

1991

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRUSTS (HAGUE CONVENTION) BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Attorney-General,
the Honourable Michael Duffy, MP)



TRUSTS (HAGUE CONVENTION) BILL 1991

OUTLINE

This Bill provides for the provisions of the Hague Convention on the law applicable to trusts and on their recognition, to have the force of law in Australia.

The Convention establishes common principles between contracting states on the law applicable to trusts and deals with the most important issues governing their recognition. It contains 32 Articles which embody a uniform and internationally acceptable regime of rules governing both the recognition of trusts and the determination of which system of law is applicable to a trust. It is intended to overcome potential conflict of laws problems which may arise where aspects of a trust have connections with more than one jurisdiction.

The main effects of the Convention are:

- to provide machinery for identifying which state's law is to govern a particular trust; and
- to provide guidelines for the recognition of that trust in accordance with that law.

The main benefit of the Convention arises when property subject to a trust is situated within the territory of a civil law contracting state. Broadly, the practical effect of Australia implementing the Convention is that the true ownership of Australian trust property in the territory of a civil law contracting state would be recognised and protected.

At present the law governing a trust with aspects extending over more than one jurisdiction is determined, in Australia, by common law rules of conflict of laws. The Convention has

only a marginal effect on Australian statute law. The proposed Act applies the Convention only to "international trusts", where the law of a foreign country is potentially applicable. It does not apply the Convention to solely "domestic" or "interstate" trusts to which the law of another Australian State or Territory is potentially applicable.

The Bill does not preclude the States and Territories from enacting laws that apply the provisions of the Convention to conflicts arising solely between laws of different States or Territories in respect of trusts.

FINANCIAL IMPACT STATEMENT

The Trusts (Hague Convention) Bill will have no impact on Commonwealth revenue or expenditure.

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NOTES ON CLAUSES

Clause 1 - Short title

1. When enacted, the Bill may be cited as the Trusts (Hague Convention) Act 1991.

Clause 2 - Commencement

2. The provisions of the Bill will commence on a date to be fixed by Proclamation being a day not earlier than the day on which the Convention enters into force for Australia. However, if the Act does not commence within the period of 6 months beginning on the day on which the Convention enters into force for Australia, it commences on the first day after the end of that period.

Clause 3 - Interpretation

3. This clause defines "Convention" for the purposes of the Act. "Convention" when used in the Act means the 1984 Hague Convention on the law applicable to trusts and on their recognition, done at the Hague on 20 October 1984, a copy of the English text of which is set out in the Schedule.

Clauses 4 and 5 - Extension to external territories; Act Binds the Crown

4. These clauses provide that the Act extends to the External Territories and binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory, of the Australian Capital Territory and of Norfolk Island.

Clause 6 - Provisions of the Convention to have force of law

5. Subject to the Act, the provisions of the Convention are to have the force of law in Australia.

**Clause 7 - Act not to apply in relation to conflicts solely
between State or Territory Laws**

6. As permitted by Article 24 of the Convention, the Act does not apply the Convention in relation to conflicts arising solely between laws of different Australian States or Territories in respect of trusts.

7. The Act does not preclude or limit the application of a law of a State or Territory that applies the provisions of the Convention in relation to conflicts arising solely between laws of different States or Territories in respect of trusts.

SCHEDULE

8. This Schedule contains the authentic English text of the Hague Convention on the law applicable to trusts and on their recognition.

9. The concept of the trust is a peculiarly common law creation. The non-common law world does not in general recognise the trust, and in some civil law systems the concept is unknown. This difference between the jurisdictions raises considerable difficulties in the field of private international law. Whilst one common law jurisdiction will, in general, recognise and give effect to a trust created under and governed by the law of another common law jurisdiction, there is no certainty that such a trust would be recognised in a civil law jurisdiction. The purpose of the Convention is to address this problem by creating a common regime of rules governing both the recognition of trusts and the determination of which system of laws is applicable to the trust.

Chapter I - Scope

Article 1 - Scope of application

10. This Article deals with the substantive scope of application of the Convention, which specifies the law applicable to trusts and governs their recognition.

11. In Australian law the concept of the trust is based on a division between legal and equitable ownership, but this is not the concept used by the Convention to determine its scope. Instead the Convention uses the concept of beneficiaries' rights as the determining factor with regard to the existence of a trust. This approach will more readily be understood in non-trust contracting states and in those contracting states which recognise the trust but not on the same basis as Australia.

Article 2 - Description of a trust

12. Article 2 is a description of the type of device that will fall within the ambit of the Convention. For the purposes of the Convention, the term "trust" is used to refer to the legal relationships created - inter vivos or on death - by a person (the settlor) when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. The Article notes the characteristics of a trust.

13. The Article further provides that the reservation by the settlor of certain rights and powers, and the fact that the trustee may himself or herself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3 - Application to certain trusts only

14. Article 3 provides that the Convention applies only to trusts created voluntarily and evidenced in writing. Article 20 provides that a contracting state may at any time by declaration extend the operation of the Convention to trusts created by judicial decisions.

