

# Questionnaire relating to the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)

Responding State:

Australia

## I. General Feedback

1. How does your State rate the general operation of the Evidence Convention?

(c) Satisfactory.

2. How does your State rate the useability of the HCCH publications developed to assist users of the Evidence Convention (the Practical Handbook on the Operation of the Evidence Convention ([Evidence Handbook](#)) and [Guide to Good Practice](#) – The Use of Video-Link)?

(b) Good.

3. What work could be carried out by the PB to facilitate the acceptance of accessions to the Evidence Convention (e.g., providing additional information or facilitating direct communication between your Central Authority and new Contracting Parties)?

*“Australia considers this primarily to be an issue that Contracting Parties should be more proactive in resolving. Subject to available resources, the PB could consider sending periodic reminders (perhaps annually) to each Contracting Party or National Organ, with a summary of the accessions not yet accepted by that particular country.”*

4. Does your State’s Central Authority have a manual or electronic case management register or system that is used to track incoming requests under the Evidence Convention?

(a) Yes – electronic for incoming only.

5. If your State’s Central Authority has oversight for outgoing requests, please indicate if there is a system used to track the progress of these.

(d) Other.

*“The Australian Central Authority does not have oversight of outgoing requests.”*

## II. Scope of the Convention

6. In the previous five years\*, has your State experienced any difficulties in interpreting the scope of the Evidence Convention?

\*If your State has become a Party to the Convention during the previous five years, responses to this questionnaire should reflect the period of time, commencing from when the Convention entered into force in your State.

(c) Yes, other.

*“One jurisdiction reported difficulties in considering whether depositions in the US were akin to pre-trial discovery in Australia – see *Washington v Johnson & Johnson and Ors* (2021) TASSC 65.”*

7. Does your State consider the Evidence Convention mandatory or non-mandatory?
- (b) Non-mandatory.
8. Has your State adopted “blocking statutes” or laws which are known by any other description, which prevent evidence being taken in the territory of your State for use in foreign proceedings other than under the Evidence Convention (or other international instrument)?
- (b) No.
9. Has your State received or submitted requests for the taking of evidence in connection with arbitration proceedings?
- (b) No.
10. Have any decisions relating to the use of the Evidence Convention in arbitration proceedings been rendered by the judicial authorities of your State?
- (b) No.

### III. Operation of the Convention

#### A. Chapter I – Preparing, transmitting and progressing Letters of Request

Requesting State refers to the State from which a Letter of Request is, or will be, issued.  
Requested State refers to the State to which a Letter of Request is, or will be, addressed.

11. As the **requesting State**, how are Letters of Request transmitted?
- (a) Directly from a judicial authority to the Central Authority of the requested State.
12. As the **requesting State**, do the authorities of your State use the recommended Model Form?
- (d) Unknown.
13. Does your State consider further work on the Model Form would be beneficial? For example, a review of the Model Form with a view to including video-link and the preparation of guidelines outlining how to complete the Model Form.
- (a) Yes.  
*“A review of the Model Form to incorporate references to modern technologies could be useful; links to relevant Convention Articles (for reference) could also be useful.”*
14. As the **requested State**, do the authorities of your State send an acknowledgement of receipt for a Letter of Request?
- (b) No.
15. During the past five years\*, as the **requested State**, has your State received a Letter of Request that is non-compliant?

\*If your State has become a Party to the Convention during the previous five years, responses to this questionnaire should reflect the period of time, commencing from when the Convention entered into force in your State.

- (a) Yes.

15.1. If the answer to Q15 above is “yes”, why was the request non-compliant?

- (a) The matter was not “civil or commercial”.
- (b) The request was not issued by a judicial authority.
- (c) The request did not relate to judicial proceedings.
- (e) The request related to a judicial act that is excluded from scope.
- (f) The request did not comply with the content requirements under Article 3.
- (g) The request did not comply with the translation requirements under Article 4.

16. As the **requested State**, does your State provide advance assistance to foreign judicial authorities to prepare a Letter of Request to be sent under the Evidence Convention?

- (a) Yes.  
*“Our Central Authority occasionally receives enquiries from foreign authorities requesting clarifications or additional information when preparing Letters of Request.”*

17. As the **requested State**, does your State provide advance assistance to legal representatives to prepare a Letter of Request to be sent under the Evidence Convention?

- (a) Yes.  
*“Our Central Authority occasionally receives enquiries from foreign authorities requesting clarifications or additional information when preparing Letters of Request.”*

18. Once your State has received a Letter of Request, do your State’s judicial authorities rephrase, restructure, and / or strike out objectionable questions or offensive wording in order to execute a Letter of Request (also known as “blue-pencilling”)?

- (a) Yes.  
*“The Court has discretion to rephrase questions in instances where it is possible to do so without altering the substance of the request to give effect to the Letter of Request.”*

19. As the **requested State**, can the execution of a Letter of Request that has been received be challenged?

- (a) Yes.  
*“For example, in some jurisdictions a person who can establish standing (i.e. because they will be affected by the orders sought) can seek leave from the Court to intervene in the matter and challenge the orders sought; in some jurisdictions, reasons for challenging a Letter of Request are included in legislation (see, e.g. Evidence Act 1977 (Qld) and Supreme Court Rules 2000 (SA)).”*

19.1. If the answer to Q19 above is “yes”, is the requesting authority or the interested party permitted to respond to the challenge?

- (a) Yes.  
*“As the requesting authority is not a party to the proceedings, it will be for the Court to consider whether leave should be granted for the requesting authority to respond.”*

20. As the **requesting State**, can the sending of a Letter of Request abroad be challenged?

- (a) Yes.  
*“Each Australian jurisdiction has its own procedures for challenging a decision to send a Letter of Request, either through legislation or judicial review.”*

21. As the **requested State**, which authority is generally responsible for informing the requesting authority of the time and place of the execution of a Letter of Request (Art. 7)?

(b) Judicial authority competent to execute the request.

22. During the past five years\*, as the **requested State**, has your State received a request specifying a particular method or procedure for taking of evidence (e.g., how witnesses are to be examined)? (Art. 9(2))

\*If your State has become a Party to the Convention during the previous five years, responses to this questionnaire should reflect the period of time, commencing from when the Convention entered into force in your State.

(a) Yes.

*“These have included requests in relation to oaths/affirmations, methods for taking a deposition, requests to undergo medical tests.”*

23. As the **requested State**, does your State require the requesting State to reimburse costs?

(b) Yes, sometimes.

23.1. If the answer to Q23 above is “yes”, please indicate circumstances where reimbursement is sought.

(a) Fees paid to experts and interpreters (Art. 14(2))

(b) Costs occasioned by the use of a special procedure (Art. 14(2))

(c) Fees paid for translation (Art. 4(3))

(f) Other.

*“Please note that not all Australian jurisdictions require reimbursement in the above-listed circumstances. In addition, some jurisdictions also require reimbursement where there are costs incurred that go beyond those of a regular request.”*

24. As the **requested State**, who may make a request for a Letter of Request to be withdrawn?

(a) Requesting authority.

25. As the requested State, does your State reject a Letter of Request seeking discovery if it is too broad?

(c) Not applicable, Article 23 declaration.

## **B. Chapter I – Execution of a Letter or Request – Witness Examination**

All questions directed towards the Contracting Party operating as the requested State.

26. As the **requested State**, how is a hearing conducted for Chapter I requests?

(a) Before a Judge, Magistrate, Special Master, or other court official.

(b) By a judicial officer.

(e) Other.

*“In some jurisdictions, the Court may also make an order for the examination of a witness before any fit and proper person nominated by the requesting authority or such other qualified person as the Court appoints.”*

27. Does your State require the Letter of Request to include specific questions to be used during the taking of evidence?

(b) No.

28. In your State, are hearings public or private?
- (a) Public, unless otherwise ordered by a judge.
29. In your State, is a witness provided with a copy of questions / matters contained in the Letter of Request in advance of a hearing?
- (a) Yes, always.
30. In your State, what are the requirements for documents that are to be presented to a witness?
- (a) Any document presented to a witness must be attached to the Letter of Request.
- (b) Any document presented to a witness must be approved by the authority taking evidence.
- (c) Other.  
*“Please note the above are not specific requirements in all jurisdictions, but are generally considered good practice.”*
- (d) No requirements.
31. In your State, are documents produced by the witness during the taking of evidence authenticated by the court or authority?
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32. In your State, can representatives of the parties who attend the taking of evidence ask additional questions and / or cross examine the witness?
- (a) Yes.  
*“Conditions depend on the jurisdiction and rules applicable to the requested authority.”*
33. In your State, is an oath or affirmation administered to the witness before the taking of evidence?
- (a) Yes.
34. In your State, can the witness be subject to further examination?
- (a) Yes.
- 34.1. If the answer to Q34 above is “yes”, is a second Letter of Request required?
- (a) Yes.
35. Does your State have sanctions for the non-appearance of a witness?
- (a) Yes.  
*“Depending on the nature of the request, some jurisdictions may issue a subpoena to require the person to give evidence. If a subpoena is issued, failure to comply may result in the witness being ordered to pay costs or fines for failing to attend. Failure to comply without a reasonable excuse could also result in a warrant being issued for the arrest of the witness for being in contempt of Court.”*

36. During the past five years\*, as the **requested State**, is your State aware of a person requested to give evidence invoking privilege?

\*If your State has become a Party to the Convention during the previous five years, responses to this questionnaire should reflect the period of time, commencing from when the Convention entered into force in your State.

(c) No.

37. Does your State require interpreters in the taking of evidence to be certified?

(a) Yes.

38. In your State, how is witness testimony transcribed?

(e) Other.

*“Verbatim audio/video recording as well as a verbatim written transcript.”*

#### IV. Use of Information Technology

In 2019, the PB circulated a questionnaire on the use of information technology in relation to the operation of the Evidence Convention. That survey was concluded prior to the start of the COVID-19 pandemic. The questions below seek information from Contracting Parties on the use of technology and in light of the pandemic.

39. Does your State’s Central Authority accept Letters of Request to be transmitted electronically?

(a) Yes.

40. Does your State allow the taking of evidence by video-link under Chapter I?

(a) Yes.

41. Does your State allow the taking of evidence by video-link under Chapter II?

(b) No.

42. Does your State use the Model Form for video-link evidence?

(b) No.

43. What challenges has your State faced regarding the use of information technology under the Evidence Convention?

(a) None.

44. Has your State adopted any new information technology measures to facilitate the operation of the Evidence Convention, particularly in response to the COVID-19 pandemic?

(a) Yes.

*“Increasing acceptance of requests received electronically; in urgent cases transmitting requests electronically between the Central Authority and relevant Australian jurisdiction; clarification that Australian jurisdictions do not object to the use of video-link to take evidence for foreign proceedings from a willing witness; encouraging electronic means of communication with foreign authorities.”*

45. In your State's opinion, what topics could the PB explore further (e.g., for the purposes of training, seminars, or conferences) in relation to the use of information technology under the Evidence Convention?

*"Australia appreciates the work done by the PB to promote the use of video-link under the Evidence Convention, but we would also be interested in other ways that technology might facilitate the execution of requests."*

46. In your State's opinion, what further work could the PB do on the use of information technology under the Evidence Convention?

- (b) Other.

*"Australia would welcome additional guidance on developments in relation to digital evidence and good practices around transmitting and retaining large amounts of data electronically."*

47. In addition to the Evidence Convention, is your State party to any bilateral, regional, or multilateral agreements that provide rules for the taking of evidence abroad?

- (a) Yes.

*"Bilateral treaties with New Zealand, the Kingdom of Thailand, and the Republic Korea. Australia is also a party to a number of bilateral treaties between the UK and some European countries. These treaties were then extended to Australia due to its place in the Commonwealth of Nations."*

*For Parties that answered yes to Q47 above:*

- 47.1. Do any of these agreements provide for the use of electronic means to assist in the taking of evidence (e.g., video-link)?

- (a) Yes.

