



International Parental Child Abduction Legal Resource

Prepared by the Family Law Section of the Law Council of Australia





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Endorsement

I am delighted to endorse the International Parental Child Abduction Legal Resource prepared by the Family Law Section of the Law Council of Australia.

The unauthorised international movement and retention of children gives rise to many difficult and complex issues both under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and otherwise.

The law and practice in this area is in constant change and development in the numerous jurisdictions who are signatories to the Convention, and the removal to and retention of children in non-Convention countries gives rise to manifold difficulties and challenges for the left behind parent.

The Resource brings together a comprehensive collection of helpful and practical information which will enable legal practitioners to assist their clients to navigate all aspects of the issues which accompany international parental child abduction proceedings.

Importantly, the Resource explains the approach to Abduction Convention cases where the inquiry is one limited by Convention rather than a wide ranging 'best interests' inquiry as in parenting cases.

From the perspective of a Judge seeing these cases, better outcomes in almost all respects will be achieved where legal representatives are well informed about the Convention and the jurisprudence, both nationally and internationally, and understand its underpinning.

I commend the Family Law Section on this initiative and recommend the Resource as a vital tool for any lawyer confronted with the challenges of advising appropriately in this often complex and always challenging area.



The Honourable Justice Diana Bryant AO

Chief Justice, Family Court of Australia

July 2015

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The Resource is intended as a guide and does not constitute legal advice. As noted above, the content has been gathered from a wide variety of authors and sources, including the following websites:

- Hague Conference on Private International Law www.hcch.net
- The International Child Abduction Database www.incadat.com
- The Commonwealth Attorney-General's Department www.ag.gov.au
- International Social Service (Australia) www.iss.org.au

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Chapter One

Introduction to the Abduction Convention

Key Points

- Incorporated into Australian law through s111B of the *Family Law Act 1975* and the *Family Law (Child Abduction) Regulations 1986*.
- Operates between Contracting States to provide for the prompt return of a child who has been wrongfully removed from or retained outside their country of habitual residence, and to secure protection for rights of access.
- Applies to any child habitually resident in a Contracting State immediately before any breach of custody or access rights and ceases to apply when the child attains the age of 16 years.
- Relies on the Contracting States adopting expeditious procedures for determining applications brought in reliance upon the Convention.
- Return applications must be made within one year of the child's removal or retention. If beyond 12 months, a court is still required to make a return order if the opposing party has not established that the child is settled in the new environment (subject to exceptions).
- Regulations set out the mechanisms by which applications are brought before and determined by the Australian courts, and outgoing applications are transmitted to overseas Central Authorities.
- Prescribed forms are set out in the Regulations.
- Role of court is to determine whether the Abduction Convention applies and to consider whether a return order ought to be made.
- The applicant, in both incoming and outgoing cases, must establish that the removal or retention is in breach of their rights of custody, and that they would have been exercising those rights but for the wrongful removal or retention.
- If the circumstances meet the necessary provisions of the Regulations, the court must order that the child be returned unless the party opposing return can establish one of a few narrow exceptions.
- Establishing an exception does not mean that the court must refuse to order return of the child, but it enlivens discretion in the court to do so.

Chapter One

Introduction to the Abduction Convention

Scope

The principal object of the Convention, aside from protecting rights of access, is to protect children from the harmful effects of cross-border abductions (and wrongful retentions) by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence. The Convention is based on the presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of the habitual residence will promote his or her interests by vindicating the right of the child to have contact with both parents, by supporting continuity in the child's life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principle of prompt return also serves as a deterrent to abductions and wrongful removals, and this is seen by the Convention to be in the interests of children generally. The return order is designed to restore the status quo that existed before the wrongful removal or retention, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction.¹

Background

- 1 The Convention on the Civil Aspects of International Child Abduction ('the Abduction Convention') was adopted by Member States, including Australia, on 25 October 1980.
- 2 The text of the Abduction Convention is reproduced at **Appendix 1** to this Resource.
- 3 The Abduction Convention is incorporated into Australian law through s111B of the *Family Law Act 1975* ('the Act') and the *Family Law (Child Abduction) Regulations 1986* ('the Regulations').² The text of the Regulations is reproduced at **Appendix 2** to this Resource.
- 4 The Abduction Convention operates between Contracting States (Abduction Convention countries) to provide for the prompt return of a child who has been wrongfully removed from or retained outside their country of habitual residence, and to secure protection for rights of access. A return order provides for the child to be returned to the jurisdiction of their habitual residence, for the determination of parenting matters. It is not in itself a parenting determination.
- 5 At the time of publication, there were 93 Contracting States to the Abduction Convention. A list of the countries in which the Abduction Convention is in force with Australia is provided at **Appendix 3**. However, practitioners should refer to the status table for the Abduction Convention on the Hague Conference website at <http://www.hcch.net> for updates to the list post publication of this Resource.

¹ <http://www.hcch.net/upload/outline28e.pdf>.

² Caution is required in relation to applications concerning ex-nuptial children in Western Australia where Abduction Convention matters are dealt with in the Family Court of Western Australia exercising Federal jurisdiction but applying State procedural and evidential law.

- 6 As Kirby J commented in *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5:

It was out of the recognition of the serious imperfections of previous remedies, of the 'evil' of child abduction, of the growing incidence of the global problem of abduction which had accompanied modern international air transportation and the imperative need for effective international cooperation, that the Convention was framed as it was. Abduction cases were to be clearly identified as constituting a distinct category of cases affecting children. They were to be treated differently from other decisions concerned with the welfare of children.

The Abduction Convention

- 7 The Abduction Convention applies to any child habitually resident in a Contracting State immediately before any breach of custody or access rights and ceases to apply when the child attains the age of 16 years (Article 4).
- 8 In broad terms, the Abduction Convention typically operates where:
- (a) A person, institution or other body³ ('the applicant') in an Abduction Convention country asserts that a child has been removed to or retained in another Abduction Convention country in breach of rights of custody, or access rights.
 - (b) The applicant makes a formal application to their local Central Authority for the return of the child.
 - (c) The local Central Authority ('the requesting Central Authority') transmits the application to the Central Authority in the country to which child was allegedly abducted or in which the child is allegedly retained ('the requested Central Authority').
 - (d) The Requested Central Authority takes steps to locate the child within its country and either:
 - (i) Resolves the issue amicably (the child is voluntarily returned or the application is not pursued); or
 - (ii) Starts Abduction Convention proceedings.
- 9 The preamble to the Abduction Convention records the fundamental motivation of the State signatories:

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions...

- 10 Article 1 sets out the objects of the Abduction Convention in the following terms:

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

³ Almost invariably the Abduction Convention is invoked by a parent but the applicant can be any person, institution or other body that has rights of custody in respect of the child.

- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

11 Article 2 (and again with similar intent in Article 11) provides that:

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

12 The Abduction Convention's objectives are reflected in the Regulations as follows:

1A Purpose

- (1) The Purpose of these Regulations is to give effect to section 111B of the Act.
- (2) These Regulations are intended to be construed:
 - (a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention; and
 - (b) recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and
 - (c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of the convention countries.

13 As the majority of the High Court commented in *De L v Director-General* (above):

... it may be said that the Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access. This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to 'its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case.

14 The 'self-denial' required of Abduction Convention countries is a matter reflected in both the provisions of the Abduction Convention and the Abduction Convention's application.

15 As the majority recorded in *De L v Director-General* (above), drawing from Anton⁴ the Abduction Convention represented a compromise:

Most delegates at The Hague were agreed that, after a wrongful removal to or retention in another country, its courts – in principle at least – should order the return of the child forthwith without entering into the merits of any custody dispute between the parties. Some delegates, indeed, argued that the achievement of the main purpose of the Convention would be imperilled if the door were left even slightly ajar to abductors to justify the new situation of the child by an inquiry in the State to which the child had been abducted into what allocation of custody rights was in the best interests of the child. Other delegates, while accepting that in principle an abducted child should be returned forthwith, considered that in certain cases a departure from this principle might be justified in the interests of the child.

What emerged was inevitably a compromise. It was agreed that a refusal to return the child should not be based on public policy or any analogous general ground. The Convention should rather limitatively enumerate the exceptions which it allowed.

16 The compromise is reflected in other articles of the Abduction Convention including:

- (a) Articles 13 and 20 which provide that a Contracting State is not bound to order the return of a child in certain circumstances (which are incorporated into Australian law by the Act and Regulations as referred to below); and
- (b) Article 19 which provides that a decision under the Abduction Convention concerning the return of a

⁴ *The Hague Convention on International Child Abduction*, International and Comparative Law Quarterly (1987) 537.

child is not to be taken as a determination on the merits as to any custody issue.

- 17 The operation of the Abduction Convention relies upon the Contracting States adopting expeditious procedures for determining applications brought in reliance upon the Abduction Convention.
- 18 Anton⁵ observed that the state of the law (at least in common law jurisdictions) prior to the Abduction Convention was such that an application for the return of a child virtually assured protracted litigation in the search for what was in the best interests of the child, substantially prejudicing the interests of the party seeking the return of the child.
- 19 Anton also observed that some Contracting States have been less enthusiastic than others in embracing the intent and purpose of the Abduction Convention. As Kirby J observed in *De L v Director-General* (above):

When analysed, this reluctance derives not so much from constitutional inhibitions about fundamental rights or judicial power as from a deep seated bias of the courts of common law countries. That bias is in favour of ensuring procedural fairness to all before the courts (including children) and insisting that decisions affecting a child should be especially sensitive to the evaluation by the court in question of the welfare and best interests of that child.
- 20 Recent decisions in some overseas jurisdictions⁶ suggest a degree of movement away from the limited enquiry envisaged by the Abduction Convention to a substantive determination on the merits. In some instances this has gone as far as a 'reversion' to a 'best interests' determination. In the Australian context that does not mean consideration of Part VII of the Act but more in-depth analysis of the exceptions to return discussed in Chapter 6.

The legislative framework in Australia

Family Law Act 1975 (Cth)

- 21 Section 111B of the Act provides:

111B Convention on the Civil Aspects of International Child Abduction

- (1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the *Convention*) but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.
- (1A) In relation to proceedings under regulations made for the purposes of subsection (1), the regulations may make provision:
 - (a) relating to the onus of establishing that a child should not be returned under the Convention; and
 - (b) establishing rebuttable presumptions in favour of returning a child under the Convention; and
 - (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.

⁵ Note 4, *supra*.

⁶ See *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122 which was a decision of the European Court of Human Rights. This was commented upon in the UK case in *re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC and clarified in obiter in *Re S (a Child)* [2012] UKSC 10.

- (1B) The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports strength of feeling beyond the mere expression of a preference or of ordinary wishes.
- (1C) A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the Convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.
- (1D) A Central Authority may do so despite any orders made by a court before the child's return to Australia.
- (1E) Any regulations made for the purposes of this section to give effect to Article 21 (rights of access) of the Convention may have effect regardless of:
 - (d) whether an order or determination (however described) has been made under a law in force in another Convention country (within the meaning of the regulations made for the purposes of this section), with respect to rights of access to the child concerned; or
 - (e) if the child was removed to Australia — when that happened; or
 - (f) whether the child has been wrongfully removed to, or retained in, Australia.
- (2) Because of amendments of this Act made by the *Family Law Reform Act 1995*:
 - (a) a parent or guardian of a child is no longer expressly stated to have custody of the child; and
 - (b) a court can no longer make an order under this Act expressed in terms of granting a person custody of, or access to, a child.
- (3) The purpose of subsection (4) is to resolve doubts about the implications of these changes for the Convention. That is the only purpose of the subsection.
- (4) For the purposes of the Convention:
 - (a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
 - (b) subject to any order of a court for the time being in force, a person:
 - (i) with whom a child is to live under a parenting order; or
 - (ii) who has parental responsibility for a child under a parenting order;
 - should be regarded as having rights of custody in respect of the child; and
 - (c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or longterm care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and
 - (d) subject to any order of a court for the time being in force, a person:
 - (i) with whom a child is to spend time under a parenting order; or
 - (ii) with whom a child is to communicate under a parenting order;
 - should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

- (5) Subsection (4) is not intended to be a complete statement of the circumstances in which, under the laws of the Commonwealth, the States and the Territories, a person has, for the purposes of the Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child.
- (5A) Subsections (1A) and (2) to (5) do not, by implication, limit subsection (1).
- (6) Expressions used in this section have the same meaning as they have in Part VII.

22 In *McCall and State Central Authority; Attorney-General (Cth) (Intervenor)* (1995) FLC 92-551 the Full Court of the Family Court of Australia concluded that s111B of the Act was a valid exercise of the external affairs power, and an application for special leave to appeal that decision was refused.

Family Law (Child Abduction) Regulations 1986

- 23 The Regulations set out, *inter alia*, the mechanisms by which applications are brought before and determined by the Australian courts and outgoing applications are transmitted to overseas Central Authorities, and prescribe template forms for such applications (see **Appendix 2**).
- 24 In *De L v Director-General* (above) the High Court majority considered earlier decisions of the Family Court of Australia, confirming that:

The Regulations reflect the objects of the Convention to settle issues of jurisdiction between the Contracting States by favouring the forum which has been the habitual residence of the child. The underlying premise is that, once the forum is located in this way, each Contracting State has faith in the domestic law of the other Contracting States to deal in a proper fashion with matters relating to the custody of children under the age of 16. Necessarily, proceedings under the Regulations are to be seen as standing apart from [proceedings relating to the custody, guardianship or welfare of, or access to, a child. It follows that they are not subject to the paramountcy principle.

This discussion by the High Court (above) appears to put beyond doubt any suggestion that the Regulations are other than valid.

- 25 Essentially, the court's role pursuant to the Regulations is to determine whether or not the Abduction Convention (through the Regulations) applies, and, if so, (and if raised) to consider whether an order for return ought to be made or refused on the basis of the limited exceptions set out in the Regulations, if raised by the person opposing return.
- 26 In broad terms, the Regulations require an order for return to be made where:
- (a) An application is brought within 12 months of the child's removal or retention (regulation 16(1), subject to regulation 28);
 - (b) The person or entity seeking return had and was exercising 'rights of custody';
 - (c) The court is satisfied that the child's removal or retention was wrongful (regulation 16(1A)); and,
 - (d) No 'exception to return' is made out pursuant to regulation 16(3).

Key aspects of the Regulations

Age of child

- 27 Regulation 2 defines a child as 'a person who has not attained the age of 16 years'. Article 4 of the Abduction Convention provides that the Convention 'shall cease to apply when the child attains the age of 16 years'.
- 28 Regulation 16(1)(a) provides as 'threshold' requirements that an application for the return of a child must have been made within one year of the child's removal or retention and that the removal or retention was wrongful. Consistent with regulation 2, such application can only be made before 'the child' attains 16 years of age.
- 29 Regulation 16(1A)(a) of the Regulations provides that a child's removal or retention will be wrongful if *inter alia* 'the child was under 16'.

Applications more than one year after removal or retention

- 30 In the event that an application is filed more than 12 months after the day upon which the child was removed to or retained in Australia, Subregulation 16(2)(c) provides that a court is required to make a return order if the opposing party has not established that the child is settled in the new environment. This is, of course, also subject to any exceptions to return that might also be raised by the person opposing return (see Chapter 6).
- 31 The person opposing return bears the onus of establishing that the child is settled in their new environment. In *Graziano v Daniels* (1991) FLC 92-212 the Full Court followed United Kingdom authority in considering that the test of 'settled' requires more than that the child is happy, secure and adjusted to his surrounding circumstances. However, this formulation was overruled by a different Full Court in *Director-General, Department of Community Services and M & C* (1998) FLC 92-829.
- 32 In *Townsend & Director-General, Department of Families, Youth and Community Care* [1999] FamCA 285 Full Court subsequently said (at 35):

... [I]nsofar as *Graziano* suggests that the test for whether a child is 'settled in his or her environment' requires a degree of settlement which is more than mere adjustment to surroundings, or that the word 'settled' has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law. We agree with the Full Court in *M and C* ... that 'The only test to be applied, is whether the children have settled in their new environment'.

Rights of custody

- 33 The applicant, in both incoming and outgoing cases, must establish that the removal or retention is in breach of their rights of custody, as defined in Regulation 4 as follows:
- 4(1) For these Regulations, a person, institution or other body has rights of custody in relation to a child if:
- (a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and
 - (b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in Australia or in the convention country in which the child habitually resided immediately before his or her removal or retention.
- (2) For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.
- (3) For the purposes of this regulation, rights of custody may arise:
- (a) by operation of law; or
 - (b) by reason of a judicial or administrative decision; or
 - (c) by reason of an agreement having legal effect under a law in force in Australia or a convention country.
- 34 The applicant, or the Central Authority on their behalf, must establish that the applicant had rights of custody in respect of the child immediately preceding their removal to or retention in Australia.
- 35 It is the law of the country in which the child is found to be habitually resident that determines whether a parent has rights of custody for the purpose of the Regulations. In *Wenceslas and Director-General, Department of Community Services* [2007] FamCA 398,

the majority held that the court must have regard to the law of the Abduction Convention country in which the child was habitually resident immediately before the removal in determining whether a person had a 'right of custody' (citing McCall above at 91 and 113).

- 36 Section 111B(4) of the Act sets out when a person is to be regarded as having rights of custody in Australia. When a child is wrongfully removed from Australia, a person, institution or other body will have rights of custody in the following circumstances:
- (a) If there is no court order, they have parental responsibility under s61C of the Act and therefore could determine where a child resides.
 - (b) They have parental responsibility for a child under a parenting order.
 - (c) A child lives with them under a parenting order.
 - (d) They have responsibility for the welfare, day-to-day or long-term care of the child under any other Australian law (e.g. by way of guardianship order).
- 37 In respect of *ex-nuptial* children in Western Australia, rights of custody will be conferred by s69 of the *Family Court Act 1997* (WA).⁷
- 38 As to rights of custody in Abduction Convention countries other than Australia, in *Secretary, Attorney-General's Department and TS* [2000] FamCA 1692 Nicholson CJ (at 63) referred to and adopted a line of English authority finding that the phrase 'rights of custody' is to be interpreted with regard to its purpose and given the 'widest sense possible'.
- 39 A court may be an 'institution or other body' for the purposes of Article 3, where there are proceedings pending for parenting orders including a determination as to rights of custody: see *Re: W; Re B (Child Abduction: Unmarried father)* [1998] 2 FLR 146. In *Brown and Burke* [2007] FamCA 1421 Murphy J said (at 97):
- The basis of a court's 'rights of custody' is, in my view, the capacity vested in a court, once a relevant, lawful and regular application is made, to make orders determining the place of residence of the child (or precluding one party from making that decision without agreement of the other).
- 40 An example of the importance of establishing rights of custody, and a breach thereof, is the decision in *Jiang and Director-General, Department of Community Services* [2003] FamCA 929. In that case, the Full Court refused to return a child to Georgia USA on the basis that the abducting mother had an order that gave her 'sole physical custody'. Even though the father had 'joint legal custody', under the law of Georgia the father had no more than a right to be consulted as to the residence of the child and this did not amount to 'rights of custody' under the Abduction Convention because the father could not determine where the child could live.
- 41 At the time of the wrongful removal or retention, it must be shown that the person with rights of custody was exercising his or her or its rights of custody or would have been exercising those rights but for the wrongful removal or retention.
- 42 The Central Authority will attach to the application copies of any court orders and an affidavit of applicable law that cites legislation to establish the rights of custody. If there

⁷ Western Australia has never referred its powers in relation to *ex-nuptial* children to the Commonwealth and as a consequence parenting matters in relation to such children is dealt with by the State Courts under State legislation.

is any ambiguity, the applicant may be asked to obtain a declaration of wrongful removal from authorities in the jurisdiction from which the child was removed or retained, as provided in Article 15 of the Abduction Convention.

Exceptions to return

- 43 If the requesting Central Authority can bring the circumstances within the provisions of the Regulations, the court must order that the child be returned unless the party opposing return can establish one of a few narrow exceptions. Establishing an exception does not mean that the court must refuse to order return, but it enlivens discretion in the court to do so.
- 44 For a detailed discussion about exceptions to returns, please refer to Chapter 6.

Chapter Two

The Role of the Central Authority

Key Points

- Central Authorities are appointed by each Contracting State to carry out that State's obligations under the Abduction Convention.
- The Australian Central Authority is the Secretary of the Commonwealth Attorney-General's Department.
- Australia has also appointed Central Authorities in each State and Territory, which have all the duties, and are empowered to exercise all the powers and functions, of the Australian Central Authority. The State and Territory Central Authorities are usually located in either the relevant child welfare department or police department.
- A Central Authority does not act on behalf of the person who has instigated the request for the return of a child, wrongfully removed or retained.
- Australia's Central Authorities:
 - Cooperate with each other to secure the prompt return of children.
 - Assist the court in the proper application of the Regulations.
 - Put before the court all available evidence that is relevant to the determination, regardless of whether such evidence assists the position of the respondent or the person who has requested the assistance of the Central Authority.
- The Central Authority's interests ceases upon fulfilment of Australia's obligations pursuant to the Abduction Convention.

Chapter Two

The Role of the Central Authority

- 1 Each Contracting State appoints a Central Authority to carry out its obligations under the Abduction Convention. The Australian Central Authority is the Secretary of the Commonwealth Attorney-General's Department (www.ag.gov.au).
- 2 Regulation 8 empowers the Commonwealth Attorney-General to appoint Central Authorities in any State or Territory, which under regulation 9 then have all the duties, and are empowered to exercise all the powers and functions, of the Commonwealth Central Authority.
- 3 In Australia, the Secretary of the Commonwealth Attorney-General's Department is the point through which all applications under the Abduction Convention are made by overseas Central Authorities to Australia or by Australia to overseas Central Authorities.
- 4 Each Australian State and Territory has appointed a Central Authority, which in most instances is located in either the relevant child welfare department or police department.
- 5 The location and contact details, at time of publication, of the Australian Commonwealth Central Authority and all State and Territory Central Authorities are provided at **Appendix 4** to this Resource. Practitioners should also check for updates to this list at the Abduction Convention website: <http://www.hcch.net>.
- 6 The Central Authority, in the Australian context, does not act on behalf of the person (usually a parent) who has instigated the request for the return of a child, wrongfully removed or retained, under the Abduction Convention. Further, the Central Authority is not charged with acting in furtherance of the interests of such a person.

Obligations of Central Authority

- 7 The Abduction Convention provides in Article 6 that each Contracting State shall '*designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities*'. Article 7 provides that Central Authorities shall '*cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention*'. Article 7 then proceeds to particularise certain obligations of Central Authorities including relevantly:
 - e to provide information of a general character as to the law of their State in connection with the application of the Convention;
 - f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
 - g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers.

Role of Central Authority

8 In 2003, the *Hague Conference on Private International Law* noted that:

The role of the Central Authorities in providing or facilitating the provision of legal aid and advice varies considerably. Various practices of Central Authorities include:

- 1 information provided on methods of obtaining legal aid and advice, and options for assistance;
- 2 applications for legal aid are facilitated;
- 3 referral to reduced fee or pro bono lawyer(s);
- 4 representation by the Central Authorities or State Attorneys;
- 5 return proceedings are free of cost;
- 6 legal costs are met by Central Authorities or Legal Aid Offices.⁸

9 In furtherance of, and consistent with, Australia's obligations pursuant to the Abduction Convention, the Regulations provide relevantly:

- (a) In Regulation 2(1), that 'Central Authority' has the meaning it has in the Abduction Convention;
- (b) In Regulation 5 (and in respect of 'State' Central Authorities in regulation 9), and in broad terms, for the duties, power and functions of the Central Authority;
- (c) In Regulation 6, that the Regulations do not prevent another person, institution, or other body with rights of custody, from making application to a court and do not prevent the court from making an order under Part VII of the Act;
- (d) In Regulation 11, and in the context of the obligations of the Central Authority where a child has been removed from Australia, that the Central Authority '*must, on behalf of the person, institution or other body [who claims wrongful removal/retention], take any action required to be taken by a Central Authority under the Convention*'; and,
- (e) In Regulation 13, that where a complying request has been received in accordance with the Abduction Convention, the Central Authority '*must take action to secure the return of the child*'.

