

National Interest Analysis [2012] ATNIA 5

with attachment on consultation

**Convention providing a Uniform Law on the Form of an International Will
done at Washington D.C. on 26 October 1973**

[2012] ATNIF 1

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. It is proposed that Australia accede to the *Convention providing a Uniform Law on the Form of an International Will*, done at Washington D.C. on 26 October 1973 ('the Convention').
2. The Convention entered into force generally on 9 February 1978. Pursuant to its Article XI, the Convention will enter into force for Australia six months after the date on which the instrument of accession is deposited with the Government of the United States of America, the Depositary Government.
3. Accession to the Convention will not affect Australia's existing succession laws, including those which implement the *Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions*, done at the Hague on 5 October 1961 ([1986] ATS 20).

Overview and national interest summary

4. The Convention seeks to harmonise and simplify the process of proving the formal validity of wills that contain international characteristics. These characteristics include situations where the testator's country of nationality, residence or domicile is different to the country in which the will is executed or where the assets, real property and beneficiaries named in the will are located.
5. The Convention seeks to introduce a new form of will (the international will) into the jurisdiction of each Contracting Party. It does so by requiring Contracting Parties to adopt the *Uniform Law on the Form of an International Will* ('the Uniform Law'), annexed to the Convention, into their domestic legal scheme. The Uniform Law sets out the requirements for the form of the international will.
6. The key benefit to Australia in acceding to the Convention is that it provides greater legal certainty for testators and beneficiaries. The practical benefit of an international will is most apparent at probate when additional information, such as witness testimony and evidence of foreign law, may not be necessary to prove formal validity. This should be particularly beneficial to testators who may have assets or beneficiaries located in several different foreign jurisdictions.
7. The use of the international will is optional and open to all prospective testators in Australia; it will not replace existing forms of wills in Australia. The Convention does not affect existing domestic succession laws, nor does it affect existing laws governing the construction and interpretation of wills.

Reasons for Australia to take the proposed treaty action

8. Accession to the Convention will provide all prospective testators in Australia with the option of choosing a new form of will, the international will. The Uniform Law sets out the form of the international will.
9. The harmonisation and simplification of the proof of formal validity process provided by the Convention will provide greater legal certainty for testators and simplicity for executors when seeking probate. Currently, proving the formal validity of a will can become more complex when testamentary arrangements contain international characteristics, for example, if the will was executed overseas or if the witnesses, real property or beneficiaries are located across several international jurisdictions. In such circumstances, the process can be prolonged as documents, witness statements, proof of foreign law and translations may need to be collected from overseas.
10. In the case of an international will, this process could be significantly simplified and shortened because an international will, using the form adopted in the Uniform Law, must be recognised as valid with regards to form. Therefore, in an unchallenged case, there would be no need to gather and adduce further evidence such as the applicable foreign law or further statements from witnesses to prove formal validity.
11. The international will can also be chosen by prospective testators who may have no international characteristics in their testamentary arrangements.
12. Australia has significant demographic and cultural ties to the current Contracting Parties and signatories to the Convention. The Convention currently has 12 Contracting Parties and an additional eight signatories from a diverse range of countries. These demographic ties to fellow Contracting Parties and signatories will add to the utility of international wills in Australia.
13. Accession to the Convention will allow Australia to take a practical step towards simplifying the domestic process to prove the validity of wills, taking into consideration the future needs of Australia's ageing population.

Obligations

Note: In the following paragraphs, Roman numerals refer to Articles in the body of the Convention and Arabic numerals refer to Articles of the Uniform Law contained in the Annex to the Convention.

