic treaty process.

Contact details

Administrative Law and Civil Procedure Branch
Access to Justice Division
ATTORNEY-GENERAL'S DEPARTMENT

Attachment on Consultation

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CONSULTATION

35. 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). There is a widespread recognition of the benefits to Australia in acceding to the Convention to streamline the process for the transmission of documents abroad, particularly as transnational litigation becomes more common.
36. At the November 2006 meeting of the Standing Committee of Attorneys-General (SCAG), Commonwealth, State and Territory Attorneys-General agreed to take the steps necessary to enable Australia to accede to the Convention and formed a Working Group, chaired by the Commonwealth, to prepare advice for SCAG Ministers' consideration of how best to implement that Convention in Australia.
37. In November 2006, SCAG Ministers requested that the Working Group consult with the Council of Chief Justices of Australia and New Zealand and other key stakeholders on accession to the Convention. The Working Group prepared a background paper which discussed key issues relating to Australia's accession to the Convention and possible models of implementation. The paper was used as the basis for consultation and circulated to members of the Working Group for consultation within their jurisdiction in December 2006 and to the Council of Chief justices on 23 March 2007. Correspondence received from the Council of Chief Justices, the High Court of Australia, Federal Courts, the Law Council of Australia and other stakeholders within the States and Territories indicated support for a model of implementation involving a single Central Authority and additional authorities in States and Territories to handle requests for service of documents. Following the consultation process, the Working Group recommended to SCAG Ministers that the Convention be implemented in Australia by this model. At its July 2007 meeting, SCAG endorsed this model.
38. On 6 June 2007, the Commonwealth Attorney-General's Department requested the Council of Chief Justices Rules Harmonisation Committee's assistance in developing uniform court rules for implementation by each jurisdiction. The Council is represented by judges from courts of each State and Territory. The Council finalised and circulated model Rules of Court to State and Territory courts for adoption in April 2009.
39. At a Commonwealth level, the Attorney-General's Department has consulted with the Office of International Law and Department of Foreign Affairs and Trade in developing internal procedural guidelines for the assessment of foreign requests for service that raise sovereignty and security issues under Article 13 of the Convention.
40. At the November 2008 SCAG meeting, the Commonwealth Attorney-General advised his State and Territory counterparts that Australia would commence formal procedures to accede to the Convention in 2009.