The Australian Context

10 The Australian courts have considered the role of the Central Authority in a number of contexts, with not entirely consistent results.

11 In *McOwan* [1993] FamCA 130 Kay J (at first instance) considered the role of the Central Authority and found (at 46) that:

The provisions of the Hague Convention appear however to limit the role of the Central Authority to securing the safe return of the child, and for making arrangements for organising or securing the effective exercise of rights of access (see Article 7).

12 In *Panayotides* [1996] FamCA 135 Fogarty and Baker JJ (in the Full Court) considered the nature of applications brought by the Central Authority under an earlier version of the Regulations. Having outlined the possible methods by which an application pursuant to the then Regulations might be brought, their Honours considered that:

⁸ "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice", Hague Conference on Private International Law, Permanent Bureau, The Hague, 2003.

- (a) It was unsatisfactory for the Central Authority to commence proceedings in its name against both abducting and non-abducting persons when, in doing so, brings proceedings '*on behalf of the non-abducting party*';
 - (b) The usual method in Australia is to bring proceedings by and in the name of the Central Authority, with the abducting person as respondent, and in so doing '*it does so on behalf of*' the non-abducting person with '*no other interest in that case aside from carrying out its statutory duties and generally to see that the scheme works satisfactorily*'; and
 - (c) This method is to be distinguished from that then adopted in the United Kingdom, United States and New Zealand where proceedings are usually brought by the Central Authority, but in the name of the requesting party.
- 13 It is noted that in *Panayotides* (above), their Honours considered that any difficulties encountered in a subsequent appeal by a person who is not party to the original proceedings, including as to applications to adduce evidence and complaints about the conduct of the trial:

... could largely be overcome in individual cases by, for example, refusing to admit as fresh evidence material which could have been called by the Authority or refusing to entertain (other than in special circumstances) grounds of appeal which challenge the manner in which the proceedings were conducted by the Authority on behalf of the non-abducting party.

- 14 In *Laing and The Central Authority* [1999] FamCA 100 Kay J (as part of a Full Court) commented under the heading '*Special duties of the Central Authority*' (at 106):

There is weight in the submission that the Central Authority needs to act to some degree as an honest broker. Its role may be likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but to implement the requirements of the Convention. The duties of the Central Authority are more particularly described in Reg. 5...

If in implementing the requirements of the Convention it obtains the return of a child who ought to be returned then it is carrying out its function. **If it draws to the Court circumstances which might lead the Court to make an order other than the return of a child then it is also carrying out its function.** [Emphasis added]

- 15 Nicholson CJ in *Laing* (above) reasoned that an even higher obligation was reposed in the Central Authority, considering (at 64-65) that:

... organisations comparable to the Central Authority here are State and Territory child protection services, or, for example, to look to other jurisdictions, prosecutors in criminal matters and government departments in freedom of information applications.

In my view, the repeat involvement of such organisations in forensic disputes places them in a circumstance of greater awareness of decisions which are material to their routine work. That awareness brings responsibilities. In matters of law, the playing field is not even when repeat organisational players are in dispute with a party who lacks a similar familiarity to be informed and lacks the organisationally vested responsibility to be vigilant for the effect of decisions as to the law in the area of their mandate. I would therefore place at a more stringent level than Kay J, the obligation upon the Central Authority as to the applicable regulations and the question of preventing a perfected order discussed below.⁹

⁹ The reasons of each of Nicholson CJ and Kay J were adopted by the Court in *P v Commonwealth Central Authority* [2000] FamCA 461.

16 The issue of the role of the Central Authority was also the subject of some consideration by the Full Court in in *Re F (Hague Convention: Child's Objections)* [2006] FamCA 685. In that decision, Bryant CJ, Kay and Boland JJ considered that:

80. The State Central Authority is charged with the obligation to do anything that is necessary to enable the performance of the obligations of Australia under the Convention (Regulation 5(1) (a)). In our view not only does that obligation extend to the requirement to facilitate the return of a child where such an order has been made, but it also requires the Central Authority to actively partake in proceedings brought by it under the Regulations and to assist the Court in determining the proper application of the Regulations to the facts of any one case.

17 In *State Central Authority and Tirzsa* (No 3) [2008] FamCA 206, Guest J proceeded on the basis of the Central Authority's stated position, with which His Honour agreed, that it did not act for the requesting parent in that case.

18 Drawing all of the above together, it appears that the role of the Central Authority in proceedings pursuant to the Regulations is to:

- (a) Do that which is necessary to enable performance of Australia's obligations pursuant to the Abduction Convention;
- (b) To assist the court in the proper application of the Regulations to the particular facts of any case; and
- (c) Put before the court all available evidence which is relevant to the determination, regardless of whether such evidence assists the position of the respondent or the person who has requested the assistance of the Central Authority;

but in so doing, the Central Authority does not act on behalf of the person requesting the assistance of the Central Authority (whether directly or through an overseas Central Authority).

19 The consequence of such a conclusion is that, notwithstanding that there may often be some commonality between the interests of the person requesting the assistance of the Central Authority and the interests of the Central Authority, such interests are not necessarily the same, nor co-extensive, nor without conflict (and diverge at least at the point where the Central Authority's interests cease upon fulfilment of Australia's obligations pursuant to the Abduction Convention).

Chapter Three

The Australian Process for Return Applications

Key Points

- Any person, institution or other body with rights of custody in relation to a child for the purpose of the Abduction Convention may be an applicant.
- A Central Authority and/or a relevant person may apply for a return order. Careful consideration should be given before a person decides to become a party to proceedings in which the Central Authority is the applicant for a return order.
- A Central Authority has beneficial evidentiary privileges (see Regulation 29).
- The hearing may be conducted on the papers.
- Applications for the return of a child should be dealt with expeditiously.
- Outgoing cases (child removed from or retained outside of Australia):
 - An applicant can contact a private practitioner, or International Social Service Australia which is a free service funded by the Australian Government, for assistance in completing an application to the Commonwealth Central Authority.
 - If an application meets the Abduction Convention requirements, the Commonwealth Central Authority sends the necessary documents to the overseas Central Authority.
 - Applications rejected by the Commonwealth Central Authority are subject to administrative review.
 - An applicant may also apply directly to the overseas Central Authority or overseas court.
 - Unless resolved by agreement, the overseas Central Authority may institute proceedings, or may refer the applicant to a lawyer who may institute proceedings in an appropriate overseas court seeking the return of the child to Australia.
 - The Commonwealth Central Authority cannot provide legal advice to the applicant.
- Incoming cases (child removed to or retained in Australia):
 - An application is usually made to the Central Authority in the country in which the child was habitually resident. Applications can also be made directly to the Commonwealth Central Authority or an Australian court.
 - The overseas Central Authority sends the application to the Commonwealth Central Authority.
 - If an application meets the requirements of the Abduction Convention, the Commonwealth Central Authority may transfer the matter to the State Central Authority.
 - Applications rejected by the Commonwealth Central Authority are subject to administrative review.
 - An applicant may also choose to commence proceedings directly with an Australian court.
 - The State Central Authority will take steps to locate the child or the person with possession of the child.
 - Unless resolved by agreement, the State Central Authority may file an application seeking the return of the child to the overseas country.

Chapter Three

The Australian Process for Return Applications

Who is the applicant?

- 1 In 2004 the Regulations¹⁰ were amended to provide that ‘any person, institution or other body that has rights of custody in relation to a child for the purpose of the Convention’ may be an applicant. This altered the previously held position of the Full Court in *A (by her next friend) and GS and Ors* [2005] FamCA 785 that only the Central Authority could be an applicant for an order for return of a child.
- 2 Thus both a Central Authority and/or a relevant person may apply for an order for return. Similarly, and as a consequence of Rule 22.04 of the *Family Law Rules 2004*, an appeal from a decision on an application pursuant to the Regulations may be pursued by the Central Authority and/or a relevant person – provided they are a person who is directly affected by the orders the subject of the appeal.
- 3 It is as yet unresolved by the courts as to whether both the Central Authority and another person or entity could be concurrent applicants for return orders, although the Full Court in *Harris and Harris* [2010] FamCAFC 221 (at 24) expressed the tentative view that Regulation 14 does not support the concept of concurrent applications. However, the Full Court, in *obiter*, suggested that there was no evident reason why a person could not seek to intervene in proceedings commenced by a Central Authority or (with the consent of the Central Authority) be substituted as applicant.
- 4 There are potentially significant consequences for a person who is not party to proceedings that are conducted by a Central Authority seeking an order for the return of a child, including in respect of:
 - (a) The scope of that person’s representation (if any) in the proceedings;
 - (b) The rights of that person in respect of the conduct of the proceedings and the extent to which they are to be bound by the conduct of the proceedings, including on any appeal; and
 - (c) The findings which may be made in the course of determining the application for the return order, including any findings adverse to that person.
- 5 Before deciding to become a party to the proceedings, such a person would need to carefully consider a number of matters including:
 - (a) The absence of any beneficial evidentiary provisions being available (see below in relation to Regulation 29, which is only applicable to proceedings in which the Central Authority is applicant);
 - (b) The inference which a court may draw as a result of the absence of any involvement by the Central Authority: see for example *Harris* (above); and,

¹⁰ See Regulation 14 in conjunction with Regulation 6 of the Regulations.

(c) The costs consequences, particularly in the event of failure.

- 6 In *S Hanbury-Brown and R Hanbury-Brown v Director General of Community Services (Central Authority)* [1996] FamCA 23, in the context of determining an application for costs, the Full Court considered that the mother (the requesting party) had made herself liable for costs ‘by effectively intervening in and taking an active role in these proceedings independently of the Central Authority which was, in any event, acting in her interests and at her behest’ (at 7.4).

Evidence adduced at the hearing

- 7 Regulation 29 specifically operates in relation to proceedings pursuant to the Regulations in which the Central Authority – as opposed to any other person – is the applicant. The Regulation permits, notwithstanding the *Evidence Act 1995*, evidence to be adduced:
- (a) By affidavit from a witness who resides outside Australia, even if that person does not attend for cross-examination;
 - (b) By attaching any document to the application or request for return, the contents of that document then being evidence as to the facts stated therein; and,
 - (c) In the form of a statement as to evidence taken in any proceedings in relation to the custody of a child or pursuant to the Abduction Convention in an Abduction Convention country.
- 8 In *Director-General, Department of Human Services and Harries* [2010] FamCA 1129, Le Poer Trench J considered (at 145-146) that:

The clear purpose of regulation 29 is to avoid difficulty with evidence being received from a party or entity in the Convention Country which has instigated the request for the Convention to be invoked ...

The Regulation creates an uneven playing field in relation to the applicant and respondent to proceedings under the regulations. In the administration of justice in Australia that is a most unusual provision. This is a Court of law in which justice is to be dispensed. While understanding the reason behind the wording of Regulation 29, the Court, in my view, needs to ensure that the regulation is not used in a manner which was clearly not intended.

- 9 With the exception of Regulations 29(5) and (6), and as His Honour proceeded to observe, the Regulation only addresses the issue of admissibility. It does not constrain or direct the manner in which the court is to take the evidence into account, including the weight to be ascribed (or otherwise) to such evidence.

The conduct of the hearing

- 10 It was once the accepted position ‘that in most cases arising under the Convention, cross-examination of deponents to affidavits is not appropriate’: see *Gazi* (1993) FLC 92-341 and *Hanbury-Brown* (above).
- 11 In *Director-General, NSW Department of Community Services and JLM* (2001) FLC 93-090, Ellis, Coleman and Joske JJ recognised, however, (at 147) that:

The Full Court has considered the question of cross-examination of deponents of affidavits in relation to applications made pursuant to the Regulations on a number of occasions; see *Gazi and*

Gazi (1993) FLC 92-341, *Hanbury-Brown and Hanbury-Brown; Director General Community Services* (1996) FLC 92-671 and *PCR and BEM* [2001] FamCA 136. As Kirby J. observed in *De L v Director-General Department Community Services (NSW)* [1996] HCA5 187 CLR 640 at 690, a judge of the Family Court enjoys a wide discretion in the procedures to be adopted in such applications but that discretion is not so large as would defeat the attainment of the objectives of the Convention and Regulations. Notwithstanding the speedy process and summary procedure envisaged by the Regulations, **in appropriate cases, cross-examination of the deponents of affidavits and the hearing of oral evidence should not only be permitted but may well be essential in the interests of justice.** [emphasis added]

- 12 In *De L v Director-General Department of Community Services NSW* [1996] HCA 5, the majority considered that:

Prompt listing for hearing is one thing; an over-hasty and insufficient hearing is another. That point is made in the concluding terms of reg 15(2) set out above. Further, there may be cases where, consistent with those precepts, some, even if restricted, cross-examination upon affidavits is appropriate to assist the court to reach a decision whether to refuse an order for the return of the child.

- 13 Such an approach is also adopted in other jurisdictions. For example, in the United Kingdom the Court of Appeal has considered that a trial judicial officer ought to have considered of his own motion allowing oral evidence where it was conceived that oral evidence might be determinative of the case: *Re W (A Child)* [2004] EWCA Civ 1366; [2005] 1 FLR 727.

- 14 In Canada, the Court of Appeal for Ontario considered in *Katsigiannis v Kottick-Katsigianni* [2001] OJ No1598 (QL) that if credibility was a serious issue, courts should consider hearing *viva voce* evidence of witnesses whose credibility is in issue: see similar considerations by that court in *Korutowska-Wooff v Wooff* 2004 CanLII 5548 (ON CA), (2004), 5 RFL (6th) 104 (QL). In *CV v LMAD*, 2009 PESC 26, Justice Kenneth R MacDonald of the Prince Edward Island Supreme Court considered that:

In a case where the issue must be decided on questions of fact it is imperative that the parties be subject to cross-examination. As stated there are numerous questions of fact to be determined. There is the question of the child's habitual residence to be decided on all the circumstances. There is the question of the length of time the child has been in Prince Edward Island. There is a question of acquiescence by the applicant to the removal of the child.

- 15 In South Africa, the Supreme Court of Appeal in *Central Authority v H* 2008 (1) SA 49 (SCA) considered a case where neither party had applied for oral evidence to be heard so the matter had to be decided on the basis of uncontested evidence. Their Honours ruled that notwithstanding the position of the parties, in such disputes it might be necessary to have recourse to oral evidence if there was no other way of deciding the issue.
- 16 Whilst the Full Court in *Harris* (above) rejected the contention, it has been argued that the High Court in *MW v Director-General, Department of Community Services* [2008] HCA12 has gone so far as to impose at least some form of obligation upon the court to require cross-examination in certain cases. Gummow, Heydon and Crennan JJ said (at 42-44):

Much of the affidavit evidence dealt with disputed issues of fact and alleged fact (particularly relating to domestic violence between the parents) which are not immediately relevant to the factual and legal issues which are still in dispute in this Court. These include the issue whether the appellant was living with the father as a *de facto* partner at the time of the birth of the child. It is unfortunate that the answer to such a question does not more readily appear on the evidence.

Both at first instance and in the Full Court much attention was given to what were said to be discrepancies in the affidavit evidence of the appellant which bore upon this issue. Perceived weaknesses in her account were relied upon to strengthen the positive case for a conclusion of wrongful removal or retention of the child which it was for the Authority to establish.

The deficiencies in the appellant's affidavit evidence would not have been left for textual analysis had one of several courses been followed. Upon application, **or at the initiative of the Family Court itself**, the proceedings may have been adjourned for the prompt provision of more adequate affidavit evidence. Leave may have been sought by the Authority for the cross-examination of the appellant. (emphasis added)

The hearing

- 17 The hearing may be conducted on the papers, however sometimes oral evidence is given and, as the High Court said in *MW v Director-General* (above), requirements that applications for the return of a child be dealt with expeditiously does not give rise to any general or inflexible rule that prohibits cross-examination of deponents of affidavits.
- 18 The Full Court recently stated in *Zotkiewicz & Commissioner of Police (No2)* [2011] FamCAFC 147 (at 94):

In many cases, the court will be able to deal with the matter adequately on the basis of affidavit evidence – looking for common ground, noting the areas of conflict and weighing the probabilities. However, there are a range of cases where such an approach will be inadequate.

- 19 The way is cleared for an expeditious hearing by the special evidentiary regime provided by Regulation 29 (identified above), which facilitates a hearing on the papers by making the contents of and annexures to the Central Authority's application admissible as evidence of the facts stated therein; and providing relief from the general requirements in relation to the authentication of court records and evidence of the law in another Abduction Convention country.

Outline of steps under the Regulations

Where child removed from or retained outside Australia (outgoing cases)

- 20 Where it is alleged that the child was removed from or retained outside Australia:
- (a) The applicant can contact International Social Service (Australia) with offices based in Sydney and Melbourne and they will assist with the preparation of an application, either in person or by telephone, when appropriate. This is a free service funded by the Australian Government and is discussed in more detail in Chapter 14. Alternatively, they can seek assistance from a private lawyer (see Chapter 18), but in doing so they have to pay for those services. The completed Form 1 application (see **Appendix 2**) and supporting evidence, usually in the form of an affidavit, is then sent to the Commonwealth Central Authority.
 - (b) The Commonwealth Central Authority is the point from which all applications under the Abduction Convention leave Australia, unless an applicant chooses to make an application under the Convention directly to the overseas Central Authority or to the overseas Court, without the involvement of the Commonwealth Central Authority.
 - (c) The Commonwealth Central Authority considers whether the application meets the requirements of the Abduction Convention, and may request further information if necessary.

- (d) If satisfied that the application meets the requirements of the Abduction Convention, the Commonwealth Central Authority prepares an affidavit as to rights of custody under Australian law and (after translating the application, if necessary) sends the application to the Central Authority of the Abduction Convention country to which the child is alleged to have been removed or in which the child is alleged to have been retained.
- (e) If the Commonwealth Central Authority is not satisfied that the application meets the requirements of the Abduction Convention, the application will be rejected. An applicant has the right to seek review of the decision or may consider applying directly to the Overseas Central Authority or overseas court, where this is possible.
- (f) Depending on the particular country, once the child or the person with possession of the child is located, an attempt may be made to resolve the issue by agreement.
- (g) Unless resolved, the overseas Central Authority may institute proceedings in an appropriate overseas court seeking the return of the child to Australia. The progress and conduct of the matter is entirely subject to the legal and administrative processes of the overseas jurisdiction.
- (h) The Commonwealth Central Authority will monitor and advise the applicant on the progress of the matter in the overseas jurisdiction and provide an avenue of communication between the overseas Central Authority and the applicant, passing on requests for further information and responses from the applicant or overseas jurisdiction.
- (i) The Commonwealth Central Authority cannot provide legal advice to the applicant.
- (j) For an Australian applicant, a key issue will be how the litigation in the country in which the child has been retained or taken to will be funded. This varies between countries and in some instances the role of the overseas Central Authority is limited to assistance in locating a practitioner to act for the applicant. Financial assistance may be available (refer Chapter 13).
- (k) If the litigation in the country to which the child has been removed or retained is funded by the overseas jurisdiction, an Australian applicant may also wish to consider obtaining legal assistance in Australia to help them with any additional affidavits or further evidence that might be requested by the overseas jurisdiction. Financial assistance is not available for the costs of these services, and the applicant may wish to apply for Legal Aid or seek the assistance of a community legal centre or a private lawyer. International Social Service (Australia) may also be able to assist, however this service may attract a fee.

Where child removed to or retained in Australia (incoming cases)

21 Where it is alleged that the child was removed to or retained in Australia:

- (a) The person with the rights of custody who is alleging the child was removed to or retained in Australia makes an application to the Central Authority of the Abduction Convention country, in which the child was habitually resident, before their removal to or retention in Australia (although applications can also be made directly to the Commonwealth Central Authority, or under Regulation 14(1)(b)).

- (b) The overseas Central Authority sends the application to the Commonwealth Central Authority.
- (c) If satisfied that the application meets the requirements of the Abduction Convention, the Commonwealth Central Authority may transfer the matter to the appropriate State Central Authority, or may conduct the matter directly. The Commonwealth Central Authority may request further information from the overseas Central Authority, or the applicant, before taking these steps.
- (d) If the Commonwealth Central Authority is not satisfied that the application meets the requirement of the Abduction Convention, the application will be refused. An applicant may choose to seek review of this decision in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.
- (e) If transferred to a State Central Authority, that Authority will assess the application and, if appropriate, take steps to locate the child or the person with possession of the child.
- (f) Either prior to or upon locating the child, the State Central Authority may, if appropriate, file an application in a Family Court seeking the return of the child and, if appropriate, urgent *ex parte* orders to prevent the further removal of the child and directions for service and a short return date.
- (g) On the next return date, service is proved and if the matter is or may be defended, directions are made for filing of further materials by the respondent and the applicant and a final hearing including, if necessary, an order for a Report (typically from a Family Consultant¹¹). Under s68L(3) of the Act, an Independent Children's Lawyer is only appointed '*if the court considers there are exceptional circumstances that justify doing so*' (refer Chapter 7).
- (h) The proceedings are listed for final hearing as soon as practicable, usually for one day.
- (i) The proceedings are determined by orders for return or dismissal.

Requirement for expedited determination

22 Subregulation 15(2) relevantly provides:

- (2) A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.

23 Albeit not directly a matter for the trial judicial officer, the intent of that provision is reflected in subregulation 15(4):

If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is filed:

- (a) the responsible Central Authority or Article 3 applicant who made the application may ask the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and
- (b) as soon as practicable after being asked, the Registrar must give the statement to the responsible Central Authority or Article 3 applicant."

¹¹ Regulation 26.

Stays of domestic proceedings

- 24 Regulation 19 precludes the court from making orders (other than interim orders) for guardianship, long-term care or responsibility for living arrangements until any return application has been determined. This reflects the requirements of Article 16 of the Abduction Convention that after receiving a notice of wrongful removal or retention the courts of the Contracting State to which the child has been removed or retained shall not decide on the merits of rights of custody unless it determines that the child is not to be returned under the Abduction Convention or the application for return is not lodged within a reasonable time.
- 25 If Part VII (of the Act) proceedings, have been filed, the Central Authority, as appropriate, will notify the court that the Abduction Convention application has been filed or is likely to be filed soon. That will result in the Part VII proceedings being stayed until the Abduction Convention application has been dealt with.

Stays of foreign proceedings

- 26 If an Australian applicant has been served with foreign custody proceedings, they should notify the Commonwealth Central Authority who will notify the foreign Central Authority or Court on their behalf and request a stay of those proceedings pending the outcome of the Abduction Convention application.

Chapter Four

Retention and Removal of Children

Key Points

- In establishing that a removal or retention is wrongful, it is essential that the applicant establishes the existence of a right of custody and that the removal or retention was in breach of that right.
- An abduction is construed as a 'removal' where the applicant alleges that the child was removed from the country of habitual residence without their consent and in breach of their rights of custody.
- An abduction is construed as a 'retention' where an abducting party has removed a child from the country of their habitual residence with the consent of the applicant for a distinct period of time, and the applicant alleges that the child was then retained outside their habitual residence beyond the period of consent or without ongoing consent, in breach of their rights of custody.