14. The main obligation for Australia under the Convention is to introduce the Uniform Law, as set out in the Annex to the Convention, into our domestic law (Article I). Australia may also introduce into domestic law such further provisions as are necessary to give full effect to the Uniform Law (Article I(3)). The Uniform Law sets out the formal requirements for an international will, including that:

- it must have only one testator, be in writing, be signed by the testator, and be witnessed by two witnesses and a person authorised to act in connection with international wills (Articles 2 to 5);
- particular signature requirements must be met in addition to those provided by the domestic law of the Contracting Party (Articles 6 and 7);
- in the absence of any mandatory rule pertaining to the safekeeping of the will, the authorised person will mention any safekeeping request by the testator in the certificate provided for in Article 9 (Article 8);

- the authorised person must attach a certificate in the form prescribed by Article 10 establishing that the international will complies, with regard to form, with both the requirements of the Convention, and where required, the domestic law under which he or she is empowered (Article 9);
- the authorised person is to retain one copy of the certificate and provide another to the testator (Article 11); and
- the certificate shall provide proof of formal validity of the will (Article 12). However, an incomplete or missing certificate shall not affect the formal validity of the international will (Article 13).

15. Under the terms of the Convention, each Contracting Party must also agree to recognise a properly certified international will as valid with regards to formalities (Article IV). Certification of international wills is carried out by an 'authorised person' designated by each Contracting Party to act in connection with international wills within its territory (Article II). Contracting Parties must recognise the designation of 'authorised persons' by other Contracting Parties (Article III). Accordingly, actions executed by an 'authorised person' (such as the certification of an international will) in the territory of one Contracting Party will be recognised as valid by other Contracting Parties.

16. Witness requirements will be governed by the domestic succession laws of the jurisdiction in which the authorised person was designated (Article V). The signature of the testator, authorised person and witness shall be exempt from any legalization or like formality (Article VI(1)), although the authorities of the Contracting Party in question may satisfy themselves as to the authenticity of the signature (Article VI(2)). Safekeeping requirements for international wills shall be governed by the domestic laws in the jurisdiction in which the authorised person was designated (Article VII). Article 14 of the Uniform Law provides that domestic succession law regarding the revocation of wills shall also apply to international wills. These provisions allow for the easier integration of the Convention's obligations into the domestic succession law regimes of Contracting Parties.

Implementation

17. The Convention will be implemented through the introduction of legislative amendments to the relevant succession laws of each State and Territory to establish consistency between those laws and the Convention.

18. The legislative amendments will be based on a model Bill that has been drafted by the Parliamentary Counsel's Committee (PCC). The decision to assist implementation with a model Bill was made during the July 2010 meeting of the Standing Committee of Attorneys-General (SCAG, since renamed the Standing Council on Law and Justice). It was decided that a model Bill drafted by the PCC would help to ensure as much uniformity as possible between the enacting legislation in each Australian jurisdiction.

19. Drafting instructions for the model Bill were sent to the PCC on 23 February 2011 and a finalised model Bill was received on 2 November 2011 after continuous consultation with the States and Territories. The model Bill drafted by the PCC replicates the Uniform Law but not the Convention text. Accordingly, additional provisions were drafted to ensure that legislative arrangements are consistent with the obligations of the Convention.

20. The States and Territories expect to pass their legislative amendments by the end of 2012. Australia's accession will be timed to ensure consistency with Articles I(1) and XI of the Convention.
21. Pursuant to Article I of the Convention, the text of the amendments made to State and Territory succession laws will be submitted to the Depository Government at the time of Australia's accession.
22. The model Bill designates 'Australian legal practitioners' and 'public notaries of any Australian jurisdiction' to act as authorised persons within each State or Territory's jurisdiction. While it would have been possible to designate only legal practitioners and public notaries working in the jurisdiction of the particular State or Territory, this broader approach was chosen to ensure that adoption of the Convention would not interfere with current projects to harmonise succession law and legal profession mutual recognition schemes in Australia. This broader designation will also allow the international will to be more readily available in Australia.
23. The Convention and the Uniform Law provide only for the form of an international will. They do not make any provisions dealing with issues of construction or interpretation. These substantive issues must be dealt with separately according to the law and procedures of the jurisdiction in which probate will be sought. This maintains the current differences between the substantive law in each State and Territory within Australia.
24. Additionally, while some requirements are provided for in the Convention (such as the requirement that the will be in writing), other formalities, such as those with regards to safe keeping, witness requirements and provisions for signatures where a testator cannot sign, are addressed by reference to the domestic succession laws of the Contracting Party in which the authorised person is designated. The 'authorised person' is empowered to act in the territory of the Contracting Party in which he or she was designated (Article II(1)). A Contracting Party may also designate its diplomatic or consular agents abroad to act in relation to international wills in respect of that country's nationals, provided that this is not contrary to the laws of the host State (Article II(1)). In accordance with the wishes of State and Territory governments, Australia will not be seeking to designate our diplomatic or consular agents to act as authorised persons abroad.