*"Although they do not expressly provide for the use of electronic means, there is also nothing to prohibit their use."*

*For Parties that answered yes to Q47 above:*

- 47.2. If yes, what electronic means or information technology does your State use in the taking of evidence?

- (a) Electronic transmission via online platform administered by the government.  
(c) Video conference.

## V. 2023 Meeting of the Special Commission & Monitoring

48. Does your State have any suggestions that could assist in the promotion, implementation or operation of the Evidence Convention?

- (a) Yes.

*"Australia is considering developing practical factsheets for foreign authorities in multiple languages; this could be useful for other Contracting Parties. We would also suggest strongly encouraging requesting authorities to provide email addresses with their requests, to facilitate follow-up and clarification. Processing delays and recovery of costs to be reimbursed also continue to be problems for Australian authorities."*

48.1. If the answer to Q48 above is “yes”, please indicate whether the information provided may be published.

(a) Yes.

49. What are the three key topics or practical issues related to the Evidence Convention that your State would like discussed at the 2023 meeting of the Special Commission?

1. *“Types of evidence that can and cannot be obtained in different Contracting Parties (incl. more information around Contracting Parties’ interpretation/practice around the grounds of refusal in Article 12).”*
2. *“Use and operation of the mechanisms under Chapter II.”*
3. *“Standardisation in the collection of data and statistics.”*

49.1. Please indicate whether the information provided in Q49 above may be published.

(a) Yes.

50. The PB is in the process of revising the Evidence Handbook and the Guide to Good Practice – The Use of Video Link, with a view to consolidating these publications. Are there any specific topics, suggestions for presentation or formatting, or any other proposals you recommend for inclusion?

(a) Yes.

*“Australia agrees with the proposal to consolidate the two publications, incorporating the content related to video-link into the body of the Handbook.”*

50.1. If the answer to Q50 above is “yes”, please indicate whether the information provided may be published.

(a) Yes.

## DATA & STATISTICS FOR CONTRACTING PARTIES

### I. Statistics under Chapter I

#### A. Incoming Requests

1. How many incoming Letters of Request for the taking of evidence did your State receive under Chapter I in each of the following years?

2017	-
2018	-
2019	53
2020	48
2021	68
2022	56
Unknown – please explain. <i>“Please note that these figures are approximate and cover only those requests received by the Central Authority; rejected requests and requests sent directly to Australian State and Territories are not captured. Data has only been provided from 2019, as the electronic database used to record and manage requests received by the Central Authority was only implemented in 2018.”</i>	

2. Which three States made the most requests?

Requesting State	Number
Turkey	87
Poland	29
USA	25

3. What is the average time taken (in months) to execute a Letter of Request in your State?

*“Please note that the time take to execute requests varies greatly among Australian jurisdictions; however, the overall average time for execution across Australian authorities between 2019 and 2022 was 6-12 months.”*

4. If possible, please provide a breakdown of how long (in months) it took to execute incoming requests.

	< 1	1-3	3-6	6-12	> 12
2017	-	-	-	-	-
2018	-	-	-	-	-
2019					x
2020					x
2021					x
2022 (if data available)					x
Unknown – please explain. <i>“Unknown – please explain. Please note that these figures are approximate and cover only those requests received by the Central Authority; rejected requests and requests sent directly to Australian State and Territories are not captured. Data has only been provided from 2019, as the electronic database used to record and manage requests received by the Central Authority was only implemented in 2018.”</i>					

5. How many incoming Letters of Request for the taking of evidence did your State receive via **electronic transmission** under Chapter I in each of the following years?

2017	-
2018	-
2019	-
2020	-
2021	-
2022	-
Unknown – please explain. <i>“The Australian Central Authority does not currently record this data.”</i>	

**B. Outgoing Requests**

6. How many outgoing Letters of Request for the taking of evidence did your State make under Chapter I in each of the following years?

2017	-
2018	-
2019	-
2020	-
2021	-
2022	-
Unknown – <i>please explain.</i> “The Australian Central Authority does not have oversight of outgoing requests.”	