Article 4 - Non-application to preliminary issues

15. Article 4 states that the Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5 - Non-application to extent that applicable law does not provide for trusts or the category of trusts involved

16. Article 5 provides that the Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or for the particular category of trusts involved.

Chapter II - Applicable Law

Article 6 - Choice of law to govern the trust

17. Article 6 provides that the settlor may stipulate the law to govern the trust. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust. That instrument or writing is to be interpreted, if necessary, in the light of the circumstances of the case. This is in accordance with the existing law in Australia, at least with respect to movable property. The situation under the present law with respect to immovable property is uncertain.

18. Where the chosen law makes no provision for trusts, or the category of trust involved, the choice shall not be effective and the law with which the trust is most closely connected as determined in accordance with Article 7, shall apply.

Article 7 - Trust governed by law with which it is most closely connected

19. Article 7 provides that where the settlor has not chosen an applicable law the trust will be governed by the law with which the trust is most closely connected. In ascertaining that law, regard is to be had in particular to the place of administration of the trust designated by the settlor, the situs of the trust assets, the place of residence or business of the trustee, and the objects of the trust and the places where those objects are to be fulfilled.

20. There is some academic opinion to the effect that Article 7 does not precisely accord with Australian conflicts rules with respect to trusts of immovable property. In view of the unsettled state of the law in this area, application of the Convention will bring the benefit of certainty.

Article 8 - Aspects of trust governed by applicable law

21. Article 8 provides that the applicable law specified in Articles 6 or 7 shall govern the validity of the trust, its effects and its administration.

Article 9 - Severability and depeçage

22. Article 9 allows depeçage, which is the practice of subjecting certain elements of the trust to different laws. Although depeçage is not clearly established in Australian law, it is widely accepted in the United States and internationally.

Article 10 - Severability and substitution of law applicable to the trust

23. Article 10 provides that the law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law. An example of the application of this principle would be where an Australian settles property on trust and chooses the law of Victoria to govern the validity of the trust, but the law of California to govern its administration, because that is where the assets are situated and the administration is centred. If the settlor or the trustee wishes to alter the law governing administration from California to England because the assets and administration have subsequently been moved there, it is for the law of Victoria to decide whether it is possible to make such a change and whether such a change has been validly effected. The law governing validity is thus made the controlling law, which appears to be the solution favoured by Anglo-Australian law.

Chapter III - Recognition

Article 11 - Recognition of a trust created in accordance with the applicable law

24. Article 11 deals with the issue of recognition of a trust in accordance with the applicable law. A trust created in accordance with the law specified in Chapter II must be recognised as a trust with the effects appropriate under that law. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his or her capacity as trustee, and that he or she may appear or act in this capacity before a notary or any person acting in an official capacity. In addition, recognition implies, so far as the law applicable to the trust requires or provides, four things: the trust assets are not available to the personal creditors of the trustee; nor do they form part of the matrimonial property of

the trustee or of his or her spouse; or of the trustee's estate upon insolvency or bankruptcy; and the trust assets can be traced, at least against the trustee. The question of tracing the assets as against third parties, whether purchasers for value or otherwise, is left to the law of the forum, including its choice of law rules. This will usually refer the matter to the *lex situs* and where this is a non-trust state, tracing into the hands of a third party will rarely, if ever, be possible.

Article 12 - Registration of trust interests

25. Article 12 deals with the registration of trust interests. Unless prohibited by or inconsistent with the law of the state where registration is sought, a trustee shall be entitled to register movable or immovable assets, or documents of title to them, in his capacity as trustee or in such other way that discloses the existence of the trust. Allowing for acknowledgement of the trust relationship on registers will help to overcome the problem that civil jurisdictions have in acknowledging the separation of legal and beneficial ownership. There is no obligation for new registers to be created in order that the trust interests be recorded.

Article 13 - Refusal to recognise a trust

26. Article 13 allows a contracting state to refuse to recognise a trust where the significant elements (other than the choice of applicable law, place of administration and habitual residence of the trustee) are more closely connected with states which do not have trusts or the category of trust involved.

Article 14 - Application of rules more favourable to the recognition of trusts

27. Article 14 provides that the Convention shall not prevent the application of rules of law more favourable to the recognition of trusts than the provisions of the Convention.

Chapter IV - General Clauses

Article 15 - Effect of laws which cannot be derogated from

28. Article 15 provides that the Convention shall not prevent the application of provisions of the law designated by the conflicts rules of the forum in so far as those provisions cannot be derogated from by voluntary act. Such laws may relate inter alia to the protection of minors and incapable parties, matrimonial property, succession rights, transfer of title to property and security interests in property, the protection of creditors in insolvency matters and the protection in other respects of third parties acting in good faith.

29. Where recognition of the trust is prevented under paragraph 1 of Article 15, paragraph 2 requires the court to try to give effect to the objects of the trust by other means.

Article 16 - Non-exclusion of laws of the forum which apply to the trust

30. Article 16 provides that the Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflicts of laws - an example might be exchange control regulations. The Article goes on to provide that in exceptional circumstances effect may also be given to another state's laws of the same character if that state has a sufficiently close connection with the case. Although this extension may be precluded by reservation Australia does not propose making such a reservation.

Article 17 - Exclusion of renvoi

31. Article 17 provides that the word "law" in the Convention means the rules of law which are in force in a state, other than its rules of conflict of laws. This excludes the concept of renvoi, which is the doctrine regarding the choice of law where the law of more than one country may be applicable.

Article 18 - Non-application of Convention on public policy grounds

32. Article 18 provides that the provisions of the Convention may be disregarded when their application would manifestly be incompatible with public policy (ordre public).

Article 19 - Non-prejudice to the fiscal powers of contracting states

33. Article 19 provides that nothing contained in the Convention shall prejudice the powers of contracting states in fiscal matters.

Article 20 - Extension of Convention to trusts declared by judicial decisions

34. Article 20 provides that a contracting state may, at any time, declare that the provisions of the Convention will be extended to trusts which are declared by judicial decisions. These trusts are excluded from the ambit of the Convention by Articles 2 and 3, the purpose being to avoid problems associated with the recognition of foreign judgments. Australia does not propose making a declaration under Article 20.

Article 21 - Reservation of right to recognise only trusts valid under law of a contracting state

35. Article 21 permits a contracting state to reserve the right to apply the provisions of Chapter III of the Convention only to those trusts the validity of which is governed by the law of a contracting state. The scope of the Convention is otherwise universal and does not depend on reciprocity - all trusts are covered wherever they may be. The Article was inserted mainly for the benefit of civil law States and Australia does not propose to make a reservation under it.

**Article 22 - Application of Convention and creation date
of trust**

36. Article 22 provides that the Convention applies to trusts regardless of the date on which they were created, but permits a contracting state to reserve the right not to apply the Convention to trusts created before the date on which the Convention enters into force for that state. As the Convention does not depart significantly from existing Australian law, and it is in the interests of common law countries to promote wide application of the Convention, Australia does not propose to make a reservation under Article 22.

**Article 23 - Application of Convention to contracting states
having a federal structure**

37. Article 23 provides that, for the purpose of identifying the law applicable under the Convention, where a state comprises several territorial units each of which has its own rules of law with respect to trusts, any reference to the law of that state is to be construed as a reference to the law in force in the territorial unit in question.

**Article 24 - Application of Convention to conflicts solely
between laws of federal territorial units**

38. Article 24 provides that a state within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units.

Article 25 - Non effect on other international instruments

39. Article 25 provides that the Convention shall not affect any other international instrument containing provisions on matters which are governed by the Convention to which a contracting state is, or becomes, a party.

Chapter V - Final Clauses

Article 26 - General declarations and reservations

40. Article 26 provides that a state may, at the time of signature, ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 29, make the reservations provided for in Articles 16, 21 and 22. No other reservations are permitted. Reservations may be withdrawn and cease to have effect on the first day of the third month after notification of the withdrawal.

Article 27 - Signature

41. Article 27 provides that the Convention shall be open for signature by states which were members of the Hague Conference on Private International Law at the time of its Fifteenth Session. Australia was a member at that time. The Convention shall be ratified, accepted or approved and instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 28 - Accession

42. Article 28 provides that any state that was not a member of the Hague Conference on Private International Law at the time of its Fifteenth Session may accede to the Convention after it has entered into force in accordance with Article 30, paragraph 1. Member states can object to such accessions. Instruments of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 29 - Declarations as to federal territorial units

43. Article 29 allows a contracting state with two or more territorial units in which different systems of law are applicable, to declare that the Convention shall extend to all of its territorial units or only to one or more of them. If a

contracting state makes no declaration under this Article, the Convention extends to all territorial units of that state. It is not proposed that Australia make a declaration under Article 29.

Article 30 - Entry into force

44. Article 30 provides that the Convention shall enter into force on the first day of the third month after the deposit of the third instrument of ratification, acceptance or approval. To date only the United Kingdom and Italy have ratified the Convention. The Netherlands, Luxembourg, Canada and the United States of America have signed the Convention.

Article 31 - Denunciation

45. Article 31 provides that any contracting state may denounce the Convention by formal notification in writing. Such a denunciation takes effect on the first day of the month following the expiration of six months from the date of receipt of the notification or on such later date as specified in the notification.

Article 32 - Notifications to member states of the conference

46. Article 32 provides that the Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify member States of the Hague Conference on Private International Law, and the States which have acceded to the Convention under Article 28, of information concerning signatures, ratifications, acceptances, accessions, date of entry into force, accessions and the objections raised to accessions referred to in Article 28, extensions referred to in Article 29, declarations referred to in Article 20, reservations or withdrawals referred to in Article 26 and denunciations referred to in Article 31.

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