

## 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.<sup>1</sup>
- 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.<sup>2</sup>
- 3.3 Currently, the service of court documents abroad is administered through diplomatic channels, which regularly takes some months.<sup>3</sup>
- 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

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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.<sup>4</sup> 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.<sup>5</sup>

- 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.<sup>6</sup>

## 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.<sup>7</sup>
- 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.<sup>8</sup> 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.<sup>9</sup>
- 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

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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.<sup>10</sup>

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).<sup>11</sup>

3.10 The Hague Service Convention applies only to civil and commercial matters. It does not apply to criminal matters.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup>

## 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.<sup>15</sup>

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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.<sup>16</sup>
- 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.<sup>17</sup>

## 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.<sup>18</sup>
- 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.<sup>19</sup>
- 3.18 In terms of initiating documents to be served on persons abroad, all judicial authorities in Australia will be permitted to generate requests

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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.<sup>20</sup>

- 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.<sup>21</sup> 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.<sup>22</sup>

## 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

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20 NIA, Para 19.

21 NIA, Para 20.

22 NIA, Para 26.