7. Which States were the subject of the most requests?

Requesting State	Number
-	-
-	-
-	-

8. How many outgoing requests for the taking of evidence did your State make via electronic transmission under Chapter I in each of the following years?

2017	-
2018	-
2019	-
2020	-
2021	-
2022	-
Unknown – <i>please explain.</i> “The Australian Central Authority does not have oversight of outgoing requests.”	

**C. Video-Link**

9. How many incoming Letters of Request for the taking of evidence did your State execute under Chapter I in each of the following years?

2017	-
2018	-
2019	-
2020	-
2021	-
2022	-
Unknown – please explain. “The Australian Central Authority does not currently record this data.”	

10. How many incoming requests for the taking of evidence did your State execute under Chapter II in each of the following years?

2017	-
2018	-
2019	-
2020	-
2021	-
2022	-
Unknown – please explain. “The Australian Central Authority does not currently record this data.”	

## CASE LAW, ADDITIONAL INFORMATION & SUPPORTING DOCUMENTS

### I. Case Law

Please list all your State's judicial decisions that have considered the Evidence Convention since 2014, and provide a link to, or upload, the decision (in PDF format only).

*“The Australian Central Authority does not maintain a comprehensive list of judicial decisions that consider the Evidence Convention. Ahead of the Special Commission, the Australian Central Authority will continue to research relevant case law and legislative developments to assist the PB with the revision of the Handbook and preparation for the Special Commission meeting. The following cases were provided by the relevant States and Territories: • A-G (NSW); ex parte Thomas Hollins [2016] NSWSC 622 • Application by the A-G (NSW) under the Evidence on Commission Act 1995 [2016] NSWSC 1086 • Application by the A-G (NSW) under the Evidence on Commission Act 1995 [2016] NSWSC 862 • Application by the A-G (NSW) in the Estate of Raimon Gruss [2016] NSWSC 1267 • In the Application of her Majesty's A-G (NSW) under s 32 and s 33 of the Evidence on Commission Act 1995 (NSW); In the matter of a request from the Civil and Commercial Court of First Instance No 4 in Dolores, Buenos Aires, Argentina, for the taking of evidence and the production of documents from Westpac Banking Corporation [2016] NSWSC 834 • Application of Computer Sciences Corporation under the Evidence on Commission Act 1995 (NSW) [2017] NSWSC 810 • A-G (NSW) [2018] NSWSC 683 • Application of Irwin Seating Company under the Evidence on Commission Act 1995 (NSW) [2018] NSWSC 918 • Application of Computer Sciences Corporation under the Evidence on Commission Act 1995 (NSW) [2019] NSWSC 777 • La Valette v Chambers-Grundy [2019] NSWSC 1355 • Application of the Securities and Exchange Commission of the USA under the Evidence on Commission Act 1995 (NSW) (No 2) [2020] NSWSC 1500 • In the Application of Her Majesty's A-G (NSW) under s 32 of the Evidence on Commission Act 1995 (NSW); In the matter of a request from the Didim 1st Civil Court of First Instance of the Republic of Turkey in case file no. 2018/5, Ismir/Turkey for assistance [2020] NSWSC 816 • Application of the A-G under s 33 of the Evidence on Commission Act 1995 [2021] NSWSC 151 • Nanoteko Pty Ltd v Nanotech Industrial Solutions Inc [2022] NSWSC 272 • Application by the A-G (NSW) [2022] NSWSC 1236 • Re Nanotech Industrial Solutions Inc [2021] VSC 167”*

### II. Additional Documents

Please provide links to and / or any additional information or documentation to support your response (in PDF format only). This may include:

- ⇒ resources for the general public or guidelines for Central or other Authorities' staff;
- ⇒ implementation legislations, recent legislative developments; or
- ⇒ books, articles, or other published work.

*“Factsheet available to the general public: Taking of evidence in Australia for foreign court proceedings (ag.gov.au) See also: <https://www.ag.gov.au/international-relations/private-international-law/frequently-asked-questions-faqs>”*

*1 file uploaded.*

## PUBLICATION OF RESPONSES

Please confirm whether your responses to this questionnaire can be published on the HCCH website.

- (a) Yes.