

HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

QUESTIONNAIRE RESPONSE BY AUSTRALIA

1. Do you have at your disposal recent precedents delivered pursuant to the 1970 Convention and which would be relevant for the Special Commission ? If so, can you provide them to us? Insofar as the text of the ruling is drafted in a language other than English or French, a summary in the English or French language of the facts and grounds for the ruling would be very helpful.

Australia is a Federation comprised of States and Territories. At Federal level, the Federal Court of Australia, the Family Court of Australia and Federal Magistrates Court have federal jurisdiction throughout the country. Within each State/Territory is a tiered court system. No single precedent or procedure has been adopted across the Federal and State/Territory systems.

In the Supreme Court of New South Wales case of Pickles and Ors v Gratzon and Ors [2002] NSW Law Reports 533, it was argued by one party that the Convention may be referred to as an aide to interpretation of domestic legislation, namely the Evidence on Commission Act 1995. It was determined that (consistent with Australia's obligations under the Convention) Section 32 precludes the court from exercising its powers in such a way as, in effect, to require pre-trial or other discovery. However, Section 33 confers discretion to enable the court to ensure that its process is not used inappropriately or unjustly.

2. Do you have at your disposal statistics relating to the number of requests to obtain evidence addressed to your State from different States Party to the Convention?

Although the Attorney-General's Department is the Central Authority competent to receive letters of requests from another Contracting State, in each State and Territory the Registrar or Prothonotary of the Supreme Court has been designated as an additional authority under Article 24 of the Convention. However in practice letters of request and other enquiries are referred to State or Territory law Departments. Complete statistics are not held centrally.

3. Have you encountered practical difficulties connected with application of the Convention?

Frequently, the letter of request is not sufficiently specific to satisfy the provisions of Article 3(f) of the 1970 Convention, and reliance is often place more on the statement of the subject matter rather than the individual questions to be put to the persons to be examined.

Furthermore, there have been instances of non-compliance with the requirements of Article 4 of the 1970 Convention (most commonly the translation of attachments to court orders) in view of Australia's declaration pursuant to Article 33, to exclude the operation of paragraph 2 of Article 4.

In addition, for some States/Territories difficulties are posed by the high costs of arranging evidence to be taken from witnesses who are geographically distanced from the relevant court.

On one occasion an expert witness required a certified interpreter of a high degree of competence in view of the complexity of the evidence, the costs of which were ordered to be paid by the requesting party. As the witness did not qualify as an expert witness according to the laws of the Contracting State from which the letter of request originated, the payment of the witness' costs as an expert witness were resisted and argued to be irrecoverable.

4. In light of the terminology used in the Practical Handbook for the Service Convention (see provisional version of the new Practical Handbook, Prel. Doc. No 1, (I. -5. -B)), do you have at your disposal precedents determining whether the Convention is considered as "mandatory" by your State ? Do you have at your disposal case-law determining whether the Convention is considered as "exclusive" by your State?

No such precedents or case-law are available.

5. If your State has stated a reservation under Article 23 of the Convention, has that reservation been asserted to deny performance of requests to obtain evidence from abroad? If so, what was the procedure applied in such case?

Australia declared pursuant to Article 23 that "it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries". This policy is reflected in the legislation of some but not all Australian States and Territories.

Formal statistics are not kept of the occasions on which reliance has been placed on such a declaration.

6. At the Special Commission of 1989, it was recommended that priority be granted to the procedures provided for under the Convention for their requests to obtain evidence located abroad, and that States having made or proposing to make the reservation under Article 23 should limit its scope. Do you consider this recommendation to have been helpful? Has it been applied in practice?

The Australian declaration under Article 23 does not cover every kind of discovery but only “pre-trial” discovery, without giving further definition by way of limitation to the term “Letter of Request”. In practice, Australia’s policy is concerned principally with excluding an excessive train of enquiry. For further information, visit http://agnet.ag.gov.au/agd/Civil_Justice/International_Law/int_judicial_asst/taking_of_evidence_abroad/notes.html.

7. The Permanent Bureau has been faced on several occasions with the issue whether the Convention applies to arbitration proceedings. This issue was discussed at the Special Commission in May 1985, but the Commission had considered at the time that there was no need to adopt a Protocol in this respect. For its part, the 1989 Special Commission stated that the law of certain countries provided for legal assistance to obtain evidence in arbitration matters, in which case the Convention might be used in order to seek evidence abroad.

The position advised by the Permanent Bureau is that the benefit of the Convention may extend to arbitration proceedings insofar as the arbitration panel sends its request to obtain evidence abroad to a judicial authority of its State, which will then assume forwarding to the State addressed of the request to obtain evidence: as the arbitration panel cannot be treated as a judicial authority for the purposes of the Convention, it cannot itself forward the request to obtain evidence directly to the State addressed.

Have you had occasion to deal with such requests to obtain evidence in the course of arbitration proceedings?

Do you share the view of the Permanent Bureau?

It is considered that the application of the Convention is limited to judicial authorities and judicial acts according Article 1(1) of the Convention. Australia notes, however, that there is nothing within the Convention to prevent its use by two parties in circumstances where both parties consent to it having such additional application.

8. What is the average time elapsing between receipt of the request to obtain evidence and its performance?

Typically the time taken to process a request is three to four months, with provision for expedition in appropriate cases. Given the necessity to follow procedures at both Federal and State/Territory level (see response to question 1), more intermediary stages are involved than with single jurisdiction State Parties. Delays may be incurred by requests being sent initially to the wrong Department within the Australian Government.

9. Do you allow the representatives of a requesting Court to take part in the execution pursuant to Article 8 of the Convention?

In some States representatives have been allowed to appear for the purposes of the examination upon permission being granted by the relevant State Court.

10. Do your central authorities accept to receive requests by electronic means to obtain evidence from abroad?

Requests under the Convention are not currently received electronically. Such requests would be acceptable in principle although a degree of concern has been expressed concerning security and the transitional arrangements necessary to admit them in practice.

11. Have your authorities received or forwarded requests to obtain evidence requiring the use of new information technology? If so, were these requests fulfilled?

Requests to take evidence by audio link and video link have been received and satisfied in Australia. A noticeable increase in the requests to take evidence by video link has been observed. Similar requests have frequently been made by Australian judicial authorities of other Contracting States and these have not always been met.

12. Would you consider it useful to have a recommendation adopted for the promotion of the use of modern communication technologies? Do you consider that development of a new instrument ought to be considered in order to deal more specifically with these issues?

Yes, especially in relation to video and audio links from a witness in an overseas jurisdiction but also to facilitate the response to requests from overseas judicial authorities. We are conscious that there will be implications in the taking of video evidence abroad for such matters as the location where evidence is deemed to be taken and given, whether perjury is actionable in the jurisdiction of the requesting judicial authority and whether privilege extends to such witness statements.