Chapter Four

Retention and Removal of Children

- 1 If a child is in Australia and the subject of return proceedings under the Abduction Convention, it will be due to their alleged wrongful removal to or retention in Australia.
- 2 In *S Hanbury-Brown and R Hanbury-Brown v Director General of Community Services (Central Authority)* [1996] FamCA 23, the Full Court considered that the terms ‘removal’ and ‘retention’ must be construed in the context of the entire Abduction Convention. The court held that ‘removal’ is intended to convey the concept of physical movement of a child from one Contracting State to another, and ‘retention’ is intended to convey the concept of retention in one State as against another. An abduction is construed as a ‘removal’ where the applicant alleges that the child was removed from the country of habitual residence without their consent and in breach of their rights of custody. Alternatively, an abduction is construed as a ‘retention’ where an abducting party has removed a child from the country of their habitual residence with the consent of the applicant for a distinct period of time, and the applicant alleges that the child was then retained outside their habitual residence beyond the period of consent or without ongoing consent, in breach of their rights of custody.
- 3 In *MW v Director-General, Department of Community Services* [2008] HCA 12, the child was born in New Zealand in September 1996. Pursuant to an Access Order made by the New Zealand Family Court in December 2000, the child lived with his mother and had contact with his father every second weekend and for half of school holidays. In 2006, after a breakdown in the parents’ relationship, the mother left New Zealand with the child for Australia without telling the father. The father made an application for the child to be returned, stating that he had custody rights because of the Access Order and because he was a joint guardian as a result of having lived with the mother at the time of the child’s birth. At first instance, the Family Court ordered the return of the child. On appeal to the Full Court, the majority accepted that both parents were the child’s guardians at the time of the child’s removal from New Zealand, and accordingly, both had a right to determine the child’s place of residence. It was held that the father had ‘rights of custody’, which rendered the mother’s act of removal ‘wrongful’. However, the majority in the High Court held that the Full Court erred in concluding that the State Central Authority had discharged its onus of establishing that the child’s removal from New Zealand was ‘wrongful’. The majority found that (at 115):

The proper conclusion on the record before the Full Court was that reached by Finn J in her dissenting reasons. Her Honour stressed the burden of persuasion carried by the Authority, found that the affidavit material was insufficient to found an inference that the parents had lived together as a couple in a relationship in the nature of marriage or civil union, and concluded that the Authority had “simply failed to establish its case that the father was a guardian of the child and could thus determine the child’s place of residence.
- 4 It is accordingly essential in establishing that a removal or retention is wrongful that the applicant establishes the existence of a right of custody and that the removal or retention was in breach of that right.

Chapter Five

Habitual Residence

Key Points

- Habitual residence is not defined either in the Regulations or the Abduction Convention, and is in each case a question of fact.
- The concept of habitual residence essentially has two elements:
 - residence in the country for an appreciable period of time; and
 - settled intention.
- The right to determine the child's habitual residence is the hallmark of the concept of rights of custody under the Abduction Convention.
- In order to be found to have been habitually resident in a country, the courts generally require that the child has lived in that country for 'an appreciable period'. There is no definition of what that term means; however, it need not be an extended period of time.

Chapter Five

Habitual Residence

- 1 The concept of habitual residence operates both in relation to:
 - (a) Being a necessary pre-condition to the operation of the Regulations – that is, the child must be habitually resident in an Abduction Convention country; and,
 - (b) Identification of whether there exists, and whether there has been breached, any right of custody that is being exercised at the time of wrongful retention or removal.
- 2 Habitual residence is not defined either in the Regulations or the Abduction Convention, and is in each case a question of fact.¹² There are essentially two elements to the concept of habitual residence: residence in the country for an appreciable period of time, and settled intention. These concepts are discussed below.
- 3 The consequences of modern life, including the rapid expansion of global travel and the increase in international employment, can make this an increasingly difficult matter to determine. Where habitual residence (or rights of custody) is unclear, this issue is often best approached by a court in accordance with the *Guide to Good Practice under the Hague Abduction Convention*.¹³
- 4 It should be noted that a child may be without any habitual residence.¹⁴
- 5 The concept of habitual residence was explored in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, in which Lord Brandon of Oakbrook said:

It follows, I think, that the expression is not to be treated as an expression of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. Such a person, cannot however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of a J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.
- 6 Further, in *DW and Director General, Department of Child Safety* [2006] FamCA 93, Finn and May JJ considered (adopting Fogarty and Baker JJ in *Panayotides* [1996] FamCA 135, that (at 4.3):

¹² *LK v Director-General, Department Of Community Services* [2009] HCA 9; *McCall and State Central Authority; Attorney-General (Cth) (Intervenor)* (1995) FLC 92-551.

¹³ 'Guide to good practice' under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, page 47, http://www.hcch.net/upload/abdguide_e.pdf.

¹⁴ *DW and Director-General, Department of Child Safety* [2006] FamCA 93.

The question of habitual residence has been the subject of much judicial deliberation, and we have been referred to numerous authorities in that regard. From those authorities, the following principles emerge:

- (1) (the expression “habitually resident” is not to be treated as a term of art with some special meaning, but rather it is to be understood according to the ordinary literal meaning of the two words used (see, *In re J (a minor)* (1990) 3 WLR 949);
- (2) the question of whether a person is or is not habitually resident in a specified country is a question of fact to be determined by reference to all the circumstances of the case (see, *In re J (a minor)* (supra);
- (3) the habitual residence of a child whose parents reside together is the habitual residence of those parents (see, *Re B (minor)* (1993) 1 FLR 993);
- (4) it is not possible for one parent to unilaterally determine a child’s habitual residence by removing that child (see, *State Central Authority v McCall* [1994] FamCA 156; (1995) FLC 92-552);
- (5) habitual residence refers to the parents’ habitual abode in a country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or long duration (see *Re B (minor)*).

- 7 In *Re F (a minor) (Child Abduction)* (1992) 1 FLR 548 Butler-Sloss LJ adopted Lord Brandon’s views in *Re J (above)* in support of her conclusion that:

A young child cannot acquire habitual residence in isolation from those who care for him. While (the subject child) lived with both parents, he shared their common habitual residence or lack of it.

Habitual residence and rights of custody

- 8 The right to determine the child’s habitual residence is the hallmark of the concept of rights of custody under the Abduction Convention.¹⁵ Unless a parent has the right to determine where a child will live under the law of the Abduction Convention country in which the child was habitually resident, he or she will not have rights of custody under the Abduction Convention and an application for the return of a child where the requesting parent does not have rights of custody will not succeed.¹⁶

Abandoning an habitual residence

- 9 In *LK v Director-General, Department of Community Services* [2009] HCA 9, the father and mother separated in Israel in 2005. The children continued to live with their mother who was an Australian citizen. All four children, aged between 15 months and 8 years, were entitled to Australian citizenship. In May 2006, the mother and children travelled to Australia with the father’s consent. The mother intended to return to Israel if the parties reconciled. The mother took steps to establish a home for herself and her children in Australia, for example, the two eldest children started school. In July 2006, the father told the mother that he wanted a divorce and that he wanted the children to return to Israel. The issue was whether Israel was the children’s country of habitual residence.
- 10 A single judicial officer of the Family Court ordered that the children be returned. On appeal, the Full Court upheld this decision, finding that the absence of the mother’s ‘settled purpose or intention’ of abandoning Israel determined the issue of the children’s habitual residence.
- 11 The High Court unanimously rejected this analysis, set aside the orders of the trial

¹⁵ See Regulations 11 and 13, *Family Law (Child Abduction) Regulations* 1986.

¹⁶ *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654 INCADAT cite HC/E/UKe 34.

judicial officer and the Full Court and dismissed the Director-General's application for return to Israel. The High Court held the following:

- (a) It is necessary to undertake a broad factual inquiry and look at all the circumstances of the case.
- (b) As at July 2006 when the application was made, the children did not habitually reside in Israel. There was no need to decide whether the children were habitually resident in Australia.
- (c) The possibility that the children might again take up habitual residence in Israel (if their parents were reconciled) does not deny that they had ceased to be habitually resident there.
- (d) An examination of a parent's intention will usually be relevant but should not be given 'controlling weight'. It will be particularly relevant where there is a shared intention. It was decisive that the parents shared their intention when the children left Israel – and that the mother had put that shared intention into effect.
- (e) A person may cease to be habitually resident in one place without acquiring a new place of habitual residence.
- (f) To try to identify set criteria in determining where a child is habitually resident, or to attempt to list the possible matters that might bear upon the question of habitual residence, would be to deny the simple observation that the question of habitual residence falls for decision in a very wide range of circumstances.

An appreciable period

12 In order to be found to have been habitually resident in a country, the courts generally require that the child has lived in that country for 'an appreciable period'. There is no definition of what that term means however it need not be an extended period of time. For example, it can be as short as one month.¹⁷

13 In *LK v Director-General* (above), the High Court cited with approval a passage from *Re B* where Waite J said (at 40):

Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.

All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

14 The Full Court in *Zotkiewicz & Commissioner of Police (No 2)* [2011] FamCAFC 147 added (at 74):

We do not discern from anything said in *LK* that there has been any departure in Australia from the proposition that in order to find someone is habitually resident in a place they must generally have lived there for an 'appreciable period'.

¹⁷ *Re S (a Minor)* [1998] AC 750.

Chapter Six

Exceptions to Return

Key Points

- Unless an exception is established, a court is obliged to make a return order if the application is made within 12 months of the wrongful removal or retention of a child under the age of 16.
- The burden of establishing an exception to return rests with the respondent.
- The establishment of an exception to return enlivens the court's discretion to refuse to make an order. However, the court is not required to refuse to order the return of a child simply because an exception (defence) is established.
- The court has the discretion to refuse to make a return order:
 - If the person seeking return had consented or subsequently acquiesced in the child being removed or retained.
 - If there is a grave risk that the child would be exposed to physical or psychological harm or otherwise place the child in an intolerable situation.
 - If the child objects to being returned **and** the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes **and** the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.
 - If the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.
- An order discharging a return order, or part of a return order, may be made only if the court is satisfied that:
 - All parties consent to the discharge;
 - Circumstances have arisen since the return order was made which make it impractical for it to be carried out;
 - Exceptional circumstances exist, justifying the order being discharged; or
 - The discharge application was filed more than a year after the return order was made or an appeal against it determined.

Chapter Six

Exceptions to Return

- 1 If an application for return of a child is made within 12 months of the wrongful removal or retention and it has been established that a child under the age of 16 years has been wrongfully retained or removed, a court is obliged to make an order for return unless a ground within Regulation 16(3) is made out by way of exceptions to returns.
- 2 Regulation 16(3) provides:
 - (3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:
 - (a) the person, institution or other body seeking the child's return:
 - (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
 - (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or
 - (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
 - (c) each of the following applies:
 - (i) the child objects to being returned;
 - (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
 - (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or
 - (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.
 - (4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.
 - (5) The court is not precluded from making a return order for the child only because a matter mentioned in subregulation (3) is established by a person opposing return.
- 3 In *Director General of Family and Community Services v Davis* [1990] FamCA 119 Nygh J, with whom Strauss and Rowlands JJ agreed, stated (at 13):

It is ... the intention of the Convention and the Regulations which implement it, to limit the discretion of the court in the country to which the children have been taken quite severely and stringently.
- 4 Whilst there can be little doubt that the above passage reflects the intention of the Abduction Convention, the intent has been considered to add nothing to the application of the actual words of the Regulations: see *DP v Commonwealth Central Authority* [2001] HCA 39 and *JLM v Director-General, NSW Department of Community Services* [2001] 206 CLR 401.
- 5 The burden of establishing an exception to return under Regulation 16(3) rests with the respondent, but the court will also have regard to the relative positions of the parties to adduce evidence (see *DP v Commonwealth Central Authority* (above) and *JLM v Director-General* (above)).

- 6 The establishment of the exception to return enlivens the court's discretion to refuse to make an order. The court is not required to refuse to order the return of a child simply because one of the above grounds is established. Rather, the Regulations provide that the matter remains one within the discretion of the court. On occasions the court has put in place a range of conditions to a return order to ameliorate an exception to return¹⁸ (see also conditions on return in Chapter 8).

Consent or acquiescence

- 7 In *Wenceslas and Director-General, Department of Community Services* [2007] FamCA 398 May and Thackray JJ considered that (at 246):

... the defences of "consent" and "acquiescence" are quite distinct. Regulation 16(3) makes clear that mere "acquiescence" in the removal of the child would not enliven the discretion of the Court to refuse to order the return of the child. As Wall J said in *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171 at 173, "[c]onsent ... has to arise before the act of removal or retention: acquiescence can only arise after such an act.

- 8 In the context of 'consent', their Honours proceeded to review United Kingdom authority and, particularly that of Hale J in *Re K (Abduction: Consent)* [1997] 2 FLR 212, in the following terms:

It is obvious that consent must be real. It must be positive and it must be unequivocal. But that is a separate issue from the nature of the evidence required to establish it. There will be circumstances in which the Court can be satisfied that such consent has been given, even though it has not been given in writing. It stands to reason, however, that most people who wish to retain or remove a child would be well advised to get written consent before they do so to place the matter beyond argument. There may also be circumstances in which it can be inferred from conduct.

before concluding that:

It seems to us that the views expressed by Hale J allow for the vagaries often associated with the way in which parents communicate in matters relating to their children. As presently advised (since the matter was not the subject of any submissions before us), we are of the view that consent can be inferred from conduct; however, we are also of the view that the consent must be real and unequivocal and can only be made out by clear and cogent evidence.

- 9 As set out above, 'acquiescence' is to be considered as quite distinct from consent. In *Friedrich v Friedrich* 6 Circ (1996), 78F3D 1060 the United States Court of Appeal said:

Acquiescence under the Convention requires either an act or statement with the requisite formality such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.

- 10 In *P v Director General, Department of Community Services* [2002] FamCA 321, the court considered that a parent cannot be found to have acquiesced in a child's removal unless the parent was aware of it.

Grave risk

- 11 Under Subregulation 16(3)(b) the court has the discretion to refuse to make a return order if there is a grave risk that would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

¹⁸ *Director-General, Department of Community Services & Frampton* (No 3) [2008] FamCAFC 64.

- 12 Decisions of the Family Court of Australia until 2001 disclose a divergence of opinion in that court regarding whether Subregulation 16(3)(b) should be interpreted ‘narrowly’ or ‘broadly’. However, in *DP v Commonwealth Central Authority* (above) *JLM* (above), the High Court considered the issue and set out the principles to be applied in determining whether the exception to return properly arises. Put simply (at 41)’:

What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in an intolerable situation.

- 13 In *DP v Commonwealth Central Authority* (above) *JLM v Director-General* (above), Gaudron, Gummow and Hayne JJ (with Callinan J agreeing) considered the proper interpretation of Subregulation 16(3)(b) in the following terms (at 39):

... If it would expose the child to a grave risk of physical or psychological harm, or an intolerable situation, the discretion to refuse to make an order for return is enlivened. It is for the Australian Court to decide whether return would expose the child to that risk. Of course it must be recalled that the onus of proof lies on the party opposing return. It will be for that party to demonstrate a grave risk of exposure to harm. Many factors may be relevant to that inquiry. Often enough the answer to a claim of grave risk will be that the feared harm will form a central issue in subsequent judicial proceedings in the country of return. But it is important to notice that this answer has two parts: first, that there will be judicial proceedings in the country of return and, second, that the feared harm which is alleged can be a matter relevant to those proceedings. Both parts of that answer are important if it is to meet a contention that return will expose the child to a grave risk of harm.

- 14 In relation to the prior debate before the Family Court (including the Full Court) as to whether the regulation was to be interpreted ‘narrowly’ or ‘broadly’, their Honours found (above at 41-45):

... Exactly what is meant by saying that reg 16(3)(b) is to be narrowly construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in “an intolerable situation”. That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a Court cannot avoid making that prediction by repeating that it is not for the Courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires Courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description “grave”. Leaving aside the reference to “intolerable situation”, and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would expose the child to harm.

Because what is to be established is a grave risk of exposure to future harm, it may well be true to say that a Court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the Court that there is a real risk of exposure to harm.

... That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return.

... while it may be right to say that return is to a country, not a place or a person, the application of reg 16(3)(b) requires consideration of what are said to be the consequences of that return. That is essentially a question of fact which will fall for decision on the evidence that is adduced in the proceedings. No doubt it is necessary to bear in mind not only that the person opposing the return carries the onus of proof, but also the way in which the proceedings are conducted both by the person opposing return and by the Central Authority (at 65 above).

If, as was the case here, upon return of the child there will be a judicial determination of questions of custody and access, it will probably often be the case that assertions of risk of exposure to harm will not be established. But the bare fact that there will be such a judicial determination in the country of return does not mean that reg 16(3)(b) can have no operation. Cases in other jurisdictions concerning the possible return of a child to a sexually predatory or violent parent illustrate why that is so. The fact that there will be proceedings between the parties in the country of habitual residence does not relieve the Australian Court of its obligation to give effect to the whole of the Regulations including, where applicable, the provisions of reg 16(3)(b) (at 66 above).

- 15 Kirby J (in dissent) considered a more stringent interpretation ought to be imposed than the majority, finding (at 132):

The adoption of the word “grave” to qualify “risk” plainly contemplates that in some cases, an order of return will be made although there is a real, even significant (but not “grave”) risk of the kinds of harm contemplated. Similarly, the use of the word “otherwise” in reg 16(3)(b) indicates that the types of “physical or psychological harm” referred to must also be such as to place the child concerned in an “intolerable situation”. Therefore, the language in question, as well as its appearance in a provision enumerating limited exceptions to the general rule, make it clear beyond argument that orders of return will be made to uphold the principal object of the law in circumstances where, were the matter simply a custody dispute (however described), in all likelihood, on the evidence provided, the child’s current arrangements would not be altered. Only a circumstance where the party resisting the order can establish, in the context presented by the ordinary rule of return, that that result would expose the child to a grave risk that was “intolerable ... extreme and compelling”, will invite the application of the exception.

- 16 The Full Court has considered that the focus ought to be upon the possibility of exposure of the child to harm as a consequence of the child’s return, and not as a consequence of “*harm which might emerge at a future time, if after return an unsatisfactory situation is allowed to persist without alteration*”: see *HZ & State Central Authority* [2006] FamCA 466 (at 22).

- 17 In *Director-General, Department of Families, Youth and Community Care and Bennett* [2000] FamCA 253 the Full Court, in *obiter*, gave the following example of circumstances where the Subregulation 16(3)(b) exception might be made out (at 47):

... where a very young baby was wrongfully removed or retained in circumstances that would otherwise lead to its return being ordered, if it was being breast-fed by its “abducting” mother and her personal circumstances genuinely precluded her return with the child (eg. her medical condition or perhaps even her incarceration), then the reg 16(3)(b) exception might be made out ...

- 18 The above example is, however, to be viewed in the context of the findings of the Full Court in *Director General v Davis* (above) (which were affirmed in *Laing v The Central Authority* (above)), that it was not sufficient merely to establish some degree of psychological harm. The degree of psychological harm must be substantial and comparable to an intolerable situation in order to come within the exception.

- 19 In Canada in *Thomson v Thomson* [1994] 3 SCR 551, the Supreme Court has considered that:

...it has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word “grave” modifies “risk” and not “harm”, this must be read in conjunction with the clause “or otherwise place the child in an intolerable situation”. The use of the word “otherwise” points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation...

- 20 The above Canadian decision has been adopted in the USA, including in *Friedrich v Friedrich* [1996] USCA6 311; 78 F.3d 1060 USLW 2603 where the Circuit Court considered that:

A review of deliberations on the Convention reveals that “intolerable situation” was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an “intolerable situation” is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child’s return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an “intolerable situation” and subjected to a grave risk of psychological harm.

- 21 Whilst interpretation of this provision has changed significantly over the years, the decision of *In the Marriage of Murray and Tam; Director, Family Services (ACT) (Intervener)* [1993] FamCA 103 (‘Murray’s case’), illustrates the importance of considering whether the asserted risk and harm will be addressed in the country of return. In this case, the husband was a member of the New Zealand motorcycle gang known as ‘the Mongrel Mob’. The mother brought her children aged five, four and two to Australia from New Zealand. Her evidence was that she was the victim of several violent attacks that included head butting, punching and kneeing her at the base of the spine. She had also received death threats. The acts of violence either took place in the presence of, or in close proximity to, the children. She said the husband had an arsenal of weapons, which included firearms, knives, chains and meat cleavers, and was likely to use the weapons against her. The husband, whilst admitting to a turbulent relationship with the wife and some incidents of violence, said her claims were exaggerated. The trial judicial officer had rejected regulation 16(3)(b) exception to return commenting that it was not possible to determine the veracity of the allegations and that the evidence relating to them would be available only in New Zealand. The Full Court in rejecting the mother’s appeal, said (at 172-174):

As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

It would be presumptuous and offensive in the extreme for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts. In our view, and in accordance with the views expressed by this court in *Despona’s* case, the circumstances in which regulation 16(3) comes into operation should be largely confined to situations where such protections are not available.

- 22 This decision has been argued by some to represent the most restrictive application of the Subregulation 16(3)(b) exception, albeit that it was consistent with the intended construction of the Regulations as expressed:

1A Purpose

- (1) The purpose of these Regulations is to give effect to section 111B of the Act.

- (2) These Regulations are intended to be construed:
 - (c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries.

- 23 In *DP v Commonwealth Central Authority* (above) and *JLM v Director-General* (above), a challenge was made to a Full Court decision in these cases, one was an appeal and the other was an application for special leave to an appeal. In both cases, the application was opposed by a mother who relied upon the exception in Subregulation 16(3)(b), that is to return the child to the country of habitual residence would be to expose the child to the grave risk of harm. The High Court dealt with the matters in a single judgment.
- 24 In *DP v Commonwealth Central Authority* (above), the mother returned to Australia from Greece with the child in 1998. Upon arrival in Australia, the child was diagnosed as suffering autistic spectrum disorder, and commenced medical treatment. The father made an application that the child be returned to Greece. The mother resisted the application on the basis of the child's medical condition and argued that there would be a grave risk of harm to the child as the necessary medical treatment and facilities were not available in the area where the father lived in Greece. In the first instance, the Family Court ordered the return of the child to Greece. The Full Court unanimously dismissed the mother's appeal and held that the Regulations should be narrowly construed as to the meaning of grave risk of physical or psychological harm. On appeal by the mother to the High Court, the majority allowed the appeal and held:
- (a) '*The exception is to be given the meaning its words require*' (at 44). The grave risk of harm is not limited to harm that will actually occur, but to the risk that the return would expose the child to harm. This may require some clear and compelling evidence. However, these considerations do not warrant the conclusion that the exception should be given a 'narrow' construction.
 - (b) The appeal against return to Greece was allowed.
- 25 *JLM v Director-General* (above), was an application for special leave to appeal relating to the wrongful retention of a child who was born in February 1997 in Mexico. The couple travelled with the child from Mexico to Australia in 1998. In January 1999, the father returned to Mexico alone. A month later, the mother informed the father that she intended to remain permanently in Australia with the child. Judicial Registrar Johnston, as his Honour was then, made orders for the return of the child to Mexico. The single judicial officer of the Family Court set aside those orders and held that there was a 'very serious' or 'high risk' of the mother committing suicide if an order was made requiring the child to be returned. This would create a grave risk of psychological harm to the child which would place the child in an intolerable situation. The Full Court overturned the decision of the primary judicial officer. It was considered that the evidence showed that the mother's threats of suicide were directed towards return of the child to the father, whether in Mexico or not, and that those circumstances did not enliven the Regulation. The High Court unanimously granted special leave and the appeal was allowed. The High Court held (at 80):

To say that she is the originator of the source of the risk of harm appears to take no account of the fact that the mother is not in command of her situation and it betrays a complete lack of any understanding of the major depressive illness from which she suffers.

