

## **SECOND READING SPEECH**

### **Wills Amendment (International Wills) Bill 2012**

In July 2010 the Standing Committee of Attorneys General decided that Australia should take steps to accede to the International Institute for the Unification of Private Law's *Convention Providing a Uniform Law on the Form of an International Will 1973* (the Convention).

To facilitate adoption of the Convention, the Parliamentary Counsels Committee, which comprises Chief Parliamentary Counsel from all jurisdictions, developed a model Bill consistent with the Convention for implementation at State and Territory level. As required by the Convention, the Schedule to the Bill reproduces the text of the Uniform Law.

This Bill uses the model Bill and it has been adapted only to fit into the Tasmanian *Wills Act 2008*.

All other Australian States and Territories either have implemented or are currently in the process of implementing legislation to adopt the international will scheme.

Adopting the Convention does not affect existing will provisions in any jurisdiction, but provides a form which may be used when a will has some international characteristics.

Wills often have international characteristics. For example, a will may deal with foreign assets or the testator's country of nationality, residence or domicile may differ from the country in which the will is executed.

Due to an aging population, a high number of migrants and the increased mobility of people, a growing number of Australian wills have international characteristics which may lead to problems in determining which country's law applies to the will and, once that has been decided, what that law is.

For example, probate on a will executed in Milan, Italy dealing with immovable property both in Hobart and Milan, is sought in Hobart by the executor of the will.

Even if the will is uncontested, the formal validity of the Will needs to be established by reference to one of the options provided for in Part 5 of the *Wills Act*.

If the testator has relied on the domicile (permanent place of residence) at the time of the execution of the will, the executor may have to find proof of domicile.

If this proof supports the claim that the domicile of the testator at the time of execution was in Milan, the executor may need to provide further information on the internal law of Italy with regard to the formal validity required for a will in that country.

The executor may also need to seek affidavits from the witnesses of the will to confirm that they were witnesses to the will. As the will was executed overseas, this may require the executor to find and obtain affidavits from overseas witnesses. The executor will need to do all this in addition to the usual documentation and information gathering required by local probate rules.

The Convention offers a solution to such problems by providing a Uniform Law that prescribes necessary elements for the form of an 'international will' which will be universally accepted by signatory countries, including, for example, witnessing, writing and certification requirements.

Adoption of the Convention will remove the need to delve into the internal law of another jurisdiction in determining the formal validity of a will where that other jurisdiction is also a signatory to the Convention and the international form is used.

The Convention sets out requirements for the form of the will and the process for its execution — it does not deal with issues such as the capacity required of the will-maker or the construction of the terms of

a will. These are matters that will continue to be dealt with by local law.

In the above example, if both Italy and Australia have acceded to the Convention, provided the will is in the prescribed international form that will be sufficient for the will to be recognised in Australia as being formally valid. This removes the requirement for the executor to provide information on the legal requirements for a valid will in Italy.

Probate could then be sought in Tasmania in the normal fashion.

The Convention currently has 12 State parties and an additional eight signatories, including the United Kingdom, Italy, Canada and the USA.

The form of the international will does not differ markedly from that of a Tasmanian will, except for the fact that an authorised person must attach a certificate in a prescribed format confirming that the requirements of an international will have been complied with.

Under the model Bill Australian legal practitioners and public notaries of any Australian jurisdiction may act as an authorised person in connection with the certification to an international will created in Australia and can certify that the formalities of an international will have been complied with.

The model Bill also recognises the authority of authorised persons designated outside this jurisdiction, thereby implementing the requirements of the Convention with regards to recognition of valid international wills that have been created in other convention countries.

It will be up to each individual to decide whether his or her will should be a standard domestic will (which will most likely be the case for the majority) or whether using the form of an international will makes greater sense in the individual's circumstances because of their domicile or property ownership.

Once all States and Territories have implemented the model Bill and have confirmed with the Commonwealth that implementation has

occurred the Commonwealth will commence the formal accession process.