



Australian Government
Attorney-General's Department

Response to the Hague Conference on Private International Law*

Questionnaire to assess the practical difficulties in accessing the content of foreign law and the need for the development of a global instrument in this area

Contact Officer:

*Catherine Fitch
Principal Legal Officer
Private International Law Section
Tel: +61 2 6250 6866
Email: catherine.fitch@ag.gov.au*

* Please note, in the time available it has not been possible to consult Australian courts on this response. The Australian Government intends to consult Australian courts on this matter in advance of the 2008 Special Council on General Affairs and Policy.

Part I – General Questions

1) Is your State Party to:

- a) The London Convention⁸ YES NO
- b) The Montevideo Convention⁹ YES NO
- c) The Minsk Convention¹⁰ YES NO
- d) Any bilateral treaty YES NO

(Please indicate the number of bilateral treaties concluded: 2)

2) If not, does your State intend to become in the near future a Party to:

- a) The London Convention YES NO
- b) The Montevideo Convention YES NO
- c) The Minsk Convention YES NO
- d) or conclude any bilateral treaty YES NO

Australia has no specific intention to conclude further bilateral treaties in this specific area, although it may do so in the future.

3) Please indicate (if applicable) the number of requests received in 2006 and the average number of weeks taken to respond to the requests under:

- a) The London Convention No of requests: _____ No of weeks: _____
- b) The Montevideo Convention No of requests: _____ No of weeks: _____
- c) The Minsk Convention No of requests: _____ No of weeks: _____
- d) Any bilateral treaty No of requests: 0 No of weeks: _____

We are not aware of any requests under the relevant bilateral treaties.

4) Please indicate (if applicable) the number of requests that emanated from the judicial authorities in your State in 2006 and the average number of weeks taken to respond to these requests under:

- a) The London Convention No of requests: _____ No of weeks: _____
- b) The Montevideo Convention No of requests: _____ No of weeks: _____
- c) The Minsk Convention No of requests: _____ No of weeks: _____
- d) Any bilateral treaty No of requests: 0 No of weeks: _____

5) Do you foresee an increase in the number of requests referred to in:

- a) Question No 3 (incoming requests)
 YES
 NO
- b) Question No 4 (outgoing requests)?
 YES
 NO

While an increase in requests appears generally likely as the rate of transnational litigation increases, there is no particular reason to consider this will occur.

6) If so, in which areas of the law? Please specify for each of the sub-questions:

- a)
- b)

Not applicable

7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1:

Australia is very pleased with the operation generally of the bilateral agreements referred to in questions 1-5. At this stage, use has not been made of the provisions relating to the content of foreign law.

8) Please indicate, if applicable, in bullet form any shortcomings of these Instruments:

Not applicable

Part II – Free public access to information on the content of the law

9) Does your State and / or Regional Economic Integration Organisation (“REIO”) provide online access to its legislation through an official (governmental) website?

YES. Please specify whether this information is also provided in a non-official language and, if so, in which language(s): **No**

NO. Does another, non-governmental body or organisation provide this information online (please specify which organisation or body)?

The Commonwealth and each of the Australian States and Territories provide online access to their legislation and regulations through official websites. Each jurisdiction maintains its own website.

10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?

YES. Please specify for which areas of the law: **There is no specific service provided however information may sought from and provided by the relevant agencies on an ad hoc basis.**

NO. Does another, non-governmental body or organisation provide this service (please specify which organisation or body)?

11) Are the services in Question No 10 available to people in other States?

YES. Is this service offered in any non-official language and, if so, in which? **No. Requests from people in other States are treated in the same way as requests from people within Australia. Information is provided in English only.**

NO

12) If yes, do people in other States have access to this service at the same costs as residents?

YES

NO

As indicated above, there is no specific service. However, there is no differentiation between requests from people within Australia and in other States. Requested information is generally provided at no cost by the relevant agencies.

13) Do you foresee the proportion of people in other States using these services increase in the future?

YES

NO

Please specify:

There are no formal 'services'. However, it is likely that there will be more requests for information from people in other States, as a result of the increasing number and scope of cross-border personal and business relationships.

Part III – Access to information on the content of foreign law at the litigation stage

14) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase.

If no estimate can be obtained for 2006, please refer to another year. Percentage: ___% (year: ____). Likely to increase: YES NO

It is not possible to provide an estimate.

15) Please indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.