- 26 The issue of whether psychological harm to a child resulting from the mother refusing to accompany the child could amount to a grave risk was considered in the English case *Re C (A Minor) (Abduction)* [1989] 1 FLR 403. It was held not to amount to grave risk. Butler-Sloss LJ commented:

Is the parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to the child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four horses through the convention at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny his contact with his other parent.

- 27 Gleeson CJ referred to those comments and (albeit in dissent) said ‘*When a threat of direct or indirect harm to the child by the person opposing return is the source of the grave risk relied upon by that person ... the threat could defeat the object of the Regulation*’.
- 28 The majority did not agree with the Chief Justice. In relation to the grave risk exception, Gaudron, Gummow and Hayne JJ said the following:

So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that “there is a grave risk that [his or her] return ... would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”. If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might *otherwise* have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

- 29 In criticising the Full Court’s statement that there is a strong line of authority that the exceptions of Regulations 16(3)(b) and (d) are to be narrowly construed, the High Court said:

Exactly what is meant by saying that reg 16(3)(b) is to be *narrowly* construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous.

- 30 As identified by the High Court in *DP v Commonwealth Central Authority* (above) the exception requires some prediction, based on evidence, of what may happen if the child is returned (see para 24 above).
- 31 In dissent, Gleeson CJ reiterated that it is unhelpful to say that Subregulation 16(3)(b) is to be construed narrowly (at 97):

In a case where there is no serious question of construction involved, such a statement may be misunderstood as meaning that the provision is to be applied grudgingly. The task of the decision-maker is to give effect to the regulation according to its terms. The meaning of the regulation is not difficult to understand; the problem in a given case is more likely to be found in making the required judgment. That is not a problem of construction; it is a problem of application.

- 32 Other relevant decisions include *Director-General of the Department of Community Services and Timms (aka Black)*; [2008] FamCAFC 132 (at 49), *Perkis* [2010] FamCA 649 (at 133) and *Parry* [2010] FamCA 689 (at 110) and *Harries and Harries* [2011] FamCAFC 113 (at 95); *Department of Communities (Child Safety Services) & Rayleigh* [2011] FamCA 308; *McDonald & Director-General, Department of Community Services NSW* [2006] FamCA 1400.

Child objects

- 33 Regulation 16(3)(c) provides that the court may refuse to make a return order if the child objects to being returned AND the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes AND the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.
- 34 In *De L v Director General Department of Community Services NSW* [1996] HCA 5, the mother was born in Australia and the father was born in the United States. They married in the United States and had two children. When the children were aged 11 and 9 years, the mother relocated with them to Australia. Following the father's application for their return, the children expressed a wish not to return to the United States.

The trial judicial officer determined that the children were of sufficient age to decide that they did not want to be returned. On appeal, the Full Court adopted a narrow reading of the exception in line with the English decision of *Re R (A Minor: Abduction)* [1992] 1 FLR 105 where it was held (at 108) that 'The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute.'

The majority of the High Court referred to Article 13 and stated, "*In this setting there is no particular reason why Reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as 'the child objects to being returned'. The term is 'objects'. No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition*", effectively overturning the Full Court's narrow interpretation of this exception. Justice Kirby dissented, saying that the purpose of the Abduction Convention means that the exceptions should be narrow.

- 35 Following this decision, Parliament amended the Act by enacting s111B(1B), which states:

The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.

- 36 Regulation 16(3)(c) requires satisfaction of each of the three matters set out therein, being:
- (a) That the child objects to being returned; and
 - (b) That the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; and
 - (c) That the child has attained an age, and a degree of maturity, at which it is

appropriate to take account of his or her views.

37 In *De L v Director-General* (above), the majority considered that:

...if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judicial officer hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the 'discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]' enable it to be said that a particular consideration is extraneous [*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon JJ]. That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion...

38 In *TB v JB (formerly JH)* [2000] EWCA Civ 337 Laws and Arden LJ (with Hale J dissenting) upheld an appeal from a decision of Singer J and ordered the return of children aged 14, 13 and 10½ to New Zealand, in circumstances where the mother had brought the children to England seeking to escape from what she said was an abusive relationship with her second husband. It was clear that the eldest child did not wish to return to New Zealand.

39 Arden LJ said of the exercise of discretion in the *TB* case (above) that as the majority were sending the younger children back and that the mother would follow, notwithstanding the wishes of the elder child, the interests of the child dictated that she be forced back as well, finding (at 107):

However K is entitled to separate exception under Article 13 by reason of the fact that she is able to express her wishes and objects to return. She is now fourteen and a half years old. ... It is important that her wishes should be respected so far as possible but on the other hand since her brothers are to return, the Court should consider whether it is right to respect those wishes in those circumstances. More importantly she is close to her brothers and her mother. She has been a source of strength to her mother in the past. Her mother says that at times she does not know how she could cope without K. In my judgment, the likelihood is that her mother will return to New Zealand with A and K. In those circumstances, despite some dislocation in her education, it is in K's best interest to return also. ... Other factors include the fact that she has grown up in New Zealand and has the benefit of her mother's extended family there. Having considered those matters, in my view, in the exercise of discretion effect should not be given to K's wishes and she too should be ordered to return...

40 Hale LJ considered in this context that:

... the policy of the Hague Convention undoubtedly weighs heavily in respect of the children's objections. In my view, expressed in *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392, it weighs particularly heavily in those cases where children come to visit a parent living here and wish to remain: unless their objections are very cogent indeed, they should return to their primary carer for the dispute about a change in primary care to be settled in their home country. It weighs rather less heavily when the children wish to remain with their primary carer, particularly where, as here, the child has had no contact with the other parent for such a long time...

Protection of human rights

41 Regulation 16(3)(d) (which reflects Article 20 of the Abduction Convention) provides that the court may refuse to make a return order if the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

42 The Hon Joseph Kay, writing extra-judicially noted that the reference is to the fundamental principles of the requested State, not to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which may have been ratified or accepted by Contracting States.

43 This exception has rarely been applied.

44 In *McCall and State Central Authority; Attorney-General (Cth) (Intervenor)* [1994] FamCA 120, it was argued that the return of the child without treating the child's individual welfare as paramount would be in breach of Subregulation 16(3)(d). The Full Court of the Family Court found that return would not amount to such a breach. In discussing Article 20 of the Abduction Convention, which corresponds with Subregulation 16(3)(d), the Full Court said (at 109):

It was intended as a provision that could be invoked on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process.

And went on to say (at 112):

it is difficult to imagine a situation in which this test could be satisfied as a distinct test from that set out in Regulation (3)(b).

45 In *Director-General, Department of Families, Youth and Community Care & Bennett* (2000) FLC 93-011, the Full Court of the Family Court found that the return of an Aboriginal or Torres Strait Islander child to a foreign country, in itself, was not a breach of Australian principles relating to the protection of human rights and fundamental freedoms. The Court found that it could not be said that only an Australian court had the ability to give proper consideration to such heritage. The Full Court said that the exception under Subregulation 16(3)(d) is *'extremely narrow and is limited to circumstances in which the return of the child ought to be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.'* (at 6).

46 In *Re S*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a, the mother and father lived in Israel with their child. The mother was originally from Spain. They divorced and held joint rights of custody. The mother relocated to Spain with the child. The father made an application for the return of the child under the Abduction Convention. On appeal, the District Court in Spain held that the return of the child would be contrary to the basic principles of Spanish law concerning the protection of human rights and basic liberties. The Spanish Court was concerned that the child would be removed from the mother on her return to Israel to punish her for her actions and without a consideration of the child's best interests. It was held that the strict standard required under Article 20 had been made out and the return was refused.

47 In *McCall* (above), the Full Court said (at 111-112):

The point is made that to be able to refuse to return a child on the basis of this Article, it would be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible with these principles.

... It is clear that the applicant in the present case could not satisfy these tests and indeed it is difficult to imagine a situation in which this test could be satisfied as a distinct test from that set out in [Art 20]. However, that issue can no doubt be resolved in the future.

Applications to discharge return orders

- 48 When a return order is made, the Central Authority or other person, institution or body that has instituted the application, or the respondent, may apply to discharge it.
- 49 A discharge application is made under Regulation 19A of the Regulations in accordance with Form 2D (see **Appendix 2**).
- 50 An order discharging a return order, or part of a return order, may be made only if the court is satisfied that:
- (a) All parties consent to the discharge;
 - (b) Circumstances have arisen since the return order was made which make it impractical for it to be carried out;
 - (c) Exceptional circumstances exist justifying the order being discharged; or
 - (d) The discharge application was filed more than a year after the return order was made or an appeal against it determined.
- 51 If the Abduction Convention country from which the child was removed is also a Protection Convention¹⁹ country then the court must also consider the provisions of s111CE of the Act where the Protection Convention country has retained jurisdiction over the child under that convention.

The exercise of the discretion

- 52 Even where an exception to return is established, the court retains the discretion to order or refuse the return of the child.
- 53 In *De L v Director-General* (above), the High Court said:
- The Regulations are silent as to the matters to be taken into account in the exercise and the discretion is therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations] enable it to be said that a particular consideration is extraneous.
- 54 In *Agee v Agee* [2000] FamCA 1251, the Full Court held that the underlying purpose and intent of the Abduction Convention must be afforded significant weight in the exercise of the discretion, as should “*specific consideration of the welfare of the particular child*” (at 64).
- 55 In the United Kingdom, some more content has been given to the exercise of the discretion. In *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 – and later adopted by him in the Court of Appeal in *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570 – Waite J (as he then was) considered that those matters to be considered in exercising the jurisdiction included:
- (a) the comparative suitability of the forum to determine the child’s future in the substantive proceedings;
 - (b) the likely outcome (in whichever forum) of the substantive proceedings;
 - (c) the consequences of the acquiescence;
 - (d) the situation which would await the absconding parent and the child if compelled to return;

¹⁹ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the Protection Convention). This has been implemented in Australian law through the *Family Law Amendment (Child Protection Convention) Act 2002* (Cth) and the *Family Law (Child Protection Convention) Regulations 2003* (Cth).

- (e) the anticipated emotional effect upon the child of an immediate return (a factor which is to be treated as significant but not paramount); and
- (f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

56 Le Poer Trench J in *Director-General & Harries* (above) also considered each of the above in determining the exercise of the discretion.

Chapter Seven

Independent Representation of Children

Key Points

- The appointment of an Independent Children's Lawyer (ICL) in Abduction Convention matters is limited to those proceedings with exceptional circumstances and if such an order is made, the court must specify the circumstances that justify the making of the order.
- Unlike the position for ICLs appointed to act in Part VII (general parenting) proceedings, the inquiry in Abduction Convention matters is not primarily focused on the best interests of the child.
- The ICL is obliged to make any independent inquiries as may be necessary to determine the child's views and interests.
- The ICL's inquiry will be focused on whether or not the court should exercise its discretion to return the child if it is determined that the child has been wrongfully removed or retained.

Chapter Seven

Independent Representation of Children

1 Section 68L of the Act provides:

68L Court order for independent representation of child's interests

- (1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.
- (2) If it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court:
 - (a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and
 - (b) may make such other orders as it considers necessary to secure that independent representation of the child's interests.
- (3) However, if the proceedings arise under regulations made for the purposes of section 111B, the court:
 - (a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court considers there are exceptional circumstances that justify doing so; and
 - (b) must specify those circumstances in making the order.

Note: Section 111B is about the Convention on the Civil Aspects of International Child Abduction.

- (4) A court may make an order for the independent representation of the child's interests in the proceedings by a lawyer:
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) the child; or
 - (ii) an organisation concerned with the welfare of children; or
 - (iii) any other person.
- (5) Without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.

Note: A person cannot require a child to express his or her views in relation to any matter, see section 60CE.

- (6) Subsection (5) does not apply if complying with that subsection would be inappropriate because of:
 - (a) the child's age or maturity; or
 - (b) some other special circumstance.

- 2 The power to appoint an ICL arises from s68L(2) of the Act, which states that the court may appoint an ICL to independently represent a child's best interests if it considers it appropriate to do so. The ICL is therefore appointed to represent the child's interests independent of the interests of either of his/her parents and independent of the child. As the ICL is representing the interests of the child, rather than representing the child his/herself, the ICL is not required to act in accordance with the child's instructions.²⁰
- 3 Under s68L(3), the appointment of an ICL in Hague Abduction Convention matters is limited to those proceedings with exceptional circumstances and if such an order is made, the court must specify the circumstances that justify the making of the order.

²⁰ Family Law Act 1975 s68LA(4)(b).

Unlike the position for ICLs appointed to act in Part VII (general parenting) proceedings, the inquiry in Abduction Convention matters is not primarily focused on the best interests of the child.

- 4 In *State Central Authority & Best (No 2)* [2012] FamCA 511, Bennett J took the opportunity to set out in some detail her view as to the role of the ICL. Her Honour noted that ICLs were particularly helpful when the abducting parent was unrepresented, and that in her view this constituted ‘*exceptional circumstances*’. Her Honour noted the responsibilities assigned to the ICL by s68 of the Act, and said that in addition to these, ICLs in Abduction Convention matters had some special responsibilities as follows:
 - (a) Facilitating discussions between the parents (the left behind parent is not a party to the litigation) and making arrangements for mediation (and attending it);
 - (b) Ensuing that collateral issues are thought through, for example the making of mirror or complementary orders in the requesting state;
 - (c) Ensuring that the left behind parent has appropriate time or communication with the child;
 - (d) Providing the court with evidence of social service supports in the requesting state;
 - (e) Keeping the child informed, if the child is old enough, of how the court will treat the child’s views and what the process is;
 - (f) Making submissions reasonably open on the facts to advance the best interests of the child, within the confines of the application;
 - (g) Requesting through the trial judicial officer, the assistance of Hague Network Judges for information about hearings as to jurisdiction within the state of habitual residence, or to arrange an expedited hearing or a timely initial listing in the courts of the habitual residence to follow conveniently upon the return of the children.
- 5 On another view, these very same functions are often appropriately undertaken by the State Central Authority, whose role (as has already been explained) is to ‘uphold the Abduction Convention’ and not purely to represent the interests of the applicant.
- 6 The role of the ICL in Abduction Convention proceedings was subsequently considered by the High Court in *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v the Honourable Justice Colin James Forrest, one of the Judges of the Family Court of Australia & Ors* (2012) FLC 93-517 (‘the RCB case’). In that case the maternal aunt of the children involved in the proceedings, who was acting as litigation guardian on their behalf to resist a return to Italy under the Abduction Convention, argued the children had been denied the right to be heard in the case. An ICL had not been appointed, nor did the family seek one, but there were reports prepared by a Family Consultant, which expressed the children’s views.
- 7 The majority judgment of the High Court in the RCB case (above) states it is relevant for the court to determine as appropriate the interests and views of the subject child when determining if a return order ought be made. It may be, for example, if the child was to be exposed to the risk of significant psychological harm if returned against his/her will then the court should exercise its discretion and not order the return. In this case, the respondent parent was of the view that the children were all opposed to returning to Italy.

- 8 The majority judgment in the *RCB* case (above) also explored the ways in which a court may inform itself of the views of the child/ren the subject of the proceedings. It concluded that one appropriate way was through a Family Report, as had been done in this case. Another appropriate means was through the assistance of an ICL. The court noted that an ICL is obliged to form an independent assessment of the best interests of the child and act accordingly. The judgment states:

38. In proceedings for a return order under reg 14, s68L provides a specific but limited statutory mechanism by which the court can be assisted in ensuring that the interests of the child the subject of the proposed order are properly taken into account where they are relevant to the criteria for the making of the order or the exercise of the discretion to refuse to make the order. While the child's views (if the child be competent to express them) may be relevant to its interests, the statutory criteria and the court's discretion to refuse to make a return order, the independent representative must, according to s 68LA, form his or her own independent view of what is in the best interests of the child and act accordingly. He or she is not the child's legal representative and is not obliged to act on the child's instructions.

- 9 In Abduction Convention proceedings, the ICL is obliged to make any independent inquiries as may be necessary to determine the child's views and interests such as obtaining information from schools, counsellors and health professionals. Evidence as to the child's views may be presented in a Family Report. The ICL may give consideration to the appropriateness of meeting with the child. The inquiry will be focused on whether or not the court should exercise its discretion to return the child if it is determined that the child has been wrongfully removed or retained.

Chapter Eight

Terms and Conditions on Return Orders

Key Points

- The court may impose conditions in return orders so as to meet any suggestion of risk or other impediment that might otherwise be considered to arise.
- Conditions might include: care arrangements for children pending any determination in the country of return; protection orders for the children and/or the parent on return; housing and financial provision for the returning parent and children; and steps to be taken in any proceedings pending in the country of return.
- Where an international parental child abduction situation arises for which the Protection and Abduction Conventions are in force, it is necessary to consider the inter-relationship between the two conventions as to jurisdiction and applicable law.
- The Protection Convention reinforces the Abduction Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures that may be needed to protect the child in the long-term. It also adds to the efficacy of any temporary protective measures ordered by a judicial officer when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections

Chapter Eight

Terms and Conditions on Return Orders

Imposing conditions on return orders

- 1 Abduction Convention matters are not parenting matters brought under Part VII of the Act. Accordingly, the best interests of the child, in terms of s60CC of the Act or generally, is not the paramount consideration and, ultimately, may not be a consideration at all.²¹
- 2 The court may, and does, impose conditions upon an order for return of a child so as to meet any suggestion of risk or other impediment that might otherwise be considered to arise. The possibility of conditions ought to be considered both in the context of whether an exception to return can be made out to the requisite standard and, where an exception to return has been made out, in the exercise of the discretion as to whether or not to make an order for return in any event.
- 3 Collateral issues such as preconditions to any return capable of being implemented in the returning State often accompany the return order. Such orders may be made in accordance with the 1996 Protection Convention²² (when applicable); where there is no grave risk of harm; and where, absent conditions, there would be a grave risk of harm.

Conditions accompanying return orders where no grave risk of harm

- 4 Subregulation 15(1) provides:

If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:

- (a) make an order of a kind mentioned in that regulation; and
 - (b) make any other order that the court considers to be appropriate to give effect to the Convention; and
 - (c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.
- 5 The High Court in *DP v Commonwealth Central Authority* [2001] HCA 39 and *JLM v Director-General, NSW Department of Community Services* [2001] 206 CLR 401, recognised that orders for return may be subject to conditions.
 - 6 Conditions might include care arrangements for children pending any determination in the country of return; protection orders for the children and/or the parent on return; housing and financial provision for the returning parent and children; and steps to be taken in any proceedings pending in the country of return.
 - 7 With the consent of the parties, the trial judicial officer may initiate direct judicial communication between the Hague Network Judges in his or her State and the requesting State to ascertain matters such as:²³

²¹ *State Central Authority and Young* [2012] FamCA 563.

²² The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

²³ These examples are the requests made by Bennett J in the case of *State Central Authority & Young* [2012] FamCA 563.

- (a) The time frame within which family law proceedings can be brought on in the requesting State;
- (b) The wording of an order which may protect the removing parent from prosecution upon her/his return arising from her unlawful retention of the children;
- (c) Whether the removing parent can commence proceedings whilst they and the child are outside the jurisdiction (still in Australia);
- (d) What orders for personal protection of the removing parent, by way of safe harbour orders, would be available to the removing parent with the consent of the other parent and can be obtained prior to any return;
- (e) How this court and the parties can access any relevant documents located in the requesting State.

The Commonwealth Central Authority may also get this information from the overseas Central Authority.

Conditions accompanying return orders where there may otherwise be grave risk of harm

- 8 In *DP v Commonwealth Central Authority* (above), the High Court examined the operation of Regulation 16 with respect to attaching conditions to a return order where there might otherwise be a grave risk of harm. Gaudron, Gummow and Hayne JJ said (at 40):

In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.²⁴

- 9 Kirby J (in dissent) was more robust (at 148) :

Too much should not, in my view, be made of the difficulty of enforcing such undertakings. Such problems are inherent in cases involving foreign jurisdictions but they cannot be allowed to undo the strong initiatives of the international community reflected in the achievement of the Convention. Undertakings are now a common feature of such cases. There is no mention in the casebooks that I could find of practical difficulties that have arisen in conforming to such undertakings. This Court need not be concerned about such problems where they are not shown to exist. At least we should not pass upon them in the absence of a clear challenge on the record either to the power to exact undertakings generally or to obtain them in the form required.

- 10 In *McDonald & Director General, Department of Community Services* (NSW) [2007] FamCA 1400, the Full Court set aside the trial judicial officer's order for the return of an infant child to Belgium. The trial judicial officer had found a 'grave risk of harm'²⁵ but determined that this harm could be ameliorated by conditions. These included a protection order being in place before the mother and child returned to Belgium and the mother being given the Belgian equivalent of Legal Aid, being provided with economy class air tickets for the return flight, and being issued with visas allowing her to reside

²⁴ At paragraph 40

²⁵ Regulation 16(3)(b) of the *Family Law (Child Abduction Convention) Regulations 1986*.

with the child in Belgium and to undertake paid employment there.

- 11 In dismissing the Central Authority's application for return of the child, the Full Court concluded that there were so many difficulties in establishing satisfactory pre-conditions to enable the return that the only proper exercise of discretion open to the trial judicial officer, once the grave risk exception had been established, was to refuse to make an order for return.

- 12 The Full Court said (at 29):

It seems to us that if conditions are to be imposed to alleviate what would otherwise be a grave risk for the return of the child, then those conditions need to be clearly defined and be capable of being objectively measured as to whether or not the conditions have been fulfilled. The conditions need to be met before the return can take place. In the event that they are not met, the order needs to contain a mechanism that clearly recognises the return is no longer required to take place. All this needs to be done within a tight timetable to meet the requirements of the Convention that is founded upon the concept that prompt return to the place of habitual residence is appropriate to protect a child from the harmful effects of its wrongful removal or retention.

- 13 The trial judicial officer's orders did not sufficiently meet these requirements and did not defuse the risk of harm to the child.

- 14 In *Director-General, Department of Community Services, NSW & Frampton* [2007] FamCA 1064, the Full Court found that return on conditions was appropriate and that the fulfilment of the conditions could be easily measured. The Full Court said:

41. The answer to whether or not the mother will ever qualify for either visa can only be tested by the mother making an appropriate application to the United Kingdom authorities. Any return order would have to be conditional upon the mother making an application within a reasonable time and a favourable answer being received also within a reasonable time otherwise the order will necessarily have to lapse.

42. The second necessary requirement would be the provision of finance or aid to enable the mother and child to return. This would entail the provision of airline tickets and funds to provide housing, and day to day living expenses once they arrive in Scotland.

- 15 It ought be remembered that any conditions imposed on return orders should operate for days or weeks, not months or years, as they are directed to the immediate needs of the child.

The 1996 Protection of Children Convention ('the Protection Convention')²⁶

- 16 The Protection Convention got off to a relatively slow start, but it has now entered into force between Australia and 40 other contracting states at the time of publication, including the United Kingdom and much of Europe. For up-to-date information on the countries for which the Protection Convention is in force with Australia, please visit the HCCH website at <http://www.hcch.net>, which maintains an up-to-date list of Contracting Countries.