Costs

25. Accession to the Convention will not result in significant financial implications for the Federal or State and Territory governments, business or industry. The costs associated with certifying an international will would be borne by the testator. The designation of all Australian legal practitioners and public notaries in Australia to act as authorised persons potentially increases competition in this particular market. Cost schedules and limits already exist in some jurisdictions for services provided by public notaries. It is unlikely that the cost of certifying an international will would fall outside of these existing limits. Additionally, the initial cost of certification to the testator may be offset by the practical simplification of proving formal validity at probate. This practical benefit may result in actual financial savings to the estate and the personal representative seeking probate.
26. Accession is also unlikely to increase workload in the courts and associated Commonwealth, State and Territory government departments. In unchallenged cases, the use of an international will may reduce the workload of the courts in processing probate claims.

Regulation Impact Statement

27. 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

28. The Convention does not contain any specific provision for amendment. Pursuant to customary international law, in the absence of specific procedures, the Contracting Parties may amend the Convention by mutual consent at any time.

29. Article XIII of the Convention permits Contracting Parties to declare at accession, or any time after accession, that the Convention shall apply to all or part of their territories. Such declarations must be made by notice addressed to the Depositary Government.

30. Any future treaty action would be subject to Australia's domestic treaty process.

Withdrawal or denunciation

31. Article XII(1) of the Convention provides that any Contracting Party may denounce the Convention by written notification to the Depositary Government.

32. The denunciation will take effect 12 months after the receipt of notification by the Depositary Government (Article XII(2)).

33. The act of denunciation will not affect the validity of any international will made during the period the Convention was in effect for the denouncing State (Article XII(2)).

34. A decision to denounce the Convention would be subject to Australia's domestic treaty process.

Contact details

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CONSULTATION

35. Accession to the Convention has received broad support from State and Territory Ministers. There is a widespread recognition of the benefits to Australia in acceding to the Convention to streamline the process for the proof of formalities of wills.
36. On 3 July 2009 the Commonwealth Attorney-General wrote to each of the State and Territory Attorneys-General seeking their views on the possible accession to the Convention. There was support for further consideration of Australia's accession through the SCAG. Ministers indicated that the proposal to accede to the Convention would not raise any major conflicts with current policies or processes.
37. At the July 2010 SCAG meeting, the Committee agreed to implement the necessary legislation in each State and Territory to allow for Australia's accession. At the meeting there was a request from Committee members that a model Bill be drafted by the Parliamentary Counsel's Committee (PCC) to ensure uniformity, where possible, of the implementing legislation. A Working Group, chaired by the Commonwealth, was formed to oversee the drafting of the model Bill and its implementation into the existing succession law regimes of the States and Territories. The Ministers noted that there would be no need for further consideration of the implementation of the Convention by SCAG.
38. Drafting instructions for the model Bill were sent to the PCC by the Commonwealth on 23 February 2011. A first draft was finalised on 29 April 2011. This draft was circulated amongst the Working Group and after continuous consultation with the States and Territories, the model Bill was finalised on 2 November 2011.
39. The decision to provide a broader designation of an 'authorised person' was reached via consensus during this period of settling the draft.
40. On 2 November 2011 the Commonwealth also informed the Working Group that they would commence with formal procedures to accede to the Convention in late 2011.
41. Working Group members informed the Commonwealth that implementation is on track to take place by the end of 2012 and that further consultations with relevant stakeholders would be organised by the States and Territories.