Marriage and nullity of marriage

Divorce and legal separations

Parental responsibility

Parent-child relationship

International child protection including child abduction and child adoption

Protection of adults

Maintenance (child support and other forms of family support)

Traffic accidents

Products liability

Other types of tort

Consumer protection

Commercial contracts

Sale of goods

Securities transactions

Property

Inheritance

Bankruptcy

Choice of court agreements

Other, please specify:

Foreign law may be applied in a variety of areas, including marriage, property and inheritance law. It is not possible to identify the most common areas of law.

16) Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

Statistics are not kept on this matter.

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):

- a) *ex officio* without the assistance of an expert (*e.g.* law firm, specialised institute, university, government (*i.e.* specialised department or embassy), etc.) **Only in extremely limited circumstances.**
- b) *ex officio* with the assistance of an expert **Some Australian jurisdictions allow this approach but it is rarely used without request or agreement from at least one of the parties.**
- c) by submitting, *ex officio*, a request for information under a bilateral or multilateral treaty (where applicable)
- d) as the result of an (express) agreement of all parties, without the assistance of an expert
- e) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- f) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
- g) by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- h) at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
- i) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- j) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
- k) by submitting, at the request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- l) by any other method (please specify): **on the basis of documentary or expert evidence about the content of foreign law adduced by one or more parties to the matter.**

Under Australian law, foreign law is a question of fact, not of law.

The Commonwealth *Evidence Act 1995* sets out the requirements for a person to give expert evidence in federal courts. Namely, the person must base their opinion on specialised knowledge based on the person's training, study or experience. Division 3 of Part 4.6 of the Act (relevant sections inserted below) also specifically allows certain other evidence to be adduced to prove the content of foreign law.

Evidence law differs within Australia as each State and the Northern Territory has its own evidence laws (the Commonwealth evidence law currently applies in the Australian Capital Territory). However, under each of those laws evidence about foreign laws can be given by an expert. In all jurisdictions except Victoria there is also provision for the admission of certain foreign legal materials as evidence of foreign law.

In practice, experts are significantly more likely to be called as a witness by a party or appointed by agreement between the parties rather than being appointed by the Court.

Evidence Act 1995 (Cth)

174 Evidence of foreign law

- (1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing:
 - (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by authority of the government or administration of the country; or
 - (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or
 - (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or to prove, the statute, proclamation, treaty or act of state; or
 - (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.
- (2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

175 Evidence of law reports of foreign countries

- (1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.
- (2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

18) Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in your State to ascertain the content of foreign law under any of the methods described in a), d) and h) of Question No 17:

- Internet (official legislation, case-law and legal publications websites)
- Internet (legislation, case-law and legal publications from private databases (as opposed to official databases))
- Local or personal library (local electronic databases)
- Local or personal library (printed legislation, case-law and legal publications)
- Other:

A number of different sources may be used under Australian Law to prove the content of foreign law. See the response to Question 17. It is not possible to rank the sources with any certainty.

19) Please explain whether and, if so, how the judicial authorities in your State verify the reliability and / or authenticity of these sources and the information provided therein:

Under the adversarial system that applies in Australia a party may adduce evidence of foreign law, but another party may challenge that evidence. As

foreign law is considered a question of fact, the evidence of foreign law must be proved to the relevant evidentiary standard (the facts of a case must be proved 'beyond reasonable doubt' for criminal matters, and 'on the balance of probabilities' for civil matters).

Where an expert is appointed by the court, parties are not bound by the evidence of the expert unless they agree to be bound.

20) Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty. Description:

It is the responsibility of the party seeking to rely on the foreign law to provide evidence of that law, including through ensuring that the information can be understood by the authority (for example by ensuring that a suitable admissible translation is provided).

21) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialised institute, does it need to meet certain requirements?

YES

NO

The Commonwealth Evidence Act 1995 sets out the requirements for a person to give expert evidence in federal courts. Namely, the person must base their opinion on specialised knowledge based on the person's training, study or experience. The law does not require any specific qualifications, although such qualifications would be relevant in determining whether the person was an expert.

22) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialised institute, does it need to meet certain requirements?

YES

NO

See the answer to question 21.

Question 23:

a) Local private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

NO

b) Foreign private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

NO

c) Local specialised institute

YES

NO

d) Foreign specialised institute

YES

NO

e) Local government (including embassies abroad)

YES

NO

f) Foreign government (including embassy in your State)

YES

NO

g) Member of the local judicial authority

YES

NO - **this would almost certainly be incompatible with the person's judicial role.**

h) Member of a foreign judicial authority

YES

NO

i) Other(s): **See the response to question 21 regarding who may give expert evidence.**

j) Which of the above is most often used? **It is not possible to answer this question with any certainty.**

24) Please indicate who bears the costs of the expertise provided under any of the methods described in b), e) and i) of Question No 17:

The requesting judicial authority

The party that raised the application of foreign law

The party(ies) against whom costs will be awarded

All parties

Other:

Costs would be apportioned as agreed between the parties or as ordered by the Court.

25) Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question No 17?

YES

NO, please explain:

26) Please describe, if possible, the common characteristics of requests for information on foreign law submitted under any of the methods described in c), g) and k) of Question No 17: The type of question asked; who most frequently asks questions (*e.g.*, parties with too little or no resources to afford an expert); the reasons why questions are asked (*e.g.*, no material available in a language understood by the judicial authority seized of the matter); etc.

Description:

Not applicable

27) Please indicate whether judicial authorities in your State can transmit the request for information directly to a receiving agency in the State addressed under any of the methods described in c), g) and k) of Question No 17?

YES

NO, please explain:

Not applicable

28) If so, can the request be transmitted by regular non-secured e-mail?

YES

NO, please explain:

Not applicable

Part IV – Future development of an instrument and / or mechanisms to access information on the content of foreign law

29) In the light of your answers to this Questionnaire, are you of the view that the Hague Conference should develop a global instrument and / or mechanisms to access information on the content of foreign law?

YES

NO

Please explain:

The accessibility of foreign law is not a significant issue of concern for Australia at this stage. It is not clear what the scope and nature of any proposed instrument or mechanisms might be. Australia considers that the limited resources of the Hague Conference could be better spent on matters of a higher priority at this time.

30) If the Hague Conference were to develop a global instrument to access information on the content of foreign law:

a) Would you be in favour of a flexible instrument in particular with respect to:

i) the availability of several channels through which information on foreign law can be sought and in relation to experts from whom information can be obtained?

YES

NO

Please explain:

ii) the use that may be made of each such channel and expert?

YES

NO

Please explain:

iii) the availability of information technologies to ensure a speedy process of the requests and to alleviate language barriers?

YES

NO

Please explain:

b) Should the information received provide an objective and general description of the law in the foreign State, including references to relevant case-law (as opposed to a specific answer as to how the foreign law should be applied to the issue(s) at stake)?

YES

NO, please explain:

c) Should the information received be non-binding (as opposed to binding)?

YES

NO, please explain:

d) Should this instrument and / or these mechanisms be general in order to permit access to different areas of foreign law (as opposed to being limited to certain area(s) of the law)?

YES

NO, please explain:

The instrument should also include a facility to allow a State to exclude certain areas of law if necessary.

e) Should this instrument and / or these mechanisms contain provisions on legal assistance to accommodate individuals with little or no resources?

YES

NO, please explain:

The issue of legal assistance is better dealt with in separate instruments, for example the Convention of 25 October 1980 on International Access to Justice.

f) Should this instrument and / or these mechanisms be extended to notaries and other professionals who need to have access to the content of foreign law in contexts other than litigation (*e.g.* in relation to successions)?

YES

NO, please explain:

Under Australian law, issues of foreign law in court proceedings are dealt with under the Evidence Act 1995 (Cth) and equivalent Australian State and Territory legislation. Notaries and other professionals are not so strictly regulated and it would be difficult to create a single regime to suit both contexts.

31) If this is not yet the case for your State / REIO, are you of the opinion that it would be useful to make information on the content of the law of your State / REIO available online in a central database?

YES

NO

Please explain.

Statutes and subordinate legislation are publicly available through the website of each jurisdiction. Some judgments setting out the common law are available online but would be difficult to navigate even if provided as part of a central database.

There are also a number of educational and corporate websites containing information about the content of Australian law, including legislation and judgments.

32) Are you of the opinion that it would be useful to have information on the content of the law of your State / REIO available online in a standard electronic format (*e.g.* in the form of country profiles that are based on a pre-established, harmonised structure) available in English and French (or other language(s)) in addition to its language of origin?

YES

NO

Please explain.

The resources that would be required to maintain such information, particularly in multiple languages would be significantly out of proportion to the benefit that would be likely to be gained from providing the material.

33) If information on the content of the law of your State were to be made available worldwide in either of the forms mentioned in Questions Nos 31 and 32, please identify for which of the following subjects it would be most valuable?

See the response to question 32.

34) Are you of the opinion that the instrument identified under Question No 29 should be developed in combination with either of the instruments described under Questions Nos 31 and 32?

YES

NO

Please explain.

See the response to question 32.

35) Other comments on the models proposed in Preliminary Document No 21 A, any other model, or on a possible future instrument in this field: