On International Wills in Australia: An Unused Tool in the Estate Planning Arsenal

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International estate management poses several problems for testators, executors and for the courts. In 1973 the international community met in Washington, DC to discuss the work of the UNIDROIT Convention Providing a Uniform Law on the Form of an International Will (Washington Convention) that annexes the Uniform Law on the Form of the International Will (Uniform Law). Despite attending the Washington Conference, Australia did not consider enacting uniform legislation in the States and Territories until almost 40 years after the Washington Conference was held. There has been little discourse on the Washington Convention and the Uniform Law in Australia since that time. This article argues that there is a need for a renewed discourse on international wills that seeks to promote the political, economic and client advantages of the Washington Convention and the Uniform Law in Australia.

I. Introduction

Legal practitioners and professional estate planners might approach the international aspects of succession and estate planning with some hesitancy. The reasons for this are understandable. International estate planning, when the testator is alive, and the administration of "international" estates after the testator's demise, may involve being presented with more than one will, disposing of more than one asset, and having a connection to more than one jurisdiction. The greater the number of each of these variables (wills, assets and jurisdictions), the greater the complexity of the estate management process and the greater the expertise needed of the estate planner.

Let us take an example. If an executor is seeking advice on administering an estate under a will with a "foreign connection",[1] or with an "extraneous element",[2] usually there will only be a few options available. First, the executor may repatriate the deceased's moveable assets to the jurisdiction where the will was drafted (the principal jurisdiction). The moveable assets will then be distributed to each beneficiary named in the will. Second, the executor may consider the immovable assets of the estate and the process of devolution of these assets. The law governing the devolution of immovable assets will be governed by the law in which the real property is situated. Each foreign asset may require considering the procedural and substantive law of one or more foreign jurisdictions. Third, an executor will need to consider such tasks as apostilling and notarising the testator's will, producing an official translation, travelling to one or more overseas countries and seeking recognition of the will's validity by a foreign public authority or court. Different jurisdictions may interpret the validity of the will inconsistently. An executor will need to apply to competent authorities for their imprimatur on the will's validity according to each local law. Fourth, there is a risk that a will might be interpreted in a way that was not originally intended by a testator. The beneficiaries named in the will may be sceptical of a foreign court's ability to correctly apply the provisions of the will, or of the executor's ability in correctly administering the estate. Some beneficiaries may challenge the will's validity or seek further provision from the estate in the jurisdiction that best suits

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[1] JP Plantard, "Explanatory Report on the Convention Providing a Uniform Law on the Form of an International Will" (1974) 2 *Uniform Law Review* 91, 2.

[2] DG Ionas, "Inheritances with Extraneous Elements – The International Testament" (2013) 6(2) *Bulletin of the Transylvania University of Brasov Series VII: Social Sciences, Law* 57.

their cause. Ultimately, the processes described in the example result in increased costs in administering the estate, delays in distributing assets and winding up the estate and a lack of legal certainty that risks compromising a testator's final wishes.

In international estate planning, the increased fragmentation of succession laws increases the risk of ambiguity and error, along with the time and costs associated with the administration of an estate. The result is a decrease in the pool of assets available to the beneficiaries in the succession process. In this context, UNIDROIT has drafted the *Convention Providing a Uniform Law on the Form of an International Will*[3] (hereinafter *Washington Convention*) that annexes the *Uniform Law on the Form of the International Will* (hereinafter *Uniform Law*).[4] The *Uniform Law* has introduced a new form of will (the "International Will"), designed as a model instrument that would be recognised automatically as valid by parties in states acceding to the *Washington Convention*.

As a product of Private International Law, the international will has the advantage of obviating many issues faced by a court when considering a foreign succession instrument. Instead of determining the will's validity in an ad hoc way under the rules of conflict of laws, and if incapable of doing so, proceeding to a renvoi to the laws of the foreign jurisdiction, state accession to the *Washington Convention* allows the courts to recognise an international will as valid. For this to occur, two matters must be satisfied. First, the recognising court would need to be in a state that has ratified the *Washington Convention*. Second, the international will would need to comply with the provisions of the *Uniform Law*.

This article aims to substantiate three arguments. The first argument is that the *Washington Convention* and the *Uniform Law* assist in resolving the complexities of the Choice of Law issue in Private International Law. After discussing the Choice of Law issue, as it applies to international succession law, we present the most relevant articles of the *Washington Convention* and the *Uniform Law*, arguing that both instruments provide a useful tool that simplifies the Choice of Law issue.

Second, we argue that in Australia there has been little discourse on international wills, since Australia attended the Washington Conference in 1973. We suggest there has been a vacuum between the initial enthusiasm of the 1973 Australian delegation to the Washington Conference and the implementation of the *Washington Convention* and the *Uniform Law* in Australia some 40 years later. We suggest that one reason for the vacuum is the length of time between 1973 when the *Washington Convention* was opened for signature, and the early 2010s when Australia's States and Territories enacted uniform legislation. A lack of professional and academic publications, speeches, discussions and general discourse on international wills might suggest that there is little interest in the topic. However, the merits of the *Washington Convention* and the *Uniform Law* are such that new academic commentary is needed on the subject.

Third, we argue that there is scope for Australia to propose a renewed discourse on the *Washington Convention* and the *Uniform Law*. The title of this article suggests that international wills remain an "unused tool" that can be deployed for the benefit of many. We suggest several advantages, including from an economic, geopolitical and client perspective, in having a robust discussion on international wills and utilising international wills in estate management practices. Further, we suggest that estate planning professionals, including lawyers, estate planners, academics and their relevant professional bodies have a role to play in discussing and promoting a general understanding of the *Washington Convention* and the *Uniform Law*, which has the potential of recasting the subject matter in a more contemporary framework. In order to understand the *Washington Convention* and the *Uniform Law*, we first turn to one of the main problems that the *Washington Convention* seeks to resolve, namely the Conflict of Laws problem.

[3] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978).

[4] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex.

II. International Succession and Conflict of Laws

The Conflict of Laws Problem

At its simplest, Private International Law governs the rights and obligations of legal persons in cross-border matters. Private International Law can be categorised in different ways, one of which compartmentalises issues into four discrete categories: (1) the origin/nationality of a country or entity; (2) the rights of foreigners and foreign entities in a local jurisdiction; (3) the conflict of laws between different legal systems; and (4) the competence of a foreign or domestic court to hear contentious issue between parties.[5] Another helpful distinction divides Private International Law into three categories, namely (1) whether a court or tribunal has jurisdiction to hear a matter (the "jurisdiction" issue); (2) whether a court or tribunal is prepared to recognise a judgment from a foreign jurisdiction and/or enforce a foreign judgment in a local jurisdiction (the "recognition and enforcement of foreign judgments" issue); and (3) which law or laws, both procedural and substantive, ought to apply to the dispute (the "Choice of Law" issue).[6] It is suggested that the main preliminary issue in international succession law is the formal validity of a will under the laws of a foreign state. This entails a formal determination that a will is indeed a *valid will* and recognised as such in the foreign jurisdiction, as well as determining what law ought to apply to the interpretation of the will. Both questions need to be resolved according to a defined legal standard that is contingent on the issue of Choice of Law.

The Choice of Law issue in international succession disputes underscores the difficulty faced by the courts, when considering the application of domestic laws to foreign wills. Common Law, Civil Law, Shari'a law and East Asian Legal systems all present different rules and procedures on succession law, complicating the question of Choice of Law for a recognising court or public authority. Different succession laws around the world, which are seen broadly as a "national" body of law in each country and which present different rules and procedures, create a fragmented body of law and increases the difficulty associated with international succession planning.

As the forum for determining testamentary disputes, a court may consider several issues, including the documentary validity of the will, the manner of execution of the will, the capacity of the testator, the number and capacity of witnesses, the steps taken in the administration by an executor/administrator, the winding up of the estate, the rights and entitlements of beneficiaries, the challenges to the provisions of the will and general principles of international comity. Other issues that a court may consider include classifying the subject matter of the will, determining and applying both the substantive law and the procedural law that apply to the administration of the estate, and applying the law of the cause to any conflict that arises.[7] The multiplicity of issues surrounding foreign wills with an "international element"[8] renders the Choice of Law issue almost inescapable.

Moreover, a court will be faced with a specific dilemma of determining which law ought to be invoked to resolve specific issues. This may include the lex situs (or law of the territory) based on the location of the asset;[9] or the lex domicilii (or law of the testator's domicile).[10] A foreign court may also apply the law of the place of execution of the will, the law of the testator's country of birth, the law of the testator's domicile, or that of the place of death.[11] Although many of these laws will overlap, the conflict of laws issue continues to remain.

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[5] RAD Urquhert, "Introduction" in L Gard (ed), *International Succession* (Kluwer Law International, 2004) 4.

[6] R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 3rd ed, 2015,) 3, [1.1].

[7] Mortensen, Garnett and Meyes, n 6, 183–184 [7.3].

[8] Ionas, n 2, 59.

[9] Ionas, n 2, 495 [21.2].

[10] Ionas, n 2, 495, [21.2]; J Needham and P Suttor, "Private International Law Problems in Succession" (2013) 87 ALJ 620, 620–621.

[11] C Smyth, "What's New in Succession Law: A New World of International Wills" (2015) 35(1) *The Proctor* 30.

Some further considerations for a court may include the *dépeçage* of the estate (or the division of the estate into separate parts);[12] or the issue of renvoi of the assets (or remittance of assets to another jurisdiction),[13] to the law of the situs in which an asset is geographically located.

An executor will face a different set of issues. The executor may propose adopting a unitary approach of the estate, considering the totality of the testator's assets to be available for distribution, regardless of the geographic location of the assets. A unitary approach may be used if the testator's immovable objects are repatriated to the jurisdiction where the administration of the estate will take place.[14] It proposes using a single succession instrument to govern the entire deceased estate.[15] Alternatively, the executor might adopt a fragmented approach to the administration of an international estate, based on the location of specific assets and the presence/absence of beneficiaries and their legitimate entitlements under succession law. A fragmented approach would involve multiple estates, administered concurrently but separately from each other. The distribution of assets under multiple concurrent estates would see an executor invoke different procedural and substantive laws that apply in each jurisdiction.[16]

The recognition and legitimacy of the executor's role across multiple jurisdictions is another issue that would need to be considered. Under the Civil Law system, based on the French Napoleonic Code of 1804, an executor is not vested with any property rights and has fewer powers those of a Common Law executor/administrator.[17] Thus the issue of locus standi becomes relevant when administering an estate with foreign connections and/or assets.[18] The bequest of the testator's assets on trust presents still further problems in jurisdictions that do not recognise, or have a limited recognition, of trust law. As a creation of the English Courts of Chancery, trusts remain a pertinent feature of Common Law legal systems. The relationship of trust between a trustee and beneficiaries, and the separation of legal and equitable ownership, is not recognised as such in Civil Law legal systems.[19]

All these issues illustrate the complexity in the international estate management process governed by the traditional principles of Private International Law, and Choice of Law, regardless of whether the executor adopts a unitary or fragmented approach in administering the estate. This has led some authors to correctly claim that international succession law is "unnecessarily complex",[20] and in need of reform.[21]

If the formal validity of the will could be recognised across jurisdictions, this would (1) promote to some extent the harmonisation of international succession law, and (2) increase the efficiency in international estate management. Is there a way under contemporary international instruments to respond to the Choice of Law problem?

Responses to the Choice of Law Problem

In response to the Private International Law issues raised above, from the early 1960s the international community concluded several instruments aimed at simplifying and harmonising international succession law. These instruments include *The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* (Hague, 5 October 1961); *The Basel Convention on the Establishment of a Scheme of Registration of Wills Council of Europe*, opened for signature 16 May 1972, ETS No 077 (entered into force 20 March 1976); *The Hague Convention Concerning the International Administration*

[12] Mortensen, Garnett, and Keyes, n 6, 209, [8.2]–[8.3].

[13] Mortensen, Garnett, and Keyes, n 6, 213 [8.13]–[8.16].

[14] Urquhert, n 5, 8.

[15] M Eliescu, *Course of Succession* (Humanitas Publishing House, 1997) 25, cited in Ionas, n 2, 60.

[16] In this regard please see the comments of The Australian Law Reform Commission, which recommended a unity of succession laws: Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) [9.7]–[9.8].

[17] Urquhert, n 5, 8.

[18] Urquhert, n 5, 9.

[19] Urquhert, n 5, 9.

[20] Mortensen, Garnett and Keyes, n 6, 495 [21.2].

[21] Mortensen, Garnett and Keyes, n 6, 515–516 [21.55].

of the Estates of Deceased Persons (Hague, 2 October 1973); *The Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978); *The Hague Convention on the Law Applicable to Trusts and on their Recognition* (Hague, 1 July 1985); and *The Hague Convention on the Law Applicable to Succession of the Estates of Deceased Persons* (Hague, 1 August 1989).

The Hague Conference on Private International Law sought to address the challenges faced by Choice of Law problems, which were first raised by the international community as early as 1893,[22] culminating in the 1961 Convention.[23] A detailed analysis of this convention is beyond the scope of this article. However, it is noteworthy that *The Hague Convention of 1961* provided some 10 different ways in which the validity of a will could be tested and declared valid by a foreign court or foreign public authority.[24] It has been noted that the 1961 Convention relaxed the regional rules on testamentary validity, while promoting testamentary freedom.[25]

Also noteworthy is UNIDROIT's collection of studies conducted from 1961 to 1972 on whether a specific form of will could be acceptable as valid to all nations.[26] After UNIDROIT concluded its studies, the working committee circulated a draft convention that annexed a form of international will for approval by the state members.[27] UNIDROIT's efforts culminated in the Washington Diplomatic Conference of 1973, in which 42 States were in attendance.[28] These States met to discuss both the articles of the *Washington Convention* and the *Uniform Law* on the Form of the International Will, which is the primary subject of this article.

The 1960s Hague Conferences and the work of UNIDROIT between 1961 and 1972 addressed some of the problems faced by Choice of Law through the enactment of international instruments. We suggest that the process of harmonisation of succession law reached a new highpoint with the 1973 Washington Conference. In order to appreciate the work of the Washington Conference, we now turn to the main products of the conference, namely the *1973 Washington Convention* and the *Uniform Law on the Form of an International Will*.

III. A Means of Avoiding Conflicts of Laws

The Washington Convention

The *1973 Washington Convention* has been fundamental in responding to the challenges faced by international succession law. A salient feature of the *Washington Convention* can be found in its preamble, which states that:

> [The Signatories] DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law.

The preamble suggests three elements of critical importance in international succession law. First, that all state signatories were in favour and supported the principle of testamentary freedom. Second, that each state signatory would undertake to introduce a new form of will (the international will) into their own domestic succession laws. By implication the undertaking demonstrated a willingness to harmonise succession law. Third, that each state would reciprocally recognise the international will as an instrument

[22] E Rabel, *The Conflict of Laws: A Comparative Study* (University of Michigan Press, 2nd ed, 1958) 297, citied in RD Kearney, "The International Wills Convention" (1984) 18 *International Law* 613, 617.

[23] *The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, Hague, 5 October 1961.

[24] Kearney, n 22, 618.

[25] Kearney, n 22, 618.

[26] UNIDROIT, *Study XLIII – Form of the International Will (1961–1972)* <https://www.unidroit.org/studies/wills>; see also Plantard, n 1.

[27] Plantard, n 1.

[28] Attorney-General's Department, *Diplomatic Conference of Wills, Washington D.C. 16–26 October 1973 to Adopt a Convention Providing a Uniform Law on the Form of an International Will: Report of the Australian Delegation* (AGPS, 1974) 1, [2]–[3].

that was prima facie valid and, as such, would obviate the task of national courts undertaking a detailed analysis on the will's formal validity.

Article II of the *Washington Convention* directs each contracting party to the *Washington Convention* to designate persons to act as an "authorized person", namely as a special witness under the international will.[29] The "authorized person" definition was intended to include Public Notaries, Attorneys and Solicitors depending on the jurisdiction in question and was framed in inclusive language, so as to be acceptable to both Civil Law and Common Law countries.[30]

Article III contains an element of reciprocity, whereby the authority of an authorised person to act in accordance with an international will is recognised "in the territory of the other contracting parties".[31] So too does Art IV, which suggests that the certificate in the model form "shall be recognized in the territories of all Contracting Parties".[32] These articles on reciprocity allow certainty and predictability where two or more contracting states each ratify the *Washington Convention*. The combined operation of Arts III and IV oblige all signatory states to the *Washington Convention* to formally recognise an international will that has been drafted and executed in a foreign jurisdiction.

Article VI simplifies the authentication of all signatures on the will, including the testator's signature, and those of the authorised person and witnesses, claiming that all signatures "shall be exempt from legalisation or like formality".[33] This measure of flexibility contributes to reducing the evidentiary burden on parties that seek to prove the validly of the will's execution. Article VI further simplifies and harmonises the process of recognition of an international will.

Article X(1) suggests that the *Washington Convention* will be open for accession by new member States indefinitely,[34] making the *Washington Convention* open ended. Article XII provides the denunciation process for a state that chooses to withdraw from the *Washington Convention* after ratification of the same.[35]

Article XIV is applicable to multi-state nations, whereby a federal or multi-state signatory can declare that the *Washington Convention* applies to all state entities.[36] The Article had countries like Australia in mind. However, this article does not apply to Australian States and Territories, as it is contrary to the ratification process necessary in each of the Australian States and contrary to s 51 of the Australian *Constitution*[37] that does not list "succession" as a power of the Commonwealth Parliament. Australia's accession to the *Washington Convention* rests on each State and Territory enacting separate uniform legislation.

Uniform Law on the Form of an International Will

If the *Washington Convention* provides the overall agreement and a general consensus between states, the *Uniform Law* (as provided in Annex 1 to the *Washington Convention*)[38] prescribes the requirements for

[29] Attorney-General's Department, n 28, Art II.

[30] Kearney, n 22, 620.

[31] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art III.

[32] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art IV.

[33] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art VI.

[34] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art X(1).

[35] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art XII.

[36] *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Art XIV(1); see also K Nadelmann, "The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will" (1974) 22(2) *The American Journal of Comparative Law* 365, 373.

[37] *Commonwealth of Australia Constitution Act 1901* (Cth) s 51(i)–(xxxix).

[38] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex.

the international will. The *Uniform Law* is the instrument by which the Choice of Law issue is drastically simplified.

The *Uniform Law* did not, however, have the objective of replacing national state-based wills (the notary will, the holographic will, the common law will etc.).[39] The international will was created to complement and supplement pre-existing forms of wills that were recognised in a local jurisdiction. Thus, a testator could choose to utilise an international will, if the testator had one or more foreign connections.[40] Moreover, the *Uniform Law* applies only to the form of the will, not to the substantive provisions of the will. As such, domestic jurisdictions retain the function of ruling on issues of substance, including the testator's capacity, the competence of witnesses, the interpretation of ambiguous clauses, the application by one party for further provision out of the estate, and the validity of joint wills.

1. Mandatory Provisions on International Wills

Article 1 of the *Uniform Law* provides that a will shall be valid regardless of form, when there is compliance with all mandatory provisions in Arts 2–5.[41] This immediate reference in Art 1 in dispensing with form suggests a relaxation of the standards applicable in international wills. A will purporting to be an international will that is defective in form will be considered valid, provided the parties have complied with the mandatory provisions under the *Uniform Law*.

The mandatory provisions in Arts 2–5 can be stated succinctly. Article 2 provides that the *Uniform Law* does not apply to joint wills or to the wills of two or more people.[42] It requires that there be only one testator for each international will, and no more. If an international will purports to be drafted for more than one person, it is invalid. Article 3 requires an international will to be in writing,[43] thereby excluding all forms of international oral wills. The will document may be drafted by any person, including the testator,[44] and may be drafted in any language.[45] Conceivably, the document could be in any form, including an electronic document, a handwritten piece of paper, a note, or any other means of documentary communication, such as painted letters on a wall.[46] All would satisfy the formal requirements of being a "document" under Article 3.

Article 4(1) provides that the testator must declare that "the document is his [or her] will" and that he or she is aware of "the contents thereof".[47] This requirement ensures that the testator is both aware of the document and acknowledges it as the testator's own will, thereby taking a step towards preventing a third-party fraud or coercion, for example, by drafting an international will that a testator is unaware of. Testators are afforded some additional protections under Art 4(2) by not having to disclose to witnesses the contents of the will, which may be kept confidential.[48]

[39] Plantard, n 1.

[40] Plantard, n 1.

[41] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 1.

[42] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 2.

[43] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 3(1).

[44] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 3(2).

[45] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 3(3).

[46] This last example is given by Mr A G Hartnell and Mr M Hughes in Attorney-General's Department, n 28, 26 [78]; see also the broad definition of "document" under Commonwealth Legislation that includes (1) anything where there is writing; (2) anything on which there are marks, figures, symbols or perforations for a person qualified to interpret them; (3) anything from which sounds, images or writings can be reproduced; and (4) a map, plan, drawing or photograph: *Acts Interpretation Act 1901* (Cth) s 2B(a)–(d).

[47] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 4(1).

[48] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 4(2).

Article 5 mandates that a testator sign the international will in the presence of witnesses and in the presence of an authorised person.[49] Otherwise a testator must acknowledge his or her own signature in front of the two witnesses and the authorised person.[50] If a testator is unable to physically sign the instrument, a party that is present must make a notation on the will indicating why the testator was unable to sign.[51] Both witnesses and the authorised person must acknowledge the signature of the will and witness the document in the testator's presence.[52]

If an international will fulfils the minimum mandatory requirements outlined in Arts 2–5 of the *Uniform Law*, a testator will be able to rely on the benefits of formal recognition of the instrument in other jurisdictions where the foreign state is a signatory to the *Washington Convention*.

2. Other Provisions on International Wills

Articles 6–15 provide the remaining provisions under the *Uniform Law* that apply to international wills.[53] Although the only mandatory provisions are those in Arts 2–5, the remaining provisions are not be interpreted as optional. Failure to comply with the remaining requirements in Arts 6–15 will render the international will defective at law. However, a failure of the optional provisions in Arts 6–15 will not render the international will null and void.

Article 6 provides that the signatures shall be placed at the end of the will,[54] and on each of the numbered pages of the document.[55] Article 7 provides that the date of the will is to be the date when the authorised person has witnessed the will,[56] and noted at the end of the will.[57] Article 8 provides a mechanism for the safekeeping of the will and recording its location in a certificate annexed to the will.[58] Article 9 requires the authorised person to attach a certificate to the will that complies in form with that set forth in Art 10.[59]

Article 10 provides the prescribed form for the will certificate,[60] a copy of which is to be kept by the authorised witness under Art 11,[61] and "shall be conclusive of the formal validity of the will" under Art

[49] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 5(1).

[50] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 5(1).

[51] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 5(2).

[52] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 5(3).

[53] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Arts 6–15.

[54] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 6(1).

[55] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 6(2).

[56] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 7(1).

[57] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 7(2).

[58] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 8.

[59] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 9.

[60] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 10.

[61] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 11.

12 of the *Uniform Law*.[62] The absence or irregularity of the certificate does not affect the validity of the will[63] but it does preclude the will's automatic recognition.

Article 14 provides that a testator may revoke an international will under the *ordinary rules of revocation*. The "ordinary rules" expression in Art 14 remit the issue of revocation of an international will to each jurisdiction under the domestic succession laws of each state.[64] In other words, the *Washington Convention* does not prescribe a mechanism to revoke an international will, but rather remits this to the practices of each state. This fact was considered ambiguous by 1973 Australian Delegation that attended the Washington Conference.[65]

Finally, Art 15 of the *Uniform Law* provides that each state ought to interpret the provisions of the law uniformly to the greatest possible degree.[66] This article aims to unify and harmonise the application of the *Uniform Law* in the jurisdiction of each state signatory.

IV. Australia's Response to the Washington Convention

1973 Australian Delegation

On 16 October 1973, the United States convened a diplomatic conference in Washington to discuss UNIDROIT's proposal for a new convention on international wills. A total of 42 states attended the Conference together with six state observers and observers from the Organisation for Latin Notaries, The Council of Europe, The Hague Conference on Private International Law, UNIDROIT and the United Nations.[67] The Australian Delegation was represented by Mr A G Hartnell, Senior Assistant Secretary from the Attorney-General's Department and Mr M Hughes, First Secretary of the Australian Embassy in Washington.[68] The Australian delegation actively engaged in the discussions during the *Washington Convention*, and Australia was appointed as a member of the Credentials Committee of the Convening States at the Conference.[69]

In his welcoming speech G H Alderich, Acting Legal Adviser of the United States (US) Department of State made the following remarks:

> In a world in which modern means of transportation have resulted in numerous persons spending substantial periods of time in two or more countries (…) it is necessary to prepare wills disposing of property located in more than one country.[70]

And that:

> It seems desirable that testators, who find themselves in such a position, be afforded a method to reduce to a minimum the uncertainty as to the formal validity of a will for the disposal of their property.[71]

These remarks clearly and articulately framed the terms of the Conference for all attendees and, upon reflection, have even greater meaning some 40 years later. Modern means of transportation and communication have

[62] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 12.

[63] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 13.

[64] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 14.

[65] Attorney-General's Department, n 28, 42 [125].

[66] Uniform Law on the Form of an International Will, *Convention Providing a Uniform Law on the Form of an International Will*, opened for signature 26 October 1973, [2012] ATNIF 1 (entered into force 9 February 1978) Annex Art 15.

[67] Attorney-General's Department, n 28, 1 [2]–[3].

[68] Attorney-General's Department, n 28, 2 [4].

[69] Attorney-General's Department, n 28, 2 [6].

[70] GH Aldrich, Acting Legal Adviser, US Department of State, Welcoming Address to the Diplomatic Conference, quoted in Attorney-General's Department, n 28.

[71] Attorney-General's Department, n 28.

developed significantly since then. Premium and low-cost travel options (whether they be by air, land or sea) and modern means of transportation have led to greater mobility of people to foreign countries. Globalisation has permitted the free movement of capital across borders, where the wealthy, and now also the middle-class, can invest in foreign assets. Modern communications, powered by mobile technologies and the internet, have become almost instantaneous. In this sense, Alderich's words assume a contemporary meaning and significance, echoing the issues faced in the modern international succession law of the 21st century.

At the Washington Conference, the Australian delegation perceived a consensus between states, to incorporate the international will into each state's domestic succession law.[72] By avoiding the need for judicial exercises in determining the meanings of "domicile" and the "nationality" of the testator, the division between moveable and immovable property, and the need for renvoi to the will's home jurisdiction, Hartnell and Hughes suggested that the *Washington Convention* resolved many conflict of laws issues.[73]

Another point that was not lost to the Australian delegation was the formal character of the *Washington Convention*. It did not create uniform provisions on other contentious issues, including the revocation of wills, the construction of will provisions, or the issue of capacity.[74] Thus, while the *Washington Convention* did not resolve all issues under private international law, it was noted to be a "step in the direction of uniformity" for Australia,[75] leading the delegation to recommend that Australia become a signatory.[76]

The Commonwealth's Response

After the conclusion of the 1973 Washington Conference, there was a general absence of discourse at a federal level on accession to the *Washington Convention* for several decades.

In 2012, 39 years after the Conference, the Federal Government conducted a National Interest Analysis (NIA) to determine whether Australia's accession to the *Washington Convention* would be in the national interest and ultimately whether or not Australia should accede to it.[77] The NIA concluded that ratifying the *Washington Convention* would not affect Australia's succession laws,[78] nor the construction or interpretation of wills within State and Territory jurisdictions.[79] The NIA identified benefits of Australia acceding to the *Washington Convention*, including first that testators who chose to execute international wills would enjoy greater legal certainty that their wishes would be recognised overseas.[80] A second benefit would be enjoyed by foreign executors, who sought a formal grant of probate from Australian courts. By using an international will, foreign executors could dispense with adducing evidence on the validity of a will under foreign law and satisfying the evidential burden of presenting witness testimony to prove the will's validity.[81]

From a cost-benefit analysis, the costs of drafting an international will would be offset by the savings in the administration costs of the estate.[82] Also, significant cost-savings to the public service sector were envisaged, through a reduction in court registry workloads in uncontested probate applications.[83] The

[72] Attorney-General's Department, n 28, 3 [12].

[73] Attorney-General's Department, n 28, 44 [128].

[74] Attorney-General's Department, n 28, [129].

[75] Attorney-General's Department, n 28, [129].

[76] Attorney-General's Department, n 28, [129].

[77] *Australian Treaty National Interest Analysis* [2012] ATNIA 5.

[78] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [3].

[79] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [7].

[80] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [6].

[81] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [6].

[82] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [25].

[83] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [26].

NIA concluded that Australia should formally accede to the *Washington Convention*.[84] The advantages highlighted in the NIA were not new; most were contained or alluded to in the 1973 Attorney-General's report authored by Hartnell and Hughes.

Given Australia's federal structure and Commonwealth Parliament's inability to legislate on matters outside those listed in s 51 of the Australian *Constitution*,[85] implementation of the *Washington Convention* rested on each State and Territory incorporating the provisions in local succession laws.[86] The Commonwealth opened the matter for consultation between the Commonwealth and States Attorney-General, aiming to garner support for the incorporation of the *Uniform Law* into State succession laws.[87] That support was achieved, allowing Australia to accede to the *Washington Convention* on 10 September 2014.[88] On 10 March 2015, the model provisions of the *Uniform Law* entered into law in all Australian States and Territories.[89]

Yet the importance of the international will and the significance of the *Washington Convention* attracted little attention or debate. The Hansard parliamentary transcripts reveal that little or nothing was debated by the sitting members of Parliament. Rather, accession to the *Washington Convention* was considered a pro forma matter only.

An analysis of each of the Hansard records of each State and Territory is beyond the scope of this article. By way of example, we now present the official records of the debates on the *Washington Convention* and the *Uniform Law* in Queensland's Legislative Assembly.

Queensland's Adoption of the Washington Convention

The process of introducing the *Washington Convention* into Queensland's Legislative Assembly could fairly be described as unremarkable, with little interest being displayed by the then Attorney-General the Hon J P Bleijie, and ever so slightly more interest from the members of the opposition Labor party.

The proposed amendments to Queensland's succession legislation were introduced on 5 June 2013 with the *Justice and Other Legislation Amendment Bill 2013* (Qld).[90] On 20 August 2013, the Legislative Assembly undertook the Second Reading speech of the Bill,[91] presenting, albeit very briefly, the merits of *Washington Convention*, but failing to undertake a detailed analysis of the instrument. One could be forgiven for missing reference to the *Washington Convention* altogether, given the omnibus-styled Bill simultaneously introduced such disparate amendments to the Justice Portfolio as the definition of a "lawyer" in the *Acts Interpretation Act 1954* (Qld), the appointment requirements of a registrar under the *Births, Deaths and Marriages Registration Act 2003* (Qld), the authorisation of inquest findings under the *Coroners Act 2003* (Qld), the amendments to the *Domestic and Family Violence Protection Act 2012* (Qld), and many other amendments without relation to one another.[92] Queensland's Attorney-General hailed the Bill a success, proclaiming that "in total the Bill amended some 30 different acts of Parliament".[93]

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[84] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [26].

[85] *Commonwealth of Australia Constitution Act 1901* (Cth) s 51(i)–(xxxix).

[86] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [17].

[87] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [35]–[36].

[88] UNIDROIT, *UNIDROIT Status Table – Convention Providing a Uniform law on the Form of an International Will* <http://www.unidroit.org/status-successions>.

[89] UNIDROIT, n 88; M Perkins and R Monahan, *Estate Planning: A Practical Guide for Estate and Financial Service Professionals* (LexisNexis Butterworths, 4th ed, 2015) 181–182, [3.96].

[90] *Justices and Other Legislation Amendment Bill 2013* (Qld); Queensland, *Notice Paper for Tuesday*, Legislative Assembly, 20 August 2013, 3, which amended the *Succession Act 1981* (Qld), by inserting a new Pt 2 Div 6A Sch 3; see also the analogous amendments in other States and Territories. In New South Wales the *Succession Act 2006* (NSW) Pt 2.4A Sch 2; in Victoria the *Wills Act 1997* (Vic) Pt 2 Div 7 Sch ; in South Australia the *Wills Act 1936* (SA) Pt 3A Sch 1; in Western Australia the *Wills Act 1970* (WA) Pt XA Sch 1; in Tasmania the *Wills Act 2008* (Tas) Pt 5A Sch 5; in the Northern Territory the *Wills Act 2000* (NT) Pt 5A Sch 2; in the Australian Capital Territory the *Wills Act 1968* (ACT) Pt 3B Sch 1.

[91] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013.

[92] Explanatory Notes, *Justices and Other Legislation Amendment Bill 2013* (Qld) 1–3.

[93] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013, 2607 (Hon JP Bleijie).

On the *Washington Convention*, Hansard reveals that the Attorney-General limited his comments to one five-lined paragraph,[94] most of which was devoted to rebutting the Queensland Law Society's observations that the *Washington Convention* needed further clarification.[95] The former leader of the opposition, the Hon A Palaszczuk (as she then was), went to greater lengths to debate the merits of the *Washington Convention*, summing up that the ability of Queenslanders to draft an international will was "a simple case of business".[96] These comments from both the Attorney-General and the former leader of the opposition failed to elaborate on the merits of the *Washington Convention* and the private international law implications of the *Uniform Law*. Queensland did incorporate the *Uniform Law* into its domestic legislation, by inserting a new Pt 6A and a new Sch 3 to the *Succession Act 1981* (Qld),[97] and in doing so fulfilled the commitment of the Standing Committee of Attorney-General to adopt the *Washington Convention*.[98]

Current Academic and Professional Commentary

Australian commentary on the *Washington Convention* and the *Uniform Law* has been minimal and technical. In one article published in *Taxation in Australia*,[99] O'Sullivan discusses the incorporation of the *Washington Convention* into Victorian succession law.[100] After defining the requirements of an international will,[101] the author provides a useful checklist for solicitors to follow when preparing an international will, including the requirement for three witnesses, one of which is to be an authorised person,[102] and the inclusion a certificate to the will.[103]

In an article published in the Queensland Law Society's monthly magazine, *Proctor*, Smyth introduces the *Washington Convention* and the key elements on drawing a valid international will.[104] Much like O'Sullivan's article, this article underscores two significant features of an international will, namely the requirement for three witnesses (one of which must be a solicitor or notary public),[105] and the requirement to produce a witness certificate in a form approved by the *Washington Convention*.[106] The article concludes by stating the *Washington Convention* is best used "when there is a distinct asset in a signatory country".[107]

But both articles fail to debate the wider issues surrounding the *Washington Convention* and the *Uniform Law*, falling short of an analysis required for a significant international instrument. While O'Sullivan and Smyth ought to be commended for publishing commentary on this subject, their articles do not add any detailed analysis of the instruments, nor do they contemplate the wider conflict of laws issues surrounding international estate planning.

Given the few published articles in this field, one can infer there is a lack of interest on the subject in Australian literature, a fact that in the writers' opinion is peculiar. There is little to no academic material

[94] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013, 2610 (Hon JP Bleijie).

[95] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013, 2610 (Hon JP Bleijie).

[96] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013, 2615–2616 (Hon A Palaszczuk).

[97] *Succession Act 1981* (Qld) ss 33YA–33YE Sch 3.

[98] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 August 2013, 2615–2616 (Hon A Palaszczuk).

[99] B O'Sullivan, "The New World of International Wills", (2012) 46(7) *Taxation in Australia* 292.

[100] *Wills Act 1997* (Vic).

[101] O'Sullivan B, n 99.

[102] O'Sullivan B, n 99, 293.

[103] O'Sullivan B, n 99, 293.

[104] Smyth, n 11.

[105] Smyth, n 11.

[106] Smyth, n 11.

[107] Smyth, n 11.

published by Australian authors on the subject and the only remaining insight comes from professional journals, which provide a brief overview on the subject. This lack of discourse can be contrasted with the US literature that has seen publications in the years immediately after the *Washington Convention* with the Nadelmann-Curtis debate in the 1970s;[108] Kearney's commentary in the 1980s on the International Will;[109] a resurgence of interest in the 1990s through the writings of Covell.[110] European-based literature has produced noteworthy publications in the late 1990s and 2000s on international wills (see, for example, the works of Devaux,[111] Eliescu,[112] Hausman[113] and Ionas[114]).

V. Why International Wills Matter

The issue arises as to why closer attention should be paid to the *Washington Convention* and the *Uniform Law*. In other words, why do international wills matter? To appreciate the operation of the *Washington Convention* and the *Uniform Law*, there needs to be a renewed and comprehensive discourse on the subject. We will briefly explore the advantages of the *Washington Convention* and the *Uniform Law* and then suggest some appropriate methods to increase the level of discourse on this subject in Australia.

Advantages of the Uniform Law

1. Economic Advantages

Where a testator has assets in more than one state signatory to the *Washington Convention*, it will be cost-effective to execute an international will. This would obviate the Choice of Law issues, discussed above, bypassing the need for legal argument on the will's validity in foreign courts and providing certainty of the will's formal recognition abroad.

For an executor, there are significant economic advantages, in the form of time and cost savings, in administering an estate under an international will. The use of the *Washington Convention* and the *Uniform Law* could potentially reduce the amount of time involved in identifying estate assets, the time and costs of identifying and repaying creditors out of the estate, as well as the costs involved in distributing and winding up the estate. By simplifying the estate management process, there is potential for a decrease in administration costs and a net increase in the assets available for distribution to the beneficiaries of the estate.

Moreover, the *Washington Convention* and the *Uniform Law* allow an executor to administer the estate in a unitary manner (a single international will, recognised in all convention states), which in turn translates into a streamlined and efficient estate-management process. The beneficiaries to the estate would also be advantaged by having a clearer picture of the asset pool and their rights to a share of the assets. With a clearer picture, some beneficiaries may be less likely to commence litigation that challenges the validity of the will. A reduction in the risks of estate litigation constitutes a further economic benefit of the *Washington Convention*.

Finally, courts would also be economically advantaged (albeit indirectly) by a more widespread use of international wills under the *Washington Convention*. The increased use of international wills could

[108] Nadelmann, n 36; J Curtis, "The Convention on International Wills: A Reply to Kurt Nadelmann" (1975) 23(1) *The American Journal of Comparative Law* 119.

[109] Kearney, n 22.

[110] T Covell, "Legislation Should Prompt States to Enact International Will Laws" (1994) 133 *Trusts Estates* 42.

[111] A Devaux, "The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?" (2013) 47 *International Lawyer* 229.

[112] Eliescu, n 15.

[113] R Hausman, "Community Instrument on International Successions and Wills. The Proposal of the Commission on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Deeds, and on the Introduction of Certificates of Inheritance and of Executor/Administrator in Transitional Successions" in MC Baruffi and RC Panico (eds), *Le Nuove Competenze Comunitarie. Obbligazioni Alimentari e Successioni* (CEDAM, 2009).

[114] Ionas, n 2.

potentially decrease court times and costs in proceedings devoted to formal recognition of a will. The automatic recognition of an international will under the *Washington Convention* could potentially reduce public service expenditure and the workloads of domestic courts in this area.[115]

2. Geopolitical and Geo-economic Advantages

We suggest there are several direct and indirect advantages for Australia in promoting and utilising the *Washington Convention* and the *Uniform Law*.

First, Australia would support to its own citizens and residents, who have drafted, or intend to draft, an international will by providing a mechanism for the repatriation of estate assets to Australia. Under a single estate administration, an executor would be in a position to consolidate estate assets in one location, leading to a repatriation of foreign assets and foreign capital. The result would be an increase in the net asset pool liable to domestic taxes. The process would provide a direct fiscal benefit to the Commonwealth from an increased use of international wills.

Second, foreign investors may be attracted to invest capital in Australian markets, guided by Australia's accession to the *Washington Convention*. Foreign investors would invest overseas capital and draft an international will in their own jurisdiction, knowing that this instrument would enjoy automatic recognition in Australia. The result would be a capital inflow. Naturally, this capital inflow into Australia would depend on foreign countries acceding to the *Washington Convention*, thereby accepting recognition of the international will, as a valid succession instrument. An increase in the number of signatories to the *Washington Convention* would lead to increased awareness and recognition of international wills, which would in turn foster greater certainty and predictability in administering international deceased estates.

As in other bodies of law, Australian legal institutions could position themselves as international authorities on the interpretation and application of the *Washington Convention* and the *Uniform Law*. Australian courts could develop jurisprudence on the *Uniform Law* through scholarly publications and case law. This body knowledge and law would contribute to the development and harmonisation of international succession in the field of private international law. Australia's potential contribution to transnational jurisprudence would place it at the forefront of contemporary international succession law.

3. Client Advantages

There are also significant advantages for clients – be they testators, executors or future beneficiaries under an international will – in international succession matters.

For a testator, the advantages of using an international will would include being able to use the testator's native language in drafting the will. For example, if the testator resided in an English-speaking country but was of Hispanic or Latin American heritage, the testator could draft the international will in Spanish (or in any language comprehensible to the testator) and the instrument would retain its validity provided it complied with the formal requirements of the *Washington Convention*. There would be no need to draft the will in English. By allowing the testator to draft a will in his or her language of choice, an international will would increase the likelihood of a testator expressing his or her genuine wishes, while decreasing the linguistic ambiguities inherent in drafting a legal document in a different language.[116]

A testator would also have a psychological advantage of knowing that the international will would be recognised overseas,[117] without the need for the executor to commence formal recognition proceedings in foreign courts. A testator client, who had the urgency of drafting a will, could draft an instrument that was formally valid in an overseas jurisdiction. There would be no need to (1) rely on a local domestic will and undergo a process of recognition overseas; or (2) travel overseas to draw a will in each jurisdiction where the testator held property.[118] The increased costs of drafting an international

[115] *Australian Treaty National Interest Analysis* [2012] ATNIA 5, [26].

[116] Plantard, n 1, 5.

[117] Plantard, n 1, 5.

[118] BDS Lock, "Topic No. 5 International Legal Problems in Connection with the Drafting and Proving of Wills" (1974) 5 *International Business Journal* 93, 96.

will would be offset by the saved costs of drafting multiple wills in foreign jurisdiction and travel costs.

For an executor, the advantages of administering an estate under an international will are notable, affecting the costs and time spent on administering the estate. An executor would enjoy greater certainty in carrying out the executor's duties under the will, decreasing the chance of breaching the executor's legal and fiduciary obligations to the beneficiaries. An executor may consider adopting a unitary approach to the administration of the deceased's estate, given that a single instrument could be used to administer the testator's global asset pool under a single testamentary instrument.

For a future beneficiary, an international will would clarify the beneficiary's entitlements under the will and provide transparency and certainty for the beneficiary's entitlements. A future beneficiary would be apprised of the process of administering, distributing and winding up the testator's estate, leading to greater confidence in the estate management process. There would also be an increase in efficiency and a decrease in time and costs associated with the executor's administrative functions that would preserve the asset pool of the estate.

Strategies to Enhance Discourse

There are several strategies that can be used to enhance awareness of the *Washington Convention* and the *Uniform Law*. We have listed several suggestions to enhance the level of discourse in Australia on the *Washington Convention*, the *Uniform Law* and the international will. The list is not comprehensive. Each suggestion may enhance the level of discourse to different degrees.

1. Increased Professional and Academic Commentary

In order to promote a renewed discourse on international wills, there needs to be a greater level of professional and academic commentary on the subject. This article is a first attempt at filling the literary gap on the subject in Australia. As suggested, there have been few publications on international wills, with the majority focusing on the technical aspects on drafting the international will, but failing to consider other aspects – the implementation of the *Washington Convention*, the uniformity of succession laws, the perceived client advantages, points of interpretation and ambiguity that require further clarification, and the like. However, academics, estate planning professionals, lawyers and their respective associations (State Law Societies and Bar Associations) can contribute to a renewed discourse that positions the subject of international succession planning in contemporary times. Increased written professional commentary on international wills and estate management may stimulate intellectual debate, while enhancing the level of understanding on the subject for scholars, professionals and for the general public.

With increased accessibility to foreign travel, the movement of funds into capital-receiving markets and the rapid advance in technology, we can expect more people to purchase assets overseas. In 2018, the *Washington Convention* and the *Uniform Law* will be 45 years old. There is a need to critically discuss the provisions of the *Uniform Law* and to suggest measures of implementation and further law reform.

2. Increased Professional Training

Further education on international succession law is critical to an understanding of the problems posed in international succession and the advantages of using the *Uniform Law*. Professional legal, accounting and estate planning associations, such as the Society of Trust and Estate Practitioners can enhance the level of awareness on the *Uniform Law*, by offering educational programs on the subject.

Professional training courses can present complex topics in a palatable way for the audience. One method may be to adopt an interdisciplinary approach that touches on diverse areas of professional inquiry, including legal, accounting, taxation and health care, while discussing the points of convergence and divergence between these areas. Vocational training courses could emphasise the advantages of clients considering an international will, as opposed of the relative disadvantages of having multiple domestic wills in international estate planning.

Moreover, by providing increased education opportunities, legal, accounting and estate planning professionals would increase their own awareness on the subject, incorporating the international will into their own estate planning arsenal.

3. Increased International Colloquia

Perhaps the greatest limitation to date is the number of signatory countries to the *Washington Convention*. Of the 20 nations that have signed the Convention,[119] statistics suggest that the *Washington Convention* has entered into force in only 12 countries.[120] To date, some notable non-signatories include the United Kingdom, New Zealand, China, India and the Philippines, which account for the top five countries of birth for overseas-born Australians.[121] This is a drawback for Australian testators and estate planners. However, at an international level, an increase in the number of conferences and colloquia has the potential to contribute to greater awareness of the *Washington Convention* and the *Uniform Law* by overseas lawmakers and private citizens. These colloquia could assist in educating and presenting the advantages of the *Washington Convention* and the *Uniform Law* to foreign delegates. This, in turn, has the potential to increase the number of signatories to the *Washington Convention* and thereby further contribute to the harmonisation of international succession law.

VI. Conclusion

In 1974, BDS Lock, a solicitor from England, wrote about the need for international succession instruments for all people, that included even the "less well-to-do people", who owned overseas real estate.[122] His perspective was one similar to ours: that of the practitioner facing the real issue of advising clients with family and property connections overseas. In an ideal world, testamentary freedom would be recognised in all jurisdictions and every person's domestic will would be recognised as valid everywhere else. It is not an ideal world. Wills are regularly challenged, and often on the assumption that a testator's will is invalid in a foreign country.

When a testator holds assets overseas, the testator needs to account for the difficulties that a future executor may face in an overseas jurisdiction. Under the classical private international law framework, an executor may be put to significant time and expense in applying for recognition of the will in one or more foreign jurisdictions. Foreign courts will also face some difficult questions under the rules of private international law and may be tempted to remit the issue of formal recognition to a different court for determination.

So, what do we do? We have argued that one way to minimise the Choice of Law issue is to draft an international will under the *Washington Convention* and according to the requirements of the *Uniform Law*. Provided the mandatory provisions of the *Uniform Law* are followed, an international will provides some significant advantages over multiple domestic wills. The economic, geopolitical and client advantages of drafting an international will render this an attractive option for everyone.

We have argued that the *1973 Washington Convention* is an important instrument that harmonises international succession law. The operation of the *Washington Convention* and the *Uniform Law* provide a framework for all acceding states to adhere to. When applied, the *Washington Convention* and the *Uniform Law* allow immediate recognition of an international will as valid, obviating the need for foreign court to determine the issue of the will's validity.

In Australia, the key challenge that remains is moving beyond the minimal level of discourse that has characterised the topics of international wills, the *Washington Convention* and the *Uniform Law*.

[119] UNIDROIT, n 88.

[120] UNIDROIT, n 88. These countries are Australia, Belgium, Bosnia-Herzegovina, Croatia, Cyprus, Ecuador, France, Italy, Libya, Niger, Portugal and Slovenia.

[121] Australian Bureau of Statistics, "Estimated Resident Population – Australia – Top 10 Countries of Birth – 30 June 2015" (table) in *3412.0 – Migration, Australia, 2014–2015* (Released 30 March 2016) <www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0/>.

[122] Lock, n 118.

Australia is a signatory of the *Washington Convention*, a fact that in the writer's view ought to be lauded. However, the absence of a robust contemporary discourse has seen the topic fade into oblivion. We have argued for a renewed discourse on international wills that is spearheaded by legal practitioners, estate planners, academics and their respective professional associations. Only through a renewed discourse can contemporary estate planning professionals begin to harness the benefits of the *Washington Convention* and the *Uniform Law* for their clients.