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

Introduction

5.1 On 28 February 2012, the *Convention providing a Uniform Law on the Form of an International Will done at Washington D.C. on 26 October 1973* was tabled in the Commonwealth Parliament.

Background

5.2 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').[1] 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[2] 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.[3]

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1 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 (Hereafter referred to as 'NIA') para 1. For further information see: Mr. Jean-Pierre Plantard, EXPLANATORY REPORT on the Convention providing a Uniform Law on the Form of an International Will, http://www.unidroit.org/english/conventions/1973wills/1973wills-explanatoryreport-e.pdf, accessed 5 April 2012.

2 A testator is a person who makes a valid will.

3 NIA, para 4.

Overview and national interest summary

5.3 The Convention seeks to introduce a new form of will (the international will) into the jurisdiction of each Contracting Party by requiring them to adopt the *Uniform Law on the Form of an International Will* ('the Uniform Law'), annexed to the Convention, into their domestic legal scheme.[4]

5.4 The key benefit to Australia 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 foreign jurisdictions.[5] The international will's use is optional and will not replace existing forms of Australian wills. The Convention does not affect existing laws governing domestic succession or the construction and interpretation of wills.[6]

Reasons for Australia to take the proposed treaty action

5.5 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.[7] It will also allow Australia to take a practical step towards simplifying the domestic process to prove the validity of wills.[8]

5.6 The Convention's streamlining of the proof of formal validity process will provide greater legal certainty for testators and simplicity for executors when seeking probate.[9] This process is being significantly simplified and shortened because an international will, using the form adopted in the Uniform Law, must be recognised as valid.[10] Such a will can also be

4 NIA, para 5.

5 NIA, para 6.

6 NIA, para 7.

7 NIA, para 8.

8 NIA, para 13.

9 NIA, para 9. 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 NIA, para 10. 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.

chosen by testators who may have no international aspects to their testamentary arrangements.[11]

5.7 The Convention currently has twelve Contracting Parties and an additional eight signatories from a diverse range of countries and Australia has significant demographic and cultural ties to these Parties and signatories. The Contracting Parties and signatories include: Canada, the UK, the US and Italy.[12] There are relatively few parties to the Convention and the Attorney-General's Department concedes that the number is unlikely to increase significantly in the short term.[13]

5.8 Australia was not a party to the original negotiations that culminated in the Convention. The lengthy delay in Australia's accession to the Convention, opened to signatures in 1973, arose as Australia pursued reforms to cross-border succession laws through other fora such as the Hague Conference on Private International Law. Action by the Commonwealth, after consultation with state and territory Attorneys-General, to accede to the Convention also waited until domestic succession law reform efforts, such as the Uniform Succession Laws project of the state and territory law Reform Commissions were implemented. [14]

Obligations

5.9 The main obligation of the Convention, described in **Article I**, is for the Contracting Parties to introduce the Uniform Law into their domestic law. As with other Contracting Parties, Australia may also introduce into domestic law such further provisions as are necessary to give full effect to the Uniform Law. The Uniform Law sets out formal requirements for an international will, including that:

- **Articles 2 to 5**: 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 6 & 7**: particular signature requirements must be met in addition to those provided by the domestic law of the Contracting Party;

11 NIA, para 11.

12 UNIDROIT Wills Convention Status List.

13 Dr Karl Alderson, Assistant Secretary, Justice Policy and Administrative Law Branch, Attorney-General's Department, *Committee Hansard*, 7 May 2012, p. 11.

14 Correspondence, Attorney-General's Department, 7 June 2012. See also Dr Karl Alderson, Assistant Secretary, Justice Policy and Administrative Law Branch, Attorney-General's Department, *Committee Hansard*, 7 May 2012, p. 11.

- **Article 8**: 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 9:** 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 11:** the authorised person is to retain one copy of the certificate and provide another to the testator; and
- **Article 12 & 13:** the certificate shall provide proof of the will's formal validity but an incomplete or missing certificate shall not affect its formal validity.[15]

5.10 Under **Article IV** each Contracting Party must also agree to recognise a properly certified international will as valid. 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' in the territory of one Contracting Party will be recognised as valid by other Contracting Parties.[16]

5.11 Under **Article V** witness requirements will be governed by the domestic succession laws of the jurisdiction in which the authorised person was designated. The signatures of testators, authorised persons and witnesses shall be exempt from any legalization or like formality under **Article VI(1 & 2)**, although a Contracting Party may confirm a signature's authenticity. Under **Article VII** the safekeeping of international wills shall be governed by the domestic laws in the jurisdiction in which the authorised person was designated. **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.[17]

15 NIA, para 14.

16 NIA, para 15.

17 NIA, para 16.

Implementation

5.12 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]

5.13 The legislative amendments will be based on a model Bill that has been drafted by the Parliamentary Counsel's Committee (PCC) in consultation with the States and Territories. The decision to assist implementation with a model Bill was made in July 2010 by the then Standing Committee of Attorneys-General, since renamed the Standing Council on Law and Justice. A model Bill drafted by the PCC will help to ensure as much uniformity as possible between the enacting legislation in each jurisdiction. [19]

5.14 The model Bill designates 'Australian legal practitioners' and 'public notaries of any Australian jurisdiction' to act as authorised persons within each State or Territory. This broad approach was chosen to ensure that the Convention's adoption would not interfere with current projects to harmonise succession law and legal profession mutual recognition schemes and will make the international will more accessible.[20]

5.15 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[21] and the text of the amendments made to State and Territory succession laws will be submitted to the Depositary Government[22] at the time of accession. [23]

5.16 The Convention and the Uniform Law provide only for an international will's form. They do not make provisions for issues of construction or interpretation. These 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 Australian State and Territory. [24]

5.17 The Convention provides for some formalities, such as the will be in writing, while others, such as those with regards to safe keeping, witness

18 NIA, para 17.
19 NIA, para 18.
20 NIA, para 22.
21 NIA, para 20.
22 The Government of the United States of America.
23 NIA, para 21.
24 NIA, para 23.

requirements and provisions for signatures where a testator cannot sign, are addressed by reference to the Contracting Party's domestic succession laws 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. A Contracting Party may also designate its diplomatic or consular agents abroad to act in relation to international wills for its own nationals, provided that this is not contrary to the host State's laws. In response to State and Territory governments' requests, Australia will not be seeking to designate our diplomatic or consular agents to act as authorised persons abroad.[25]

Different countries – different laws: which law prevails?

5.18 The Committee notes that the use of the international will does not necessarily mean that there will be no difference of opinion as to the meaning of the provisions of a will. It remains possible that differing laws in differing countries may yet result in legal interpretation or proceedings. For example, if in another country daughters are considered to be eligible only to receive half of the amount that a son would receive, then the will could still be contested here in Australia. In that case:

> you still have available the mechanisms that exist in state and territory law to say, for example, that inadequate provision has been made for a dependent or a family member. This convention says that there is no debate about whether the will was validly made—those sorts of procedures and formalities of who signed it and where they signed it—it takes those out of contention. But then on the substance of it, the mechanisms under state and territory law to say, for example, that this has not made adequate provision for a child of the person remain available.[26]

Costs

5.19 The NIA claims that accession to the Convention will not result in significant financial implications for Federal, State or Territory governments, nor business or industry. Testators will bear the costs of certifying an international will. The designation of all Australian legal practitioners and public notaries in Australia to act as authorised persons potentially increases competition in this market. Cost schedules and limits

25 NIA, para 24.

26 Dr Karl Alderson, Assistant Secretary, Justice Policy and Administrative Law Branch, Attorney-General's Department, *Committee Hansard*, 7 May 2012, p. 12.

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. The initial cost of certification to the testator may also be offset by the practical simplification of proving formal validity at probate. This practical benefit may result in financial savings to the estate and the personal representative seeking probate.[27]

5.20 Put in simple terms, the extra costs of the international will to an individual are expected to be more than offset by savings when compared to alternative bureaucratic processes:

> In the case of an individual making a will, it would probably add some additional cost because of the procedures to be followed by the lawyer who is making the will. They will need to make sure they are familiar with these provisions; they will need to attach and complete the certificate. So there might be some additional cost to the total cost of executing your will. Set against that is the fact that it is entirely optional to follow this procedure and, normally, a person who chose to enter into one of these international wills would foresee that those executing their will would be likely to face even greater costs in those approving the foreign law and in getting affidavits from the foreign countries. So it allows people to make a judgment in net terms. Potentially, some small additional cost may be outweighed by the saving that is likely to be there for the executors of their will.[28]

5.21 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.[29]

Conclusion

5.22 The greater legal certainty of an international will provides practical benefits for testators and beneficiaries. This should be particularly beneficial to testators who may have assets or beneficiaries located in several foreign jurisdictions. Given Australia's history as a nation of

27 NIA, para 25.

28 Dr Karl Alderson, Assistant Secretary, Justice Policy and Administrative Law Branch, Attorney-General's Department, *Committee Hansard*, 7 May 2012, p. 12.

29 NIA, para 26.

immigration, there are potentially greater benefits for Australians than for citizens of other countries.

5.23 It is worth noting that this agreement will not eliminate all difference of opinion as to the meaning of a will's provisions. It remains possible that differing laws in differing countries may yet result in legal interpretation or proceedings.

5.24 Nonetheless, the Committee supports the agreement and recommends binding action be taken.

Recommendation 4

The Committee supports the *Convention providing a Uniform Law on the Form of an International Will done at Washington D.C. on 26 October 1973* and recommends that binding treaty action be taken.