- 17 The Protection Convention was ratified by Australia in 2003. It has been implemented

²⁶ This information is taken from the outline provided with respect to the *Hague Convention of 1996 on the International Protection of Children* found on the Hcch website at <http://www.hcch.net>. The long title for this Convention is *The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*.

in Australian law through the Act²⁷ and the *Family Law (Child Protection Convention) Regulations 2003*.²⁸ Where an international parental child abduction situation arises as between Australia and a contracting state for which the Protection and Abduction Conventions are in force, it is necessary to consider the inter-relationship between the two conventions as to jurisdiction and applicable law.

- 18 The Protection Convention contains a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property.
- 19 The Protection Convention has uniform rules determining which country's authorities are competent to take the necessary measures of protection. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has his or her habitual residence, but also allow any country where the child is present to take necessary emergency or provisional measures of protection. In addition, the cooperation provisions of the Protection Convention provide the basic framework for the exchange of information and for the necessary degree of collaboration between administrative (child protection) authorities in the different Contracting States.
- 20 The Protection Convention reinforces the Abduction Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judicial officer when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.

Practical issues

- 21 By way of example, in opposing a return consideration should be given in each case to matters such as:
 - (a) Is the abducting parent relying upon the risk of prosecution and imprisonment if he/she returns to the requesting State?
 - (b) Is the parent relying upon a risk of serious domestic violence which the requesting State from which he/she says the requesting State cannot protect him/her?
 - (c) Is the abducting parent lawfully able to enter or remain in the requesting State?
 - (d) Do the parties need parenting orders made before return?
 - (e) Has the abducting parent sufficient funds or accommodation to immediately care for the children upon return?
 - (f) What is the likely timeframe for the hearing of parenting proceedings in the requesting State, and can the abducting parent institute them from Australia?
 - (g) What orders can be made pursuant to the Protection Convention (if applicable) to

²⁷ As amended by the *Family Law Amendment (Child Protection Convention) Act 2002*.

²⁸ Some States have also implemented State-based legislation eg *Child Protection (International Measures) Act 2003 Qld*.

ameliorate any problems arising upon a return and what effect does the Protection Convention have on any orders made in either State?

- 22 A joint application to the judicial officer hearing the matter can be made, requesting that the Australian Hague Network Judge confer with the relevant Hague Network Judge in the requesting country, may facilitate a return on conditions (see Chapter 9 for further discussion).

Chapter Nine

Direct Judicial Communication

Key Points

- Practical difficulties relating to the return of a child who has been wrongfully removed or retained in Abduction Convention countries can on occasions be resolved or assisted through direct judicial communication.
- Judicial communications occur through the International Network of Hague Judges.
- Direct communication between Hague Network Judges can only occur with the consent of parties.
- The judicial communication may be in writing and/or by telephone. The Hague Network Judge will communicate the results of the communication to the parties and the Judicial Officer presiding over the matter.
- Parties are not bound to adopt, or accept as accurate, responses received by judicial communication.
- Parties can agree, but are not compelled, to put information received by judicial communication into evidence. However, if it does go into evidence, it may obviate the need for some or all aspects of the expert evidence required under the Abduction Convention process and save time and expense.
- The Protection Convention may also form the basis for judicial communication. If in force between two relevant States, it will determine the recognition and enforcement, or otherwise, of each State's orders.

Chapter Nine

Direct Judicial Communication

Assisting with resolution

- 1 Practical difficulties relating to the return of a child who has been wrongfully removed or retained in Abduction Convention countries can on occasions be resolved or assisted through direct judicial communication.
- 2 This may occur, for example, where there are uncertainties about the logistics of return; whether safe harbour orders (ie, the orders or measures required to be made and be enforceable in the requesting State to safeguard the welfare of a child and/or returning parent before the return order under the Abduction Convention will be made by the requested State) can be made; and how the courts of the requesting State can deal with the matter in a timely way following the return.

International Network

- 3 Judicial communications occur through the International Network of Hague Judges. Each Abduction Convention country may nominate a particular judicial officer or officers to act as the communication points. So that if, for example, a judicial officer in the United Kingdom hearing a Hague case wished to clarify a particular legal or procedural issue, he/she may contact the Hague Judge in the United Kingdom who would then contact one of the Australian Hague judges. This arrangement was devised with a view to facilitating the effective operation of the Abduction Convention. There are currently about 39 Hague Network Judges from 26 jurisdictions. The national judicial officers designated in Australia are the Hon Chief Justice Diana Bryant AO and the Hon Justice Victoria Bennett.
- 4 Direct communication between Hague Network Judges can only occur with the consent of parties. It may be sought by the Central Authority or the abducting/retaining parent, or suggested by the court on its own motion, to explore or clarify particular issues.

Method of communication

- 5 The judicial communication may be in writing and/or by telephone. The Hague Network Judge will communicate the results of the communication to the parties and the Judicial Officer presiding over the matter.
- 6 The parties are not bound to adopt, or accept as accurate, whatever response is received. They can agree, but are not compelled, to put it into evidence. However, if it does go into evidence, it may obviate the need for some or all aspects of the expert evidence required under the Abduction Convention process and save time and expense.
- 7 Such communications can result in decisions or agreements between the parents before the court in the requested State and/or assist the Central Authority or the judicial officer to suggest, or facilitate, settlements between the parents; streamline the return process; remove practical obstacles to return; help to ensure that the prompt return may be effected in safe and secure conditions for the child (and sometimes for an

accompanying custodial parent); and pave the way for any proceedings on the custody issues which are to take place in the country to which the child is returned.

- 8 Direct international judicial communications may reduce the number of decisions refusing return. For example, some courts may refuse an application for return based on Article 13(b) of the Abduction Convention because the parent who looks after the child is not allowed to enter the country to which the child is to be returned. In such cases, the Hague Network Judges, through direct communications in writing and/or telephone, can ensure that arrangements are in place for the immediate return of the child, accompanied by the abducting parent. In some cases, the parent seeking the return of the child may offer some 'undertakings' in relation to the return. Ensuring the enforceability of such undertakings in the State to which the child is to be returned is an important matter, and may be clarified in the course of judicial communications.
- 9 In a 2013 paper,²⁹ Australian Hague Network Judge the Hon Justice Bennett describes a matter in which she sat contemporaneously with the Hague Network Judge of Northern Ireland, the Hon Justice Stephens, and the courts convened simultaneously in Belfast and Melbourne to make a raft of orders in relation to proceedings in both countries.
- 10 The Permanent Bureau of the Hague Conference publishes and updates Emerging Guidance³⁰ regarding the development of the Judges Network and a set of General Principles for judicial communications within the context of the Abduction Convention, including commonly accepted safeguards for direct judicial communications. It provides an inclusive description, by way of examples, of matters which may be the subject of such communication in specific cases. They are:
 - (a) Scheduling the case in the foreign jurisdiction;
 - (i) to make interim orders, e.g. support, measure of protection;
 - (ii) to ensure the availability of expedited hearings;
 - (b) Establishing whether protective measures are available for the child or a parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
 - (c) Ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
 - (d) Ascertaining whether the foreign court can issue a mirror order (i.e. the same order in both jurisdictions);
 - (e) Confirming whether orders were made by the foreign court;
 - (f) Verifying whether findings about domestic violence were made by the foreign court;
 - (g) Verifying whether a transfer of jurisdiction is appropriate under the Protection

²⁹ The Hon. Justice Bennett: *Improving the operation of the 1980 Hague Convention: National and International Networking and new approaches to relocation* Paper presented to the 6th World Congress on Family Law and Children's Rights, Sydney, Australia 16-20 March 2013 at website <http://www.lawrights.asn.au/>.

³⁰ *Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges*, HccH, April 2012.

Convention (signed by some, but not all, of the Hague Abduction Convention countries).

- 11 International communications are with other judicial officers in the Network.
- 12 Within Australia, the Federal Circuit Court has a domestic liaison judge, Judge Riethmuller, who liaises with the International Hague Network Judges on behalf of that court.
- 13 Hague Network Judges can exchange experiences regarding procedures and methods, which have been developed in the course of past and current proceedings. Judicial officers from different jurisdictions may be able to inform each other about the handling of proceedings involving applications for return and custody under the Abduction Convention. Such judicial communications can also assist in promoting consistent interpretation of the Abduction Convention.
- 14 The Protection Convention may also form the basis for judicial communication. If in force between two relevant States, it will determine the recognition and enforcement, or otherwise, of each States' orders. In *State Central Authority and Quang* [2010] FamCA 231, Australian Hague Network Judge Bennett J discussed the combined effect of the Abduction Convention and Protection Convention as follows:
 - 99 The basic framework, having regard to the 1996 Convention and the 1980 Convention, provides for international legal cooperation in supporting trans-frontier contact rights and is comprised of two basic elements. First, there should be common rules defining the circumstances in which courts may exercise jurisdiction to make or vary decisions relating to contact. The aims of a common jurisdictional basis are to avoid litigation and further conflict between the parties; ensure courts and authorities have a legal basis for their decision-making; set limits on the circumstances in which an existing contact order may be varied; and provide certainty and discourage forum shopping.
 - 100 The second essential element for promoting international legal cooperation is that there be mutual respect for, recognition and enforcement of decisions made on the common jurisdictional basis. Pursuant to Article 23(1) of the 1996 Convention, orders relating to contact made by an authority exercising jurisdiction shall be recognised by operation of law in all other contracting states. The grounds for refusing recognition, pursuant to Article 23(2) of the 1996 Convention are narrow, but include:
 - (a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
 - (b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
 - (c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
 - (d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
 - (e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
 - (f) if the procedure provided in Article 33 has not been complied with.

Countries with Hague Network Judges³¹

- 15 The table of Contracting States in respect of which the Abduction Convention is in force with Australia at the date of publication is reproduced at **Appendix 3**. It also identifies the countries that have designated a judicial officer or officers to the International Hague Network of Judges. Current information should be obtained in each instance by checking the HCCH website at <http://www.hcch.net>, which maintains an up-to-date list of Hague Network contacts.

³¹ The table at Appendix 3 is reproduced by kind permission of the Honourable Justice Bennett from her 2013 paper *Improving the operation of the 1980 Hague Convention: National and International Networking and new approaches to relocation* – fully referenced at footnote 29.

Chapter Ten

Stays and Appeals

Key Points

- Where a party wishes to appeal a return order, an important step is to consider whether an application should be made for a stay of the return order pending determination of the appeal. The filing of a Notice of Appeal does not stay the operation or enforcement of the order appealed from.
- An Application for a stay pending an appeal must be filed in the same Registry in which the order under appeal was made.
- In determining an application for a stay, much of the focus of the court is directed to the question of whether a stay is required in order to preserve the subject matter of litigation. That is, whether refusal of the stay will render the appeal nugatory.
- Where a stay order is granted, it can be on such terms and conditions as the court thinks fit.
- As a general rule, the Commonwealth Central Authority will agree to a stay provided the appellant agrees to expedite the appeal.
- An appeal is not a re-hearing. On an appeal, the Full Court must be satisfied that the original decision was wrong in that it contained an error of law or material error of fact that caused the original decision to miscarry.
- Chapter 22 of the *Family Law Rules* sets out a list of steps that apply to an appeal.
- A party to an appeal or to an Application in a Case in an appeal can seek an order that another person pay costs. However, practitioners need to be aware of the limited circumstances in which costs orders may be made in proceedings relating to international Conventions, which are set out in s117AA of the Act and Regulation 7 of the Regulations.
- If a party wishes to challenge a decision made by the Full Court, an application may be made for special leave to appeal to the High Court of Australia. There is no automatic right of appeal to the High Court from a decree of a court exercising jurisdiction under the Act.

Chapter Ten

Stays and Appeals

Stays pending an appeal

- 1 Where an order has been made for the return of a child to a foreign country under the Regulations, and a parent wishes to appeal that order, an important step is to consider whether an application should be made for a stay of the return order pending determination of the appeal. The filing of a Notice of Appeal does not stay the operation or enforcement of the order appealed from.³²
- 2 An Application for a stay pending an appeal must be filed in the same Registry in which the order under appeal was made. The application for a stay is made to and heard by the judicial officer who made the order under appeal.³³ Where that judicial officer is not available, the stay may be listed for hearing before another judicial officer.³⁴
- 3 A stay order is sought in an Application in a case filed together with a supporting affidavit. The affidavit will generally:
 - (a) Annexe a copy of the order appealed from;
 - (b) Annexe a copy of the Reasons for Judgment under challenge;
 - (c) Set out the prejudice to the applicant if a stay were not granted (e.g.: return of the child to a foreign country from Australia);
 - (d) Confirm that there has been no delay in the prosecution of the appeal;
 - (e) Highlight any hardship that would be suffered were a stay not granted;
 - (f) Addressing the living arrangements for the child or children pending determination of the appeal;
 - (g) Providing a copy of the proposed grounds of appeal so the merits of the appeal can be assessed.
- 4 In determining an application for a stay, much of the focus of the court is directed to the question of whether a stay is required in order to preserve the subject matter of litigation. That is, whether refusal of the stay will render the appeal nugatory. Whilst the best interests of the child are not the paramount consideration for the court in determining an application for a stay in child abduction proceedings, the welfare of the child *'must always be in the mind of the Court in making an order affecting their interests'*.³⁵
- 5 Where a stay order is granted, it can be on such terms and conditions as the court thinks fit. This may, for example, include orders requiring that the appellant seek that

³² Family Law Rules 2004, Reg 22.11.

³³ Family Law Rules 2004, Reg 22.11(3).

³⁴ Family Law Rules 2004, Reg 1.13.

³⁵ *JRN v IEG* (1998) 72 AL JR 1329 per Kirby J; and see also *Jennings Constructions Ltd v Burgundy Royale Investments* (1986) 161 CLR 681 per Brennan J.

the hearing of the appeal be expedited, or in respect of the living with and spending time arrangements for the child the subject of the proceedings.

- 6 As a general rule, the responsible Central Authority will agree to a stay provided the appellant agrees to expedite the appeal. Under Regulation 19, the courts are not to make parenting orders:

If an application for a return order for a child is made, a court must not make an order, except an interim order, providing for the custody of the child, within the meaning of regulation 18, until the application is determined.

Appeals

- 7 An order made by a Judicial Officer (whether by a judicial officer of the Family Court of Australia or the Federal Circuit Court of Australia), may be challenged by a party or other interested person by an Appeal to the Full Court of the Family Court of Australia. The rights of an appeal against a return order is unrestricted.
- 8 The Full Court has appellate jurisdiction in appeals from the Family Court of Australia, Federal Circuit Court of Australia, Family Court of Western Australia and other courts of summary jurisdiction in certain circumstances.³⁶
- 9 An appeal is not a re-hearing. On an appeal, the Full Court must be satisfied that the original decision was wrong in that it contained an error of law or material error of fact that caused the original decision to miscarry.
- 10 The filing of a Notice of Appeal does not stay the operation or enforcement of the order appealed from.³⁷ The procedure for applying for a stay is dealt with earlier in this chapter.
- 11 An appeal must be filed within 28 days of the order being made.³⁸ The appeal is commenced by filing a Notice of Appeal at the Regional Appeal Registry. This is ordinarily the Registry where the original order of the court under the challenge was made. At the same time, the appellant files a copy of the Orders in respect of which the appeal is lodged. A filing fee is payable on lodgement of an appeal unless exemption from fees is granted. A copy of the Notice of Appeal must be served on the other parties to the original proceedings. This may include the Department or any Independent Children's Lawyer appointed in the proceedings.
- 12 The Full Court is normally constituted by a Bench of three judicial officers. An appeal against an order arising from child abduction proceedings is generally granted an expedited hearing date, and is heard at an earlier date than ordinary appeals in property or parenting matters.

Procedure for filing an appeal

- 13 Chapter 22 of the *Family Law Rules* sets out a list of steps that apply to an appeal.
- 14 Within 14 days of the Notice of Appeal being filed, the Notice must be served on each

³⁶ s93A, 94 and 94AAA of the *Family Law Act 1975*.

³⁷ *Family Law Rules 2004*, Reg 22.11.

³⁸ *Family Law Rules 2004*, Reg 22.03.

other relevant party to the appeal and any Independent Children's Lawyer ICL. The Notice of Appeal must set out the grounds for the challenge to the order. The grounds should be stated succinctly and identify, for example:

- (a) The principle of law where an error was made;
 - (b) The erroneous findings of fact, or state where relevant facts have not been taken into account; and/or
 - (c) Why it is said the decision is otherwise plainly wrong.
- 15 Within 14 days of being served with a Notice of Appeal or within 28 days of the original order under challenge being made, a respondent may file a cross-appeal to the Full Court. It is unusual for a cross-appeal to arise given the nature of child abduction proceeding where the order made generally favours one party or the other absolutely.
- 16 In the event that an appeal is not filed within the set time period, an application can be made to extend the time by filing an Application in an Appeal and an affidavit in support³⁹. The question of whether an extension of time should be granted is generally determined by a single judicial officer of the Full Court. In determining whether or not to grant that extension, the court will have regard to the facts such as the length of the delay, reasons of distance or language that may have contributed, financial problems that may have been encountered, the merits of the proposed grounds of appeal, the advantages and disadvantages of acceding to the application and the justice of the case.
- 17 The appellant must file a draft index to the Appeal Books. This is a list of each of the relevant documents that are to be taken into consideration by the Full Court when hearing the appeal. It will generally include the Order and Reasons for Judgement of the Judicial Officer who heard the case, the Applications and Responses, affidavits, exhibits, the written submissions (if any) and a transcript of the trial.
- 18 There is an Appeal Registrar in each Registry whose task it is to hold procedural hearings and make directions to settle the draft Index for the Appeal Books and make orders for their preparation and filing.
- 19 In the lead up to the Full Court appeal, the appellant will file a Summary of Argument and List of Authorities to which the respondent and any Independent Children's Lawyer will respond in writing.

What happens at a Full Court appeal?

- 20 The Full Court appeal is not a re-trial.
- 21 The Full Court proceeds on the basis of the evidence that was before the original trial judicial officer. It is only if leave is granted by the Full Court, will fresh evidence (not previously available at trial) be placed before the Full Court. There is not otherwise an opportunity to call new or additional witnesses or for cross-examination to take place. Most appeals are of less than 1 day's duration.

³⁹ *Family Law Rules 2004, Reg 1.14.*

- 22 To overturn a decision, the Full Court must be persuaded that the Judicial Officer:
- (a) Applied a wrong principle of law;
 - (b) Made a finding of fact or facts on an important issue which could not be supported by the evidence; or
 - (c) Exercised the discretion to arrive a decision which was clearly wrong.⁴⁰
- 23 The effect of the error must be of such a magnitude as to vitiate the order the subject of challenge. Where the error does not have that effect, the appeal will fail.
- 24 At the conclusion of the appeal, the Full Court can either make orders disposing of the appeal or reserve its decision and publish its decision at a later date.
- 25 In some rare instances, the matter can come before the Full Court not by way of appeal, but rather as a case stated under the Act. If a question of law arises before a trial judicial officer, and it is of an important and unusual nature which the court and a party need determined before the decision at trial can be made, the parties can prepare the terms of a draft case stated (concisely stating the facts and questions of law to be determined), which is then settled by the trial judicial officer for determination by the Full Court.⁴¹

Applications in an appeal

- 26 If a party needs to make an application in relation to an appeal, they may do so by filing an Application in an appeal together with an affidavit stating the facts relied on in support of the application.⁴² Any such Application in an Appeal (e.g.: to lead fresh evidence on appeal) must be filed in the same Registry where the Appeal was filed.⁴³
- 27 Where the Application in an appeal is that the court receive further evidence (often known as a fresh evidence application) at the appeal hearing, that Application must be filed at least 14 days prior to the date of the commencement of the sittings in which the appeal is to be heard.⁴⁴ Any other party to the appeal may file an affidavit in response to the Application not less than 7 days before the date of the commencement of the appeal sittings.⁴⁵ The Full Court will generally hear and determine the Application to receive further evidence on the same date as it hears and determines the appeal itself.⁴⁶

Costs orders in appeals

- 28 A party to an appeal or to an Application in a Case in an appeal can seek an order that another person pay costs.
- 29 Whilst the provisions of s117 of the Act apply to the determination of the question of costs, the Full Court will more readily make orders for costs in favour of a successful party and against the unsuccessful party in appeals. This is particularly in circumstances where one party is wholly unsuccessful.

⁴⁰ Family Court of Australia brochure, *Appeals Procedures – Full Court*.

⁴¹ *Family Law Rules 2004*, Regulation 22.46 and 22.47.

⁴² *Family Law Rules 2004*, Regulation 22.36.

⁴³ *Family Law Rules 2004*, Regulation 22.10.

⁴⁴ *Family Law Rules 2004*, Regulation 22.39(1).

⁴⁵ *Family Law Rules 2004*, Regulation 22.39(3).

⁴⁶ *Family Law Rules 2004*, Regulation 22.39(4).

- 30 An application for costs can be made at any stage during an appeal or by filing an Application in relation to an appeal within 28 days after the court makes an order disposing of the appeal.⁴⁷ Often when the Full Court publishes its Reasons for Judgment, they make orders disposing of the appeal and directing that any party seeking to make an application for costs do so within a specified period of time (usually 14 or 28 days). If a party seeks an order for costs on the indemnity basis, then the Full Court must be informed of any costs agreement in place and the terms of it (so that the effect of an indemnity costs order can be ascertained).⁴⁸
- 31 However, practitioners need to be aware of the limited circumstances in which costs orders may be made in proceedings relating to international Conventions, which are set out in s117AA of the Act and Regulation 7 of the Regulations, as follows:

117AA Costs in proceedings relating to overseas enforcement and international Conventions

- (1) In proceedings under regulations made for the purposes of Part XIII AA, the court can only make an order as to costs (other than orders as to security for costs):
 - (a) in favour of a party who has been substantially successful in the proceedings; and
 - (b) against a person or body who holds or held an office or appointment under those regulations and is a party to the proceedings in that capacity.
- Note: For another case where the court can also make an order as to costs, see subsection (3).
- (2) However, the order can only be made in respect of a part of the proceedings if, during that part, the party against whom the order is to be made asserted a meaning or operation of this Act or those regulations that the court considers:
 - (a) is not reasonable given the terms of the Act or regulations; or
 - (b) is not convenient to give effect to Australia's obligations under the Convention concerned, or to obtain for Australia the benefits of that Convention.
 - (3) In proceedings under regulations made for the purposes of section 111B, the court can also make an order as to costs that is:
 - (a) against a party who has wrongfully removed or retained a child, or wrongfully prevented the exercise of rights of access (within the meaning of the Convention referred to in that section) to a child; and
 - (b) in respect of the necessary expenses incurred by the person who made the application, under that Convention, concerning the child.

7 Immunity of Commonwealth Central Authority etc in respect of orders to pay costs

A court must not make an order that requires the Commonwealth Central Authority or a State Central Authority to pay costs in relation to his or her exercising the powers, or performing the functions, of the Commonwealth Central Authority.

Applications for special leave to appeal to the High Court of Australia

- 32 If a party wishes to challenge a decision made by the Full Court, an application may be made for special leave to appeal to the High Court of Australia.⁴⁹ There is no automatic right of appeal to the High Court from a decree of a court exercising jurisdiction under the Act.
- 33 An application for special leave to appeal is made by filing of such an Application in a Registry of the High Court nearest to where the order of the Full Court complained of was made.

⁴⁷ Family Law Rules 2004, Regulation 22.53(2).

⁴⁸ Family Law Rules 2004, Regulation 22.53(3).

⁴⁹ Section 95 of the Family Law Act.

- 34 Applications for special leave to appeal are generally determined by a bench of 2 or 3 members of the High Court. Special leave to appeal is granted only in exceptional circumstances. Where a grant of special leave is made, the appeal is referred for hearing at a later date before a bench of the Full High Court (generally constituted by between 5–7 members). The High Court generally only grants leave to appeal where a genuine question of public importance arises, where there is a difference of opinion between, or within the Courts, or where the interests of justice require it.⁵⁰

⁵⁰ Section 35A of the *Judiciary Act 1903*; and Part 41 of the *High Court Rules 2004*.

Chapter Eleven

Access

Key Points

- The Abduction Convention and Regulations make provision for the Commonwealth Central Authority to act, and for the Family Courts to make orders to establish, organise or secure arrangements for a person to spend time with a child.
- The applicant must satisfy a number of requirements before they can make an application under the Abduction Convention.
- Outgoing applications (for access to a child living in an overseas country) must be made in accordance with Form 3 in Schedule 3 of the Regulations.
- The applicant will be advised by the Commonwealth Central Authority if their application is accepted. It is also open for the applicant to apply directly to the overseas Central Authority for a Convention access application. The applicant can also commence domestic proceedings to secure access in the country where the child resides.
- Applications rejected by the Commonwealth Central Authority are subject to administrative review.
- The Commonwealth Central Authority will liaise with the overseas country and keep the applicant updated about their case. The Commonwealth Central Authority cannot interfere with the processes or court cases in the other country.
- Although the Australian Government provides assistance in making the initial application it does not provide any assistance in preparing any further affidavits which may be required by the courts in the overseas country.
- Incoming applications (for access to a child living in Australia) should be made to the Central Authority of the overseas country. That overseas country must be an Abduction Convention signatory. If the application is accepted by the overseas central authority accept, they will pass it on to the Commonwealth Central Authority for action.
- The Commonwealth Central Authority can only help with an access application if the child is in an Abduction Convention country.
- If the child is in another country, the applicant may want to seek private legal advice in that country about options.
- It should also be ascertained whether the other country, even if not an Abduction Convention country, may be a party to the Protection Convention, in which case access orders may be implemented through this Convention.

Chapter Eleven

Access

- 1 The Abduction Convention and, in turn, the Regulations, also make provision for the Commonwealth Central Authority to act and for the Family Courts to make orders to establish, organise or secure arrangements for a person to spend time with a child. Part 4 relevantly provides as follows:

23 Request for access to child in convention country

- (1) A person who claims under a law in force in Australia to have rights of access to a child in a convention country may request a responsible Central Authority to have arrangements made for establishing, organising or securing the effective exercise of those rights in that convention country.

Note For persons who should be regarded as having a right of access to a child, see paragraph 111B (4) (d) of the Act.

...

24 Request for access to child in Australia

- (1) The Commonwealth Central Authority must take action to establish, organise or secure the effective exercise of rights of access to a child in Australia if:
 - (a) it receives a request from a Central Authority on behalf of a person who claims:
 - (i) to have rights of access to the child under a law in force in a convention country; and that those rights have been breached; and
 - (b) it is satisfied that the request is in accordance with the Convention.

...

25 Application for access to child in Australia

- (1) The responsible Central Authority may apply to the court, in accordance with Form 4, for any of the following orders:
 - (a) an order specifying with whom a child is to spend time or communicate;
 - (b) an order for the issue of a warrant mentioned in regulation 31;
 - (c) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.

...

25A Orders

- (1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under subregulation 25 (1):
 - (a) make an order of a kind mentioned in that regulation; and
 - (b) make any other order that the court considers to be appropriate to give effect to the Convention; and
 - (c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.

...

- 2 The applicant must satisfy a number of requirements before they can make an application under the Convention:

- (a) The child must be under sixteen-years-old;
- (b) The country the child lives in must be an Abduction Convention country;
- (c) The applicant must have 'rights of access' to the child under the law of the relevant jurisdiction;

- (d) The applicant's rights of access to the child must have been breached.
- 3 If all of these requirements are met, an application can be made to the Commonwealth Central Authority.

Rights of access to a child⁵¹

- 4 It is not necessary for a parent to have a court order setting out specific rights of access. It is generally accepted that rights of custody include rights of access under Australian law.
- 5 Subsections 111B (4) (d) and 111B (5) of the Act clarify the rights that are to be regarded as rights of access.
- 6 Generally, proof of parentage is established by the parent producing a copy of the child's birth certificate (or otherwise as provided in the Act).
- 7 A person who is not the parent of a child may have rights of access if they have been granted them by a court. They may also have rights of access if there are court orders providing that:
 - (a) The child is to spend time with them under a parenting order; or
 - (b) The child is to communicate with them under a parenting order.

Process for outgoing applications⁵²

- 8 The process for making access applications is set out in Regulation 23, which provides that the application must be in accordance with Form 3 and in accordance with the Abduction Convention.⁵³ The required Form 3 is to be found in Schedule 3 of the Regulations. (See **Appendix 2**).
- 9 Article 3 of the Abduction Convention defines rights of access in an inclusive rather than exclusive manner. That is, rights of access include the right to take a child to a place other than his or her habitual residence for a limited period of time.⁵⁴
- 10 The applicant will be advised by the Commonwealth Central Authority if their application is accepted. Reasons will be provided if the application is refused. It is open for the applicant to apply directly to the overseas Central Authority for a Hague access application. Another option is to commence domestic proceedings to secure access in the country where the child resides. The Department of Foreign Affairs and Trade (DFAT) may be able to provide a list of local lawyers who could provide legal advice on this option. Details of the relevant Australian diplomatic mission or consulate overseas can be found at <http://www.dfat.gov.au/missions>.
- 11 The International Academy of Matrimonial Lawyers (www.iaml.org) is also a valuable source for identifying skilled local lawyers.
- 12 If the Central Authority refuses to accept an application that decision can be reviewed in the

⁵¹ <http://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx>

⁵² <http://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx>

⁵³ Reg 23(2) the Family Law (Child Abduction Convention) Regulations 1986.

⁵⁴ Article 5(b) Abduction Convention.

same way as any other administrative decision. An application may be made in the Federal Court of Australia or the Federal Circuit Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977*. The grounds of review are set out in ss5 and 6 of that Act.

- 13 If the application has been accepted, it will be forwarded to the Central Authority in the country where the applicant believes the child to be.
- 14 The Central Authority in that country is responsible for managing the application under the Abduction Convention. The Commonwealth Central Authority will liaise with the overseas country and keep the applicant updated about their case. Further information to support the application may be requested.
- 15 Although the Australian Government provides assistance in making the initial application it does not provide any assistance in preparing any further affidavits that may be required by the courts in the overseas country. The applicant must engage a private lawyer if they require assistance in preparing further affidavit material.
- 16 In some jurisdictions, (such as the United Kingdom) the lawyer appointed by the relevant Central Authority will be in direct contact with the applicant and assist the applicant in preparing any necessary further affidavit material. However, in most countries (including the United States of America) the applicant will be required to bear the legal costs of the access proceedings unless granted legal aid in that country.
- 17 The Central Authority in the other country determines how they will progress the case. Commonly, they may contact the person who has physical custody of the child and seek voluntary agreement to access arrangements, and then file the application in the relevant court of that country for a decision if an agreement cannot be reached.
- 18 The Commonwealth Central Authority cannot interfere with the processes or court cases in the other country. It is the other country's responsibility to initiate and facilitate any legal proceedings. Sometimes they will require Australian orders to proceed. Like in Australia, the courts in other countries are independent of government. Neither the Commonwealth Central Authority, nor the authority of the other country, can change a decision of a court.
- 19 Article 7 of the Abduction Convention states that the Central Authorities are to discover the whereabouts of a child who has been wrongfully removed or retained.⁵⁵ However, the Commonwealth and State or Territory Central Authorities do not engage private investigators or other services to locate the child. In an appropriate case the central authority may apply to the court for a location or Commonwealth information order to locate a child.

Process for incoming applications

- 20 An application for access to a child living in Australia should be made to the Central Authority of the overseas country. That overseas country must be an Abduction Convention signatory. If the application is accepted by the overseas Central Authority, they will pass it on to the Commonwealth Central Authority for action.

⁵⁵ Abduction Convention Article 7(a).

- 21 Information about contacting the Central Authority in an overseas country, is available from the Hague Conference on Private International Law website.⁵⁶ Applicants who are not located in an Abduction Convention country, may wish to seek legal advice in Australia about the options for seeking access to a child in Australia.
- 22 The best interests of the child may not always be the paramount consideration in access applications made pursuant to the Abduction Convention and Regulations. The application of Regulation 25 and the role of Part VII of the Act were discussed in *Secretary of the Attorney-General's Department & McDonald* [2013] FamCA 8, where Kent J found that:
- ...the exercise of discretion in a given case, and the place of best interests or the paramountcy principle in the context of relevant considerations is informed by the circumstances of the case.
- 23 The same approach was taken by the court in *State Central Authority: Commissioner of Police, South Australia & Philbrook* [2013] FamCA 364.

Access in non-Hague Convention Countries

- 24 The Commonwealth Central Authority can only help with an access application if the child is in an Abduction Convention country or in Egypt or Lebanon.
- 25 If the child is in another country, the applicant may want to seek private legal advice in that country about options. The DFAT can provide limited consular assistance to parents whose children are located overseas. Depending on the legal and social services framework of the foreign jurisdiction, this may include providing a list of local lawyers, and facilitating liaison with local authorities and child welfare agencies to ensure the welfare of the child involved. Contact details for the relevant Australian diplomatic mission or consulate overseas can be found at <http://www.dfat.gov.au/missions>.

Protection Convention⁵⁷

- 26 It should also be ascertained whether the other country, even if not a State party to the Abduction Convention, may be a State party to the Protection Convention (in which case access orders may be implemented through this Convention).
- 27 Further, rights of access may be better effected under the Protection Convention than under the Abduction Convention even where the other country is a State party to the latter Convention.

⁵⁶ http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24.

⁵⁷ Refer also Chapter 8.

Chapter Twelve

Locating Children

Key Points

- Where a child has been abducted to or wrongfully retained in Australia, and their exact whereabouts are not known, the Commonwealth and State Central Authorities have a number of sources to help them identify which state or territory the child is in, including the use of subpoenas.
- If a child cannot be located, and it becomes necessary to initiate court proceedings, the following orders may be made:
 - A warrant issued authorising and directing the Marshal of the Family Court of Australia and all officers of the Police Forces of the States and Territories of Australia to find and recover the child and deliver such child to the officers of the State Central Authority.
 - That the child to be handed over to the State Protection Agency so that temporary care can be provided.
 - Authorising or directing a person, if necessary by force, to stop and search a vehicle, vessel or aircraft, and to enter and search a premises or place for the purposes of finding and recovering a child.
 - Prohibiting a person from again removing or taking possession of a child.
 - Authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child.
 - A publication order under s121 of the Act, which permits the publication or dissemination of relevant details about a child.
- If a child is suspected to be in a non-Hague Convention country, or there is a justifiable concern for the welfare of the child, international enquiries may be undertaken by the Australian Federal Police. International assistance may take the form of direct engagement with partner Law Enforcement Agencies or assistance through INTERPOL inquiries.

Chapter Twelve

Locating Children

- 1 Where a child has been abducted to or wrongfully retained in Australia, it is often the case that their exact whereabouts are not known to the other parent. In those circumstances, the Commonwealth and State Central Authorities have a number of ways of identifying which state or territory the child is in and subpoenas may be used to assist that process. If the child still cannot be located it may become necessary, as part of proceedings commenced in the Family Courts, to seek both a publication order to assist in the identification and location of the child. A recovery order may be sought in limited situations if the facts indicate risk to the child or significant flight risk.
- 2 Under regulation 14(3) the responsible Central Authority may apply for:
 - (a) An order that the responsible Central Authority considers necessary or appropriate to give effect to the Abduction Convention in relation to the welfare of the child after his or her return to Australia; or
 - (b) Any other order that the responsible Central Authority considers appropriate to give effect to the Abduction Convention.
- 3 Pursuant to those provisions, a court can make orders which may have a number of functions:
 - (a) A warrant (in accordance with Form 2 of the Regulations) issued authorising and directing the Marshal of the Family Court of Australia and all officers of the Police Forces of the States and Territories of Australia to find and recover the child and deliver such child to the officers of the State Central Authority;
 - (b) Require the child to be handed over to the State Protection Agency so that temporary care can be provided. As most State Central Authorities are the child protection agencies for the relevant state, the flight risk has to be cogent before such a step is sought. Where possible, the child will be left with the respondent until the court can determine the application;
 - (c) Authorise or direct a person, if necessary by force, to stop and search a vehicle, vessel or aircraft, and to enter and search a premises or place for the purposes of finding and recovering a child;
 - (d) Prohibit a person from again removing or taking possession of a child;
 - (e) Authorise or direct a person to arrest, without warrant, a person who again removes or takes possession of a child.
- 4 The Family Courts can make a publication order under s121 of the Act. The publication order permits the publication or dissemination of relevant details about a child that may include:
 - (a) Name, pseudonym or alias if known;
 - (b) Address at which the child or a parent is thought to work or reside, or the locality in

which they presently may be situated;

- (c) Physical description or style of dress of a child or parent;
 - (d) Details of employment or occupation of the parent;
 - (e) Other particulars sufficient to identify a parent or a child.
- 5 The publication order will generally give details of the means by which the publication can take place, and this may include:
- (a) Radio broadcasts;
 - (b) Television;
 - (c) Print media;
 - (d) Social media.
- 6 Publication orders usually cease when a child is recovered.
- 7 The making of the publication order is an exception to the offence which would otherwise occur under s121 of the Act which would identify a child, a parent, a relative or any witness in those proceedings. Publication orders can be important and powerful tools in the location and recovery of children.
- 8 Where a party or the responsible Central Authority seeks a publication order, it is generally made by way of written application in a case supported by an affidavit sworn by the other parent or by an officer of the Commonwealth Central Authority detailing attempts that have been made to locate the child or children, the problems that have been encountered, the last known details of the child or children, the reasons why a publication order may assist, and the reasons why a publication order should be made in a certain form and of a particular duration.
- 9 For more information about publication orders, please view the following resources:
- (a) Section 121 of the Act.
 - (b) *Publications Order* page on the Family Court of Australia or Federal Circuit Court of Australia websites at: www.familycourt.gov.au or www.federalcircuitcourt.gov.au
 - (c) *Family Law Kit* on the Australian Federal Police website at: www.afp.gov.au/policing/family-law/family-law-kit.aspx

International enquiries

- 10 Where the location of a child is not known, or they are suspected to be in a non-Hague Convention country, or there is a justifiable concern for the welfare of the child; international enquiries may be undertaken by the Australian Federal Police on its own initiative or at the request of a law enforcement or government agency such as Attorney-General's Department or the DFAT. International assistance may take the form of direct engagement with our partner Law Enforcement Agencies or assistance through INTERPOL inquiries. Inquiries must provide sufficient information on last known travel and contacts, and sufficient justification for the inquiry to be undertaken.

Chapter Thirteen

Financial Assistance

Key Points

- The Overseas Child Abduction Scheme provides legal financial assistance to cover overseas legal and other costs incurred by people seeking the return of children who have been removed from Australia, or retained outside of Australia, without their consent.
- The Scheme is both means and merit tested. It is not a pre-requisite for eligibility that the child has been abducted to or wrongfully retained in a reciprocating Abduction Convention country, or even that an application for return of the child pursuant to the Abduction Convention has been lodged.
- The Overseas Child Abduction Scheme may cover:
 - (a) The cost of an overseas lawyer to determine the likely prospects of success in securing the return of a child to Australia;
 - (b) The overseas legal cost of obtaining a court order for the return of a child to Australia;
 - (c) Overseas accommodation and travel costs arising from court attendances in a foreign jurisdiction;
 - (d) Flights for the return of a child to Australia; and
 - (e) Flights for persons required to attend overseas legal proceedings or to escort a child back to Australia.
- Legal financial assistance will not be provided to applicants seeking to secure their rights of access to children in other countries, nor any Australian legal costs.
- Legal financial assistance may be available to meet the costs of an eligible applicant's travel, accommodation, meals and legal proceedings in a non-Convention country under the Overseas Child Abduction Scheme.

Chapter Thirteen

Financial Assistance

- 1 The Commonwealth Attorney-General's Department administers the Overseas Child Abduction Scheme to provide legal financial assistance to cover overseas legal and other costs incurred by people seeking the return of children who have been removed from Australia, or retained outside of Australia, without their consent. The child must be below age 16 and have been habitually resident in Australia before the removal or retention.
- 2 The Overseas Child Abduction Scheme is available to people who would have serious financial difficulty in financing the costs themselves, and who have reasonable prospects of having the child returned to Australia. Their entitlement to legal assistance in the overseas country must be explored before the Overseas Child Abduction Scheme will assist. Generally, people who can get legal assistance in the foreign jurisdiction will not qualify for legal financial assistance from the Attorney-General's Department.
- 3 The Overseas Child Abduction Scheme is both means and merit tested. It is not a pre-requisite for eligibility for the Scheme that the child has been abducted to or wrongfully retained in a reciprocating Abduction Convention country, or even that an application for return of the child pursuant to the Abduction Convention has been lodged.
- 4 *The Commonwealth Guidelines for Legal Financial Assistance 2012* are available on the Attorney-General's Department's website (www.ag.gov.au). The Overseas Child Abduction Scheme provides no legal financial assistance to parents who it is said have wrongfully removed children to Australia or retained them in Australia; however they may (subject to satisfying means and merit testing conditions) be eligible for legal aid from the local Legal Aid Authority in the relevant State or Territory.
- 5 The Overseas Child Abduction Scheme may cover:
 - (a) The cost of an overseas lawyer to determine the likely prospects of success in securing the return of a child to Australia;
 - (b) The overseas legal cost of obtaining a court order for the return of a child to Australia;
 - (c) Overseas accommodation and travel costs arising from court attendances in a foreign jurisdiction;
 - (d) Flights for the return of a child to Australia; and
 - (e) Flights for persons required to attend overseas legal proceedings or to escort a child back to Australia.
- 6 Legal financial assistance will not be provided to applicants seeking to secure their rights of access to children in other countries, nor any Australian legal costs.
- 7 Generally, the Scheme will not cover costs incurred before an application is made. Applications are made to the Financial Assistance Section, Commonwealth Attorney-General's Department. Applications can be made online and applications will be assessed within 28 days.

- 8 Information including application forms and guidelines for the Scheme are available from the Attorney-General's Department website at www.ag.gov.au. The Financial Assistance Section can be contacted by telephone on +612 6141 4770 or by email finass@ag.gov.au

Financial Assistance in Non-Hague Convention abductions

- 9 Legal financial assistance may be available to meet the costs of an eligible applicant's travel, accommodation, meals and legal proceedings in a non-Convention country under the Overseas Child Abduction Scheme, which is administered by the Financial Assistance Section of the Attorney-General's Department.⁵⁸
- 10 In non-Convention countries, applicants must locate a lawyer in the country where the child has been taken. In circumstances where an applicant is unable to obtain advice from a lawyer in the non-Convention country without providing payment, an initial grant of assistance to obtain this information may be provided to applicants who meet the Scheme's means test. The advice from the lawyer will be used in the assessment of a further grant of assistance to cover the costs associated with the legal proceedings in the non-Convention country.
- 11 If the applicant is unable to locate a lawyer independently, assistance can be obtained from the relevant consular office at the Department of Foreign Affairs and Trade (DFAT). The Australian Embassy in each of the countries with whom Australia has diplomatic relations maintains a list of English speaking lawyers with expertise in various fields. This list is available from DFAT's Consular Emergency Centre by telephone 1300 55 135.
- 12 Once an opinion is received the applicant, or their Australian lawyer, will send it to the Financial Assistance Section for a decision to be made about a further grant of assistance. The applicant therefore needs to ask the overseas lawyer:
- (a) What legal proceedings need to be undertaken in the non-Convention country for the child to be returned to Australia?
 - (b) What are the key issues that will be taken into account by the overseas lawyer?
 - (c) What are the applicant's prospects of success in these proceedings?
 - (d) To provide an estimate of the legal costs of the proceedings in [non-Convention country] and the overseas lawyer's standard hourly rate for legal work?
 - (e) Would the applicant be eligible for legal aid in [non-Convention country] for these proceedings?
 - (f) If the case goes to court in the non-Convention country would the applicant be required to attend the proceedings in person?
- 13 Once a grant has been provided and after costs have been incurred, the overseas lawyer sends their account to the Financial Assistance Section for payment.
- 14 If the applicant has an Australian lawyer assisting in the proceeding, under the Scheme, Australian legal representation costs are not covered. It therefore may be more appropriate for the applicant to liaise with the Financial Assistance Section directly.

⁵⁸ Further information about the Scheme and details about how to apply are available at <http://www.ag.gov.au/LegalSystem/Legalaidprograms/Commonwealthlegalfinancialassistance/Pages/Overseaschildabduction.aspx>.

Chapter Fourteen

The Role of International Social Service (Australia)

Key Points

- International Social Service Australia (ISS Australia) is a not-for-profit organisation providing professional social work support services, legal services and mediation services to families and children separated by international borders.
- Since February 2012, ISS Australia has provided legal assistance to parents in Australia seeking the return of their children or access under the Abduction Convention. The services provided include:
 - Preparation of documents for parents in Australia seeking the return of their children from Abduction Convention countries or access to children living in overseas Abduction Convention countries.
 - An International Parental Child Abduction helpline.
 - Community education and training.
- ISS Australia Legal Service offers a helpline – 1300 657 843 – which provides information to individuals and professionals whose clients are affected by international parental child abduction.
- There is no cost to the party for any of the funded services provided by ISS Australia, that is Social Work Support and Legal Services involved in Abduction Convention cases.
- Fees are charged by ISS Australia for the provision of the Mediation Service. Concession rates may be applied to individuals with a low income and, in exceptional cases, a full waiver of the fees may be made.

Chapter Fourteen

The Role of International Social Service (Australia)

- 1 International Social Service Australia (ISS Australia) is a not-for-profit organisation providing professional social work support services, legal services and mediation services to families and children separated by international borders.
- 2 ISS Australia is a member of the international ISS network which includes over 120 countries. The network is coordinated and represented by the General Secretariat in Geneva and has consultative status with the United Nations' Economic and Social Council (ECOSOC) and UNICEF. ISS Australia utilises the international network to provide Intercountry casework services.

ISS Australia Social Work Support Service

- 3 ISS Australia offers professional social work support services aimed at providing practical and emotional support to parents and families affected by International Parental Child Abduction (IPCA). This is a free national service funded by the Commonwealth Attorney-General's Department.
- 4 The ISS Australia Social Work Support Service is provided by qualified social workers who are available by phone and provide services including:
 - (a) Information, advice, support and referrals for families and professionals;
 - (b) Emotional support and short-term counselling;
 - (c) Practical support and information;
 - (d) Targeted referrals to assist with specific issues requiring long-term support;
 - (e) Coordination with other professional services according to clients' needs;
 - (f) Community education and training to agencies and community groups;
 - (g) Advocacy and research regarding the concerns of families experiencing IPCA;
 - (h) Information for parents concerned about the risk of IPCA or considering international relocation;
 - (i) Assistance for parents experiencing family violence situations where there is a risk of international parental abduction.
- 5 Typically in cases covered by the Abduction Convention, ISS Australia social workers will work with individual clients by supporting them emotionally and providing practical support before, during and after the legal or mediation process. This may also include facilitating short-term contact arrangements.

- 6 The Social Work Support Service is available to left behind parents⁵⁹ and abducting parents.⁶⁰ ISS Australia social workers do not have access to the client's legal file and there is no exchange of information between the Legal or Mediation Teams and the Social Work Support Services Team without the knowledge and consent of the client.
- 7 In cases where children are at risk, the social workers may liaise with Child Services in Australia and ISS network members worldwide to obtain urgent protective involvement.
- 8 ISS has developed a *Family Safety and Child Abduction Planning and Prevention Resource Kit*, which is available on the ISS Australia website.⁶¹

ISS Australia Legal Services

- 9 Since February 2012, ISS Australia has provided legal assistance to parents in Australia seeking the return of their children or access under the Abduction Convention.
- 10 The services provided include:
 - (a) Preparation of documents for parents in Australia seeking the return of their children from Abduction Convention countries or access to children living in overseas Abduction Convention countries.
 - (b) An International Parental Child Abduction helpline.
 - (c) Community education and training.

Preparation of documents

Where child removed from or retained outside Australia (Outgoing cases)

- 11 ISS Australia Legal Service deals with cases where children have been wrongfully removed from Australia to another Abduction Convention country or wrongfully retained in another Abduction Convention country and cases where a parent seeks access to children living outside Australia.
- 12 There is no particular referral process and generally ISS Australia clients who find themselves in this situation contact ISS Australia directly, often referred by the Attorney-General's Department.
- 13 Once a client contacts ISS Australia, he or she is referred to the Legal Service where they are assigned a specialist lawyer who assists them to draft the application and supporting affidavit material.
- 14 The lawyers liaise with the client to settle the documents and the client either attends at the office to execute documents or, more commonly, is instructed by the ISS lawyer on how to get the documents properly executed.
- 15 The final documents are checked by ISS Australia lawyers and then forwarded to the Commonwealth Central Authority with advice on the nature of the application and how it meets the requirements of the Abduction Convention. The Legal Service, like the other

⁵⁹ Parents whose children have been wrongfully removed from one Abduction Convention country to another or wrongfully retained in an Abduction Convention country as well as parents seeking access to children in Abduction Convention countries.

⁶⁰ Parents who have wrongfully removed or retained children in Australia.

⁶¹ <http://www.iss.org.au/>

ISS Australia services, is largely telephone based and is available Australia wide.

- 16 On receipt of an application and advice, the Commonwealth Central Authority decides whether or not to accept an application. If it accepts the application, the Commonwealth Central Authority then liaises with the relevant overseas Central Authority, which instructs lawyers to act for the parent in Australia and generally commences legal proceedings under the Abduction Convention in the overseas country.

Where child removed to or retained in Australia (Incoming cases)

- 17 Cases where children have been wrongfully removed to or retained in Australia or where a parent living in an overseas Abduction Convention country seeks access to children living in Australia are generally received by the Commonwealth Central Authority and then referred to the relevant State or Territory Central Authority, which commences proceedings in the Family Court in that State or Territory. ISS is not involved in this process.
- 18 The arrangement referred to above gives effect to a change in the management of Applications seeking the return of children or access under the Abduction Convention which commenced in February 2012. Prior to February 2012, State or Territory Central Authorities handled both incoming and outgoing cases.

The abduction helpline – 1300 657 843

- 19 ISS Australia Legal Service offers a helpline providing information to individuals and professionals, whose clients are affected by international parental child abduction.
- 20 The helpline provides information and advice regarding prevention of abduction; options available after abduction has occurred; the operation of the Abduction Convention; the operation of the Lebanon⁶² and Egypt⁶³ Bilateral Agreements; and post return legal processes and protection.

ISS Australia International Mediation

- 21 ISS Australia's International Family Mediation (IFM) Service provides expert assistance in the resolution of family disputes across international borders.
- 22 The IFM Service is provided by qualified Family Dispute Resolution Practitioners (FDRP) registered with the Australian Government who will assist family members affected (or likely to be affected) by separation or divorce across international borders to try to resolve their disputes with each other.
- 23 ISS Australia offers a comprehensive IFM Service including:
 - (a) Assessment of suitability for mediation;
 - (b) Mediation provided face-to-face, via telephone or online;
 - (c) Section 60I certificates for the Family Courts, where appropriate.

⁶² Agreement between Australia and the Republic of Lebanon regarding Cooperation on protecting the Welfare of Children.

⁶³ Agreement Between The Government Of Australia And The Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare of Children (Cairo, 22 October 2000) Entry into force Generally: (1 February 2002) Entry into force for Australia: (1 February 2002) Australian Treaty Series [2002] ATS 3.

The role of ISS Australia's FDRPs

- 24 The FDRP is independent of all parties involved in the process and is experienced in cross-cultural and international family matters. All FDRPs are qualified and accredited by the Commonwealth Government.
- 25 In addition to their FDRP qualification, ISS Australia staff who provide this service are qualified social workers or lawyers.

Legal Advice

- 26 ISS Australia's FDRPs cannot provide parties with legal advice. All parties have a right to seek legal advice at any time during the mediation process and are encouraged to do so. An internal referral to the ISS Australia Legal Service can be made where appropriate.

Relationship between ISS Services

- 27 While ISS Australia provides a range of services, each service operates independently. Clients can be referred on request to any of the other services provided by ISS Australia. Client confidentiality within each service is strictly protected and information is only shared between services with the consent of the client.

The ISS Australia model

- 28 Although the Social Work Support Service and the Legal and Mediation Services offered by ISS Australia are discrete services, the co-location of the services within one small organisation means that clients may easily be referred from one Service to another and clients will often access more than one Service.
- 29 At ISS Australia, there is also room for a collaborative approach in some cases, which may enhance the final outcome of international family disputes. Access applications is one area where ISS Australia has made use of a more collaborative approach using its links with the international ISS network to make direct contact with the parent overseas and provide ongoing support to both parents.
- 30 This approach depends on the level of cooperation available from the ISS partner organisation and, of course, from the other parents, but is particularly useful in those cases where the parent seeking to spend time with the child already has orders but for whatever reason the orders are not being carried out.
- 31 The ISS Network can also provide support for parents and children who have been returned to an overseas country.

Fees and charges

- 32 There is no cost to the client for any of the funded services provided by ISS Australia; that is, Social Work Support and Legal Services involved in Abduction Convention cases.
- 33 Fees are charged by ISS Australia for the provision of the Mediation Service. Concession rates may be applied to individuals with a low income and in exceptional cases a full waiver of the fees may be made.
- 34 Clients may be required to pay legal fees in the overseas country if their particular

case involves an access application or is sent to a Convention country which has made a reservation under Article 42 of the Abduction Convention in relation to costs and expenses (refer to **Appendix 1**).

- 35 If the client qualifies for legal aid under the provisions of the relevant country, then there is usually no charge. The Commonwealth Government also provides a scheme of financial assistance for parents whose children have been wrongfully removed from Australia or wrongfully retained in an overseas country.⁶⁴ This assistance is available whether or not the overseas country is an Abduction Convention country.
- 36 Financial assistance is not available for access cases even if they are in Abduction Convention countries. Some Abduction Convention countries such as New Zealand (and Australia for incoming cases) do not require the payment of legal fees for access cases. The financial assistance scheme is discussed in detail Chapter 13 of this resource.

ISS Australia locations and contact details

- 37 Contact details for ISS are available on their website at www.iss.org.au.

⁶⁴ Overseas Custody (Child Removal) Scheme – www.ag.gov.au.

Chapter Fifteen

Family Law Watchlist and Passports

Key Points

Family Law Watchlist

- A child's name may be placed on the Watchlist when:
 - the court has issued a parenting order limiting or preventing the child's overseas travel;
 - the court has issued an injunction limiting or preventing the child's overseas travel;
 - the child is the subject of a parenting order application currently before the court that may limit or prevent overseas travel;
 - the child is the subject of an application for an order to place the child on the Family Law Watchlist; or
 - the child is the subject of a parenting order or injunction under appeal.
- The Watchlist does not operate for domestic travel.
- The Australian Federal Police may also place a child who is the subject of a Recovery Order on the Watchlist.
- It is critical that the spelling of the child's name, and the gender and the date of birth on any order are identical to these particulars on their passport.
- At the conclusion of a family law matter, it is important to obtain a court order to remove the Watchlist orders.

Passports

- A person with parental responsibility for a child may raise a child alert which warns the Department of Foreign Affairs and Trade there may be circumstances that need to be considered before an Australian travel document is issued to a child.
- A Child Alert will not stop a child from travelling if she/he already has, or is legally entitled to, an Australian passport or travel document issued by another country.
- In order for a child to be issued with an Australian passport or travel document, a passport application must comply with the requirements set out in the *Australian Passports Act 2005* and the Australian Passports Determination 2005.
- Parental responsibility for the purposes of obtaining an Australian passport or travel document is defined in ss11(5) of the Passports Act and includes persons that can spend time with, or have access to, the child.
- The Department of Foreign Affairs and Trade may be limited by the *Privacy Act 1988* in what information can be provided in relation to an existing Australian passport or travel document.

Chapter Fifteen

Family Law Watchlist and Passports

Preventing International Child Abduction – the Family Law Watchlist and Issuing of Australian Passports

What is the Family Law Watchlist?

- 1 The Family Law Watchlist (sometimes referred to as the Airport Watchlist) is a system designed to alert police to the movement of children overseas. It identifies whether children are leaving Australia. A child's name may be placed on the Watchlist when:
 - (a) The court has issued a parenting order limiting or preventing the child's overseas travel;
 - (b) The court has issued an injunction limiting or preventing the child's overseas travel;
 - (c) The child is the subject of a parenting order application currently before the court that may limit or prevent overseas travel;
 - (d) The child is the subject of an application for an order to place the child on the Family Law Watchlist; or
 - (e) The child is the subject of a parenting order or injunction under appeal.
- 2 The Watchlist does not operate for domestic travel.
- 3 The Australian Federal Police (AFP) may also place a child who is the subject of a Recovery Order on the Watchlist. A Recovery Order is a court order issued under s67Q of the Act that directs Federal, State and/or Territory police to recover and return a child to the person nominated in the order.

Placing a child on the Watchlist

- 4 For the most up-to-date information on how to place a child on the Watchlist, and access relevant links, forms and contact details, please see the Family Law Kit on the AFP website at <http://www.afp.gov.au/policing/family-law/family-law-kit.aspx>.
- 5 To place a child on the Watchlist, you will need to:
 - (a) Have a court order (made under s34 or s68B) or a parenting order that limits or prevents the child's overseas travel and which also requests the AFP to place the child on the Family Law Watchlist; or
 - (b) Have filed an application with the court for a court order (to be made under s34 or s68B) or a parenting order that limits or prevents the child's overseas travel, and which also requests the AFP to place the child on the Family Law Watchlist; or
 - (c) Have filed an appeal with the court against an order of the court relating to the child that limits or prevents the child's overseas travel, that had requested the AFP to place the child on the Family Law Watchlist.

- 6 The source of power to make the orders placing a child on the Watchlist are:
- (a) If the application is made by the Central Authority as part of an application under the Regulations dealing with the *Abduction Convention*, then the court's power stems from its ancillary powers to restrain a person from leaving Australia pursuant to Regulations 14(1)(a)(iv) and 15 of the Regulations;
 - (b) If the application is made by any other party to parenting proceedings, then the court's power to make this order stems from either of s114(3) or s68B(2) of the Act;
 - (c) The court also has power under s67ZD of the Act to order that a passport of a child or any other person concerned be delivered up to the court, if there is considered to be a possibility or threat of a child being removed from Australia.

The AFP does not play a role in making orders to place a child on the Watchlist.

- 7 For the Watchlist to be effective, it is critical that the spelling of the child's name, and the gender and the date of birth on the order are identical to these particulars on their passport. It may be necessary to check the child's birth certificate for the correct spelling, as well as to check whether the child has ever been known by any other name than that on their birth certificate. Any orders made by the court ought to refer to any aliases used by any of the people or children the order seeks to prevent leaving Australia.
- 8 It is important to note that it is an offence for a party to parenting proceedings, whether they be final or not, to remove, or cause to be removed, a child from the Commonwealth of Australia unless:
- (a) A separate court order is made permitting them to do so; or
 - (b) The terms of a court order include a provision allowing consent to be given for the child's removal, and the written and authenticated consent of each other party to the proceedings is given.
- 9 At the conclusion of a family law matter, it is important to obtain an order to remove the Watchlist orders.
- 10 Practitioners and litigants are encouraged to review any existing orders and, if there are no longer any fears that a child may be removed from Australia, to take appropriate action to have orders which discharge Watchlist orders issued.
- 11 Practitioners and litigants should ensure that Orders seeking a child be placed on the Watchlist are clear in their intent and not ambiguous. It is not unusual for the AFP to receive orders which are difficult to interpret and therefore a child may be denied uplift incorrectly. The AFP preferred wording for Watchlist orders is available on the Family Law Kit on the AFP's website at <http://www.afp.gov.au/policing/family-law/family-law-kit.aspx>.

Preventing International Child Abduction – Australian Passports

Preventing the issue of a passport to a child?

- 12 A person with parental responsibility for a child may raise a child alert that warns the Department of Foreign Affairs and Trade (DFAT) there may be circumstances that need to be considered before an Australian travel document is issued to a child. Child Alert Request Forms (Form PC9) are available at passport offices in Australia, from the department's website www.passports.gov.au, by phoning the Australian Passport Information Service on **131 232** or from Australian diplomatic missions or consulates overseas (details can be found at <http://www.dfat.gov.au/missions>).
- 13 A Child Alert will not stop a child from travelling if she/he already has, or is legally entitled to, an Australian passport or travel document issued by another country.

Obtaining an Australian passport or travel document for a child

- 14 In order for a child to be issued with an Australian passport or travel document, a passport application must comply with the requirements set out in the *Australian Passports Act 2005* (the Passports Act) and the *Australian Passports Determination 2005* (the Passports Determination). The legislation was designed to protect children from child abduction and safeguard the rights of all people with parental responsibility for children.
- 15 The only way to guarantee the issue of an Australian passport or travel document to a child is to meet the requirements of ss11(1)(a) of the Passports Act which stipulates that:

The Minister must not issue an Australian passport to a child unless:

- (a) Each person with parental responsibility for the child consents to the child travelling internationally; or
 - (b) An order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally.
- 16 Parental responsibility for the purposes of obtaining an Australian passport or travel document is defined in ss11(5) of the Passports Act and includes persons that can spend time with, or have access to, the child.
 - 17 An order permitting international travel also includes an order that permits the issue of a passport to a child or contact outside Australia between the child and another person (ss11(4) of the Passports Act).
 - 18 Where the requirements of ss11(1)(a) of the Passports Act cannot be met, a request can be made for the passport application to be considered under the circumstances set out in ss11(2) of the Passports Act and ss2.1(3) of the Passports Determination. An application lodged for consideration under special circumstances will be assessed by a delegate of the Minister for Foreign Affairs. There is no guarantee that an application lodged for consideration under special circumstances will result in a passport being issued to the child. Where the child is the subject of legal proceedings pending in an Australian court, the circumstances that can be considered by the delegate is limited to those provided for in the Passports Act (ss2.1(2) of the Passports Determination). Further information can be obtained from the department's website at www.passports.gov.au.

Obtaining information regarding a child's existing Australian passport or travel document

- 19 The Department of Foreign Affairs and Trade may be limited by the *Privacy Act 1988* in what information can be provided in relation to an existing Australian passport or travel document. A person with parental responsibility who is seeking information regarding an existing Australian passport or travel document issued to their child should contact the Australian Passport Information Service on 131 232.

Further Information

Australian Federal Police website – *AFP Family Law Kit* – <http://www.afp.gov.au/policing/family-law/family-law-kit>

Australian Federal Police website – *Family Law-related contacts*

Australian Passport Information Service – 131 232

Department of Foreign Affairs and Trade (Passports) website – www.passports.gov.au

Chapter Sixteen

United Nations Convention on the Rights of the Child

Key Points

- Australia has ratified the United Nations Convention on the Rights of the Child 1989 (UNCROC).
- Particular matters dealt with by UNCROC that are affected by proceedings under the Regulations are the best interests of the child and the child's right to be heard.
- Proceedings under the Regulations are not proceedings in which the best interests of the child are the paramount consideration. Rather, they are intended to protect a child from the harmful effects of international parental abduction (initially by resolving the question of *which jurisdiction* should deal with questions of the child's best interests).
- While not the *paramount* consideration, the best interests of the child can be considered a *relevant* consideration in proceedings under the Regulations.
- The right of a child to have their views heard in proceedings is recognised by the Regulations.

Chapter Sixteen

United Nations Convention on the Rights of the Child

UNCROC and the *Family Law (Child Abduction) Regulations 1986*

- 1 Australia has ratified the United Nations Convention on the Rights of the Child 1989 (UNCROC).⁶⁵
- 2 One of the amendments made by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* concerned the application of UNCROC to the provisions of the Act. Part VII of the Act was amended so that s60B(4) now reads:

An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

- 3 The effect of the insertion of this additional object is described in the Explanatory Memorandum for the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*, as follows:

[The Bill]...

...inserts a new subsection into section 60B of the Act to provide that a further object of Part VII of the Act is to give effect to the United Nations Convention on the Rights of the Child (the Convention). The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.

...[]... Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring children's rights. The Convention contains the full range of human rights – civil, cultural, economic, political and social rights. These rights can be broadly grouped as protection rights, participation rights and survival and development rights. One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making. Part VII of the Act is based on this same principle; although the best interests of the child are elevated to 'paramount' status in several provisions. The reference to the Convention in section 60B does not adversely affect these provisions in Part VII or dilute the meaning of 'paramount consideration'. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes...

- 4 The insertion of the additional object in s60B, which is in Part VII of the Act, has no impact on matters brought under the Regulations.⁶⁶
- 5 However, UNCROC is still relevant to such proceedings. The High Court has previously considered the general relevance of UNCROC to such proceedings in *De L v Director-General Department of Community Services* (NSW) [1996] HCA 5. In his judgment in that case, Kirby J took the opportunity to expand upon the application of UNCROC [here

⁶⁵ Australia Treaty Series (1991) No 4.

⁶⁶ Hague abduction matters are brought pursuant to the *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations) which were made to give effect to s111B of the Act. Section 111B sits within Part XIII AA (International Conventions, International Agreements and International Enforcement).

called the CRC] in child abduction cases. His Honour said:

Australian legislation will be construed, and the common law developed, so far as possible, to conform with Australia's obligations under treaties which Australia has ratified. This principle extends to the CRC, although not expressly incorporated into Australia's municipal law. The Full Court of the Family Court has held that the Convention in question in these proceedings is not inconsistent with the CRC. However that may be, if there were any disharmony, the duty of an Australian court would clearly be to comply with the plain language of a valid Australian law. The Convention here in question is concerned, relevantly, with protecting the rights of children from the disruption and psychological harm which may follow international abduction. The CRC also envisages that action will be taken to combat this particular problem. Both the Convention and the CRC are, in this sense, concerned with aspects of the welfare of children. Both Article 13 of the Convention and Article 12 of the CRC contemplate that, where children are mature enough to form their own views, they should be listened to for the purposes stated. But in the case of the Convention, which addresses a specific problem both of children and of the international community, the views will not be given weight, even in the case of a child of sufficient age and maturity, unless they amount to an objection. This specific provision must be respected not only because it is reflected in reg 16(3)(c) of the Regulations but also because any other approach would defeat the achievement of the objectives of the Convention which Australia has ratified and which the Parliament, by s111B of the Act, has endorsed.

- 6 The particular matters dealt with by UNCROC that are affected by proceedings under the Regulations are the best interests of the child and the child's right to be heard. These are considered below.

Best interests of the child in proceedings under the Child Abduction Regulations

- 7 Article 3 of UNCROC provides, relevantly, that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

- 8 Proceedings under the Regulations are not proceedings in which the best interests of the child are the paramount consideration. Rather, they are intended to protect a child from the harmful effects of international parental abduction (initially by resolving the question of *which jurisdiction* should deal with questions of the child's best interests). The Explanatory Report⁶⁷ for the Abduction Convention provides:

...the dispositive part of the Convention contains no explicit reference to the interest of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

While not the *paramount* consideration, the best interests of the child can be considered a *relevant* consideration in proceedings under the Regulations. See Kirby J in *DP v Commonwealth Central Authority* (2001) HCA 39 and *JLM v Director-General, NSW Department of Community Services* (2001) 206 CLR 401.

⁶⁷ Explanatory Report by Elisa Perez-Vera.

Child's right to be heard

9 Article 12 of UNCROC provides that:

Article 12

- 1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

10 The right of a child to have their views heard in proceedings is recognised by the Regulations. Regulation 16(3) provides that a court *may* refuse to make an order under Regulation 16(1) or (2) if a person opposing return establishes (among other matters) that:

...(c) each of the following applies:

- (i) the child objects to being returned;
- (ii) (the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
- (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views...

11 How the Regulations ensure the right of the child to *express* their views (or provide a mechanism through which to express those views) is less clear. Section 68L of the Act deals with the independent representation of a child's interest in proceedings under the Act. However, the appointment of an Independent Children's Lawyer under ss68L(3) is only made in exceptional circumstances in relation to proceedings under the Regulations. This is discussed further in Chapter 7.⁶⁸

12 The Explanatory Memorandum for the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*, which, when enacted, substituted s68L(3) in the Act explained that this substitution, among other things, clarified that it is the child's interests that will be represented, rather than the child's best interests, and that, in any case, under the Abduction Convention, inquiries into the best interests of a wrongfully removed or retained child are a matter for the country of habitual residence of the child. The Abduction Convention is also designed to achieve the return of wrongfully removed or retained children to their country of habitual residence expeditiously. This is clear from Article 11, which requires that '*...Contracting States shall act expeditiously in proceedings for the return of children...*' and permits reasons for delay to be requested if no decision is reached within six weeks from the date of commencement of proceedings.

⁶⁸ See also, for example, Parkinson, P., *The Family Law Act and the UN Convention on Children's Rights: A New Focus on Children?* published online at *Right Now – Human Rights in Australia* July 13 2012.

Chapter Seventeen

Non-Hague Convention Countries

Key Points

- The Commonwealth Central Authority can only help with a return application if the child is in an Abduction Convention country.
- If an Australian child is abducted to a non-Hague Convention country with which Australia has no bilateral agreement on the issue of international parental child abduction, the matter is governed by general principles of private international law and—depending on determination of forum issues—the domestic family laws of the Non-Hague Convention Countries.
- Financial assistance may be available under the Overseas Child Abduction Scheme.
- Where a child who is habitually resident in a Non-Hague Convention Country is abducted to Australia, the left behind parent must initiate proceedings in the Family Court of Australia.
- If a left behind parent has a parenting order made by an overseas court of a prescribed overseas jurisdiction, he or she may apply to register it in Australia under the Act and the *Family Law Regulations 1984*.
- Where the left behind parent does not have an overseas family law order capable of registration, he or she could seek an order for the return of the child under s67ZC of the Act, which enables the court to make orders for the welfare of the child.
- If a child has been taken to or retained in Egypt or Lebanon, it is also possible to make an application for assistance under bilateral agreements between Australia and Egypt and Australia and Lebanon.

Chapter Seventeen

Non-Hague Convention Countries

- 1 The Commonwealth Central Authority can only help with a return application if the child is in an Abduction Hague Convention country. Non-Convention abductions are generally regarded as more problematic than Abduction Convention cases.⁶⁹
- 2 International parental child abduction to or from non-Hague Convention countries has been described by the Hon Michael Kirby AC CMG as ‘a legal wasteland’ with ‘absolutely no effective legal or political sanction’.⁷⁰
- 3 Essentially the only legal course of action available to a parent whose child has been taken to or retained in a non-Hague Convention country is to commence proceedings in the country to which the child has been taken.

Private international law⁷¹

Outgoing matters (abductions from Australia to non-Convention countries)

- 4 If an Australian child is abducted to a non-Hague Convention country with which Australia has no bilateral agreement on the issue of international parental child abduction, the matter is governed by general principles of private international law and—depending on determination of forum issues—the domestic family laws of the non-Hague Convention country. The left behind parent seeking the return of his or her child must initiate proceedings in the overseas jurisdiction to which the child was abducted. Central Authorities have no mandate to intervene in these proceedings.

Financial assistance in non-Convention abductions

- 5 Financial assistance may be available under the Overseas Child Abduction Scheme as discussed in Chapter 13.

Incoming matters (abductions to Australia from non-Convention countries)

- 6 Where a child who is habitually resident in a non-Hague Convention country is abducted to Australia, the left behind parent must initiate proceedings in the Family Court of Australia. If a left behind parent has a parenting order made by an overseas court of a prescribed overseas jurisdiction,⁷² he or she may apply to register it in Australia under the Act and the *Family Law Regulations 1984*. The full list of countries whose orders can be registered in Australia is set out in Schedule 1A of the *Family Law Regulations 1984*. Alternatively, if the parenting order was made in a country that is a signatory to the 1996 Child Protection Convention, the orders may be able to be registered under the

⁶⁹ Senate Legal and Constitutional Affairs Reference Committee, October 2011, Commonwealth of Australia 2011, ISBN 978-1-74229-536-7.

⁷⁰ The Hon Michael Kirby AC CMG, ‘Children Caught in Conflict—the Child Abduction Convention and Australia’ (2010) 24(1) *International Journal of Law, Policy and the Family* 95, p. 99.

⁷¹ Senate Legal and Constitutional Affairs Reference Committee, October 2011, Commonwealth of Australia 2011, ISBN 978-1-74229-536-7.

⁷² Regulation 14 of the *Family Law Regulations 1994*.

Family Law (Child Protection Convention) Regulations 2003. Further information about registering overseas child orders is available from the Attorney-General's Department website at www.ag.gov.au

- 7 Where the left behind parent does not have an overseas family law order capable of registration, he or she could seek an order for the return of the child under s67ZC of the Act, which enables the court to make orders for the welfare of the child. The court may also make a recovery order under the Act, requiring the child to be returned to the custody of the non-abducting parent, where he or she has parental responsibility in respect of the child.

Egypt and Lebanon

- 8 If a child has been taken to or retained in Egypt or Lebanon it is also possible to make an application for assistance under bilateral agreements between Australia and Egypt and Australia and Lebanon.⁷³ The agreements are set out in **Appendix 5 and Appendix 6** of this Resource.
- 9 The bilateral agreements with Egypt and Lebanon do not provide for specific legal processes to address international parental child abduction, nor do they confer substantive legal rights upon affected persons. Instead they establish Joint Consultative Commissions which provide a forum for dialogue and mutual assistance in the event of international parental child abduction to or from either country. They also make provision for support services to be provided by the country to which the child has been abducted.⁷⁴
- 10 Financial assistance may also be available for applications for assistance under these bilateral arrangements⁷⁵ (see Chapter 13).
- 11 Further information about these bilateral agreements and how to make an application is available on the Commonwealth Attorney-General's Department website.⁷⁶

⁷³ *Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare Of Children* (Cairo, 22 October 2000) Australian Treaty Series[2002]ATS 3; *Agreement between Australia and the Republic of Lebanon regarding the Welfare of Children*, Beirut 18 March 2009 Australian Treaty Series[2010] ATS 14.

⁷⁴ Senate Legal and Constitutional Affairs Reference Committee, October 2011, Commonwealth of Australia 2011, ISBN 978-1-74229-536-7.

⁷⁵ Further information about the Scheme and details about how to apply are available at <http://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Commonwealthlegalfinancialassistance/Pages/Overseaschildabduction.aspx>.

⁷⁶ <http://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx>.

Chapter Eighteen

The Role of the Private Legal Profession

Key Points

- One of the key difficulties for practitioners involved in Abduction Convention matters is to assist their clients to depart from the usual way of thinking of parenting cases.
- It is critical that if practitioners do not regularly undertake this type of work, they promptly seek expert advice and guidance from another practitioner or counsel who does, to ensure that their client's interests are protected and advanced and not prejudiced.
- Often parents will seek legal advice in contemplation of the possibility of a child being taken, or not returned from, overseas. The instructions obtained and advice provided by practitioners in these circumstances must be careful, considered and comprehensive.
- If advising regarding a child's potential travel overseas, practitioners might consider the particular country's reputation for compliance with the Abduction Convention.
- Practitioners should be familiar with the offences created by s65Y and s65Z of the Act.
- Practitioners should also bear in mind their professional and ethical responsibilities to children in such cases, drawing guidance from the *Best Practice Guidelines for Lawyers Doing Family Law Work*.
- Practitioners should be mindful when receiving instructions to advise or act for a left behind parent, of the distinction between acting in cases where a child has been abducted overseas and where a child has been abducted within Australia. Care must be taken that the left behind parent, or a practitioner on their behalf, **does not**:
 - Do anything that might be construed as consent or acquiescence to the child's removal from their place of habitual residence or retention to another jurisdiction;
 - Take any steps that might be construed as acceding to jurisdiction in the country to where the child has been removed/retained;
 - Take any other steps that may prejudice an Abduction Convention return application.

Chapter Eighteen

The Role of the Private Legal Profession

- 1 Private legal practitioners may find themselves engaged to act on behalf of a parent seeking return of a child pursuant to the Abduction Convention or a person resisting the return of a child. In either scenario, the private practitioner can play a significant role.
- 2 One of the key difficulties for practitioners involved in Abduction Convention matters is to assist their clients to depart from the usual way of thinking of parenting cases – where the best interests of a child is paramount. This can be exceptionally difficult for parents to understand, even with the benefit of clearly-articulated, expert legal advice.
- 3 It is critical that if practitioners do not regularly undertake this type of work, they promptly seek expert advice and guidance from another practitioner or counsel who does, to ensure that their client's interests are protected and advanced and not prejudiced.

Advice in anticipation of travel

- 4 Often parents will seek legal advice in contemplation a child being taken, or not returned from, overseas. The instructions obtained and advice provided by practitioners in these circumstances must be careful, considered and comprehensive.
- 5 When advising with respect to a child's potential travel overseas, practitioners should consider whether each proposed travel destination is a country in respect of which the Abduction Convention is in force with Australia. Practitioners should also consider making enquiries of each particular country's reputation for compliance with the Convention. Whilst Australia does not currently publish statistics with respect to Abduction Convention cases, Australian judgments from Abduction Convention cases are available online;⁷⁷ many overseas cases can be accessed via INCADAT⁷⁸ or from other online resources; and Compliance Reports published by the United States may be of assistance.⁷⁹

Travel in the absence of consent

- 6 If a parent seeks advice with the intention of travelling overseas with a child without the express consent of the other parent or is considering extending an agreed period of travel with a child, that parent should be informed of the potential risks and consequences of their plans. This advice extends beyond the potential for an order for return under the Abduction Convention.
- 7 Practitioners should be familiar with the offences created by s65Y and s65Z of the Act, which apply where parenting orders have been made or parenting proceedings are pending, and a party — or a person acting on behalf of, or at the request of, a party — takes or sends a child overseas without a court order or the written consent of another party. Child abduction is also a criminal offence in many other countries.

⁷⁷ www.austlii.edu.au.

⁷⁸ www.incadat.com.

⁷⁹ <http://travel.state.gov/content/childabduction/english/legal/compliance.html>.

- 8 Practitioners should also bear in mind their professional and ethical responsibilities to children in such cases, drawing guidance from the *Best Practice Guidelines for Lawyers Doing Family Law Work*.⁸⁰

- 1.3 In any case where the separating couple have a dependent child or children, lawyers should exercise particular care, even where there is no apparent dispute between the parents. If there are child protection issues, **whether arising from family violence, child abduction or any other matter, the safety of the children should be treated as paramount.** [emphasis added]

Travel with consent

- 9 If a child is travelling with the consent of both parents, ideally that consent should be documented by way of court orders, a parenting plan or a signed consent (preferably witnessed and/or notarised).
- 10 Care should be taken to ensure that any order, written agreement or signed consent is drafted to reflect the family's individual circumstances and any legal requirements from both the Australian perspective and that of the jurisdiction(s) to which the child will be travelling.
- 11 Whilst a helpful resource, standard consent forms should be used with care and the benefit of legal advice. By way of example, the I CARE Foundation has available online, an *"International Child Travel Consent Form"*, which has been commended by many agencies and practitioners.⁸¹ The Foundation reinforces the above warning, making it clear that *"The 'International Travel Child Consent Form' is not legal advice. Parents intending to use this form in any capacity should consult with a qualified attorney."*

Risk of travel without consent

- 12 Where there is a risk of passport or travel documents being obtained without a parent's consent, practitioners should also consider advising their client to lodge a Child Alert Request with the Department of Foreign Affairs and Trade. However, a Child Alert will not stop a child from travelling if she/he already has, or is legally entitled to, an Australian passport or travel document issued by another country.
- 13 Child Alert Request Forms (Form PC9) are available at passport offices in Australia, from the Department's website,⁸² by phoning the Australian Passport Information Service on **131 232** or from Australian diplomatic missions or consulates overseas.⁸³
- 14 Where a child has been abducted or there is a risk of a child being removed from Australia without consent, practitioners should be familiar with and consider making appropriate applications (including, if necessary, emergency *ex parte* applications by contacting the Family Court's emergency hotline) seeking injunctions, orders directed to carriers, location and recovery orders, Family Law Watchlist orders and/or orders to ensure the safekeeping of existing passports.

⁸⁰ Prepared by the Family Law Council and Family Law Section of the Law Council of Australia (2nd ed), including at Part 6, reflecting the law as at October 2010.

⁸¹ http://www.cobar.org/repository/email_templates/Family/I_CARE_Foundation_InternationalTravelConsent.pdf

⁸² www.passports.gov.au.

⁸³ Details can be found at <http://www.dfat.gov.au/missions>.

Negotiating the return of a child by consent

- 15 Where it is apparent that a child has been wrongfully removed from his or her place of habitual residence (whether such removal is deliberate, misguided or inadvertent), it may be possible for a practitioner to assist in negotiating the prompt return of the child, avoiding the need for the institution of Abduction Convention proceedings. This will most likely be achieved where both parents receive the advice of experienced practitioners from the outset.
- 16 Practitioners should always consider whether it is possible to secure the voluntary return of a child, either before or contemporaneously with making an application for return pursuant to the Abduction Convention. However, care should be taken before contacting an 'abducting parent' where there is a risk that parent may flee with the child to another jurisdiction to avoid the operation of the Abduction Convention, or if to do so would compromise the child's safety or return.

Acting for a parent resisting return

- 17 Frequently, a parent resisting the return of a child will engage a private practitioner for advice either before or after a child is removed or retained overseas or in Australia; seeking to issue proceedings in the local jurisdiction; or to act on their behalf in Australian court proceedings to resist the return of a child pursuant to the Abduction Convention. A private legal practitioner may play an important role in any of these scenarios, including where child abduction proceedings are conducted overseas.

Where return proceedings are conducted overseas

- 18 The direct role an Australian practitioner and the Australian Central Authority can play in an overseas jurisdiction is limited. A parent who has removed a child to, or retained the child in another jurisdiction should be advised from the outset and during the course of any proceeding to engage local, specialised lawyers to act on their behalf in that jurisdiction to work in conjunction with the Australian practitioner. The International Academy of Matrimonial Lawyers (www.iaml.org) is a useful source of referral to overseas practitioners with particular expertise in international family law matters. The parent should also be advised:
 - (a) How the Abduction Convention operates;
 - (b) That the court will not be approaching the case with the child's best interests as the paramount consideration;
 - (c) What exceptions to return or other legal avenues, might be available to resist the child's return;
 - (d) What evidence will be required to support the case, including documentary evidence and witness testimony, and how that evidence should be obtained;
 - (e) The prospects of resisting a return application;
 - (f) The potential impact of the parent's conduct and/or a return order upon the child and upon any pending or future parenting case in another jurisdiction, including a potential relocation case;
 - (g) Whether the parent may face criminal charges for child abduction offences;

- (h) The likelihood that any parenting proceedings that are filed in Australia will be stayed pending determination of the Abduction Convention proceedings;
- (i) The potential benefits of participating in mediation;
- (j) The potential benefits of voluntary return;
- (k) In relation to the making of arrangements for the child to spend time with and/or communicate with the left behind parent during the course of the Abduction Convention proceedings;
- (l) What arrangements might need to be made if an order is made for the child's return, including for passports, visas and travel;
- (m) Whether the court should be requested to consider making conditions upon a child's return, including 'soft landing' or 'safe haven' orders; and
- (n) Whether the Protection Convention is in force between the two relevant countries and, if so, if it can be of assistance.

Where return proceedings are conducted in Australia

- 19 A legal practitioner acting in contested Abduction Convention proceedings in Australia, for a parent who is alleged to have wrongfully removed children to or retained children in Australia will be responsible for:
- (a) Advising in relation to those matters identified at 18 above;
 - (b) Seeking advice from an overseas practitioner about whether the parent may face child abduction charges in another jurisdiction;
 - (c) Advising their client throughout the proceedings as the case develops;
 - (d) Advising in relation to formulating any exception to return or other legal strategies to resist return (which requires keeping up to date with domestic and international case law and developments regarding implementation of the Abduction Convention);
 - (e) Advising of the limited framework for and potential difficulties of formulating an exception to return or otherwise resisting return;
 - (f) Preparing and filing a response and supporting affidavit material;
 - (g) Adducing other relevant evidence, including expert and other evidence in support of any exceptions to return;
 - (h) Seeking the appointment of an Independent Children's Lawyer where that may be appropriate;
 - (i) Seeking orders for the preparation of family consultant report where required;
 - (j) Making arrangements for witnesses to give evidence, including possibly by electronic means;
 - (k) Preparing submissions;
 - (l) Arranging representation at court, including briefing suitably experienced counsel; and
 - (m) Assisting to engage suitably experienced legal representation in other relevant

jurisdictions and liaising/coordinating with those practitioners to ensure a cooperative and consistent approach is taken to proceedings in both jurisdictions.

- (n) If there are already proceedings pending overseas, whether an application should be made to stay those proceedings pending determination of the Abduction Convention proceedings;
- (o) The likely timeframe of the proceedings;
- (p) The legal costs the parent may incur in defending the case and whether a costs order may be made;
- (q) Negotiating parenting arrangements upon the children's return in the event a return order is made, including via mediation; and
- (r) Considering the financial and other resources that may be required for proceedings about the parenting arrangements for the children following the determination of the Abduction Convention proceedings.

Acting for a left behind parent

Where a child has been removed from Australia

- 20 Where a child has been wrongfully removed from Australia or retained overseas in another Abduction Convention country, a practitioner engaged by the left behind parent should assist that parent to complete an application for return, including required supporting affidavits, to be lodged with the Australian Central Authority. It is important that this is done promptly as any delay may compromise the return application. The practitioner may also refer the left behind parent to International Social Service Australia, who will assist with the preparation of the application at no charge (see Chapter 14).
- 21 The lawyer for the left behind parent should liaise with the Central Authority as the application is made; and offer ongoing assistance to the Central Authority on behalf of their client, even after the application is transmitted overseas and proceedings are instituted in that jurisdiction.
- 22 A left behind parent may contact a private lawyer after lodging an application for return with the Central Authority. At this point, the parent may require assistance with the preparation of secondary evidence, such as affidavits responding to any material filed by the other parent. Assistance with the preparation of material in reply is available from ISS, for a fee.
- 23 There can be lengthy delays in the conduct of Abduction Convention proceedings and a left behind parent may encounter difficulties in obtaining information about the conduct of the proceedings overseas via the relevant Central Authority, depending on the jurisdictions involved. Sometimes a private practitioner may be able to obtain information more readily via the Central Authority or directly from practitioners overseas, helping the left behind parent to feel more engaged in the Abduction Convention proceedings.
- 24 If a child is removed to a country where the Abduction Convention is not in effect, a practitioner should investigate whether any bilateral treaty is in place and, if not, refer the parent to a practitioner in the other jurisdiction for advice as to the institution of court proceedings there. Consideration should also be given to the potential benefit of

local proceedings seeking to compel the parent to return the child, which (coupled with penalties for contempt if the orders are not complied with) may be particularly effective if the abducting parent returns to Australia, even briefly, without the child. Consideration should also be given to utilising the Child Protection Convention if in force between the two relevant countries.

25 Practitioners may also be able to assist a left behind parent in Australia to:

- (a) Make an application for parenting orders in Australia, including an order for the child to live with that parent and for recovery of the child; and/or an application to be filed immediately upon the conclusion of Abduction Convention proceedings;
- (b) Obtain legal advice and representation overseas and liaise with/coordinate with that practitioner to ensure a cooperative and consistent approach to parenting matters in both jurisdictions, including in relation to the gathering of evidence and the filing of applications and affidavit material. Again, the International Academy of Matrimonial Lawyers is a particularly useful source of referral;
- (c) Gather evidence for the overseas proceedings;
- (d) Negotiate with the other parent directly and/or via their legal representatives, with a view to achieving the voluntary return of the child;
- (e) Negotiate for the child to spend time with and/or communicate with the left behind parent pending determination of Abduction Convention proceedings;
- (f) Participate in mediation;
- (g) Seek financial assistance, including via the Commonwealth Attorney-General's Department; and
- (h) Obtain support from organisations such as International Social Services.

Where a child has been removed to Australia

- 26 Whilst an application for return is generally made by the Central Authority on behalf of a left behind parent, it is possible pursuant to Regulation 14(1)(b) of the Regulations for a left behind parent to make an application for the return of a child directly to the court. The Regulations were amended in 2004 to provide specifically for an application to be made by an applicant other than the Central Authority, overcoming the effects of the decision of the Full Court of the Family Court in *A and GS & Ors* (2004) FLC 93-199 where Finn, May and Carmody JJ ruled that an individual could not apply to a court under the regulations in force at that that time.⁸⁴
- 27 This is rarely, if ever, undertaken in Australia, given the expertise and resources of the Central Authority available without legal cost to the applicant parent. However, it remains an option in an appropriate case.
- 28 Although the interests of a left behind parent and the Central Authority are often the same, the Central Authority does not act on the instructions of a left behind parent and can provide only limited advice to that parent.

⁸⁴ See Explanatory Memorandum to the *Family Law Amendment Regulations* 2004 (No 3) (SR 2004 No 371).

- 29 A left behind parent overseas can benefit greatly from private legal representation during the course of Abduction Convention proceedings conducted in Australia, including for the following purposes:
- (a) For advice in Australia, including in relation to the potential and likely outcomes of the Abduction Convention proceedings;
 - (b) Obtaining legal advice and representation overseas, including in relation to the institution and/or stay of overseas proceedings pending determination of Abduction Convention proceedings and liaising with and coordinating a cooperative approach to litigation in both jurisdictions as noted above. The International Academy of Matrimonial Lawyers is a valuable source of referral;
 - (c) To liaise with the Central Authorities in both countries on behalf of the left behind parent;
 - (d) To liaise directly with and assist the State Central Authority or other authority/ agency conducting the Abduction Convention proceedings on behalf of the Central Authority, which can be significantly more efficient than the authority/agency seeking instructions via the usual channels (ie. via the Australian Central Authority; from the overseas Central Authority; from the left behind parent; and back again), which can result in significant delay, particularly due to geographical distance, language and time differences;
 - (e) Making evidence available to the Central Authority, including preparing affidavit material and arranging expert evidence;
 - (f) Attending court hearings with a 'watching brief', which enables a speedy and accurate direct report back to the left behind parent and may provide the left behind parent with a greater sense of engagement in the Abduction Convention proceedings. In some circumstances, a judicial officer presiding over a Abduction Convention application may permit and be assisted by hearing submissions directly from the practitioner for the left behind parent, notwithstanding that parent is not a party to the proceedings;
 - (g) Liaising with an Independent Children's Lawyer where one is appointed;
 - (h) Proposing direct judicial communication where appropriate;
 - (i) Negotiating with the other parent directly and/or via their legal representatives, in the hope of achieving a voluntary return;
 - (j) Negotiating for a left behind parent to spend time with and/or communicate with the children pending determination of Abduction Convention proceedings;
 - (k) Arranging and facilitating mediation;
 - (l) Assisting with the implementation of a return order and any conditions upon return, if made; and
 - (m) Obtaining support from organisations such as International Social Services.
- 30 Practitioners should be mindful when receiving instructions to advise or act for a left behind parent, of the distinction between acting in cases where a child has been abducted overseas and where a child has been abducted within Australia. Care must be

taken that the left behind parent, or a practitioner on their behalf, does not:

- (a) Do anything that might be construed as consent or acquiescence to the child's removal from their place of habitual residence or retention to another jurisdiction;
- (b) Take any steps that might be construed as acceding to jurisdiction in the country to where the child has been removed/retained: for example, initiating proceedings (other than Abduction Convention proceedings) in the contracting State to which the child has been removed/retained. Even an order for a recovery or location order in that jurisdiction, as one might do in a domestic abduction case, may prejudice the Convention proceedings; or
- (c) Take any other steps that may prejudice an Abduction Convention return application.

Appeal by a left behind parent

- 31 Even where proceedings are conducted by the State Central Authority on behalf of a parent and the parent is not a party to the proceedings, the parent may have standing to bring an appeal following an unsuccessful Abduction Convention case as a person affected by the orders made by the trial judicial officer: see *Harris & Harris* [2010] FamCA 221. A private practitioner therefore may assist a parent in relation to a potential appeal, even if that parent was not a party to the Abduction Convention proceedings at first instance.

Glossary

Abduction Convention

Convention on the Civil Aspects of International Child Abduction.

Applicant

An applicant can be any person, institution or other body that has rights of custody or rights of access in respect of a child.

Acquiescence

Acquiescence may be a ground for a court to refuse to make a Return Order. It is quite distinct from consent. 'Acquiescence under the Convention requires either an act or statement with the requisite formality such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time' (*Friedrich v Friedrich* 6 Cir (1996), 78F3D 1060 – United States Court of Appeal).

Central Authority

Body appointed by each Contracting State to carry out that State's obligations under the Abduction Convention.

Child

The Abduction Convention (Article 4) applies to '*...any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.*'

Consent

A court may refuse to make a Return Order if the person opposing return of the child establishes that the person seeking the child's return consented to the child being removed, or retained (regulation 16(3)(a)(i)).

Contracting State

Country which is a party to the Abduction Convention.

Exception to Return

If an application for return of a child is made within 12 months of the wrongful removal or retention and it has been established that a child under the age of 16 years has been wrongfully retained or removed, a court is obliged to make an order for return unless a ground within regulation 16(3) is made out by way of exceptions to return, including:

- Consent or acquiescence
- Grave risk
- Child objects to return
- Protection of human rights

Grave Risk

Under Regulation 16(3)(b) the court has the discretion to refuse to make a Return Order if there is a grave risk that would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Habitual Residence

Habitual residence is not defined either in the Regulations or Abduction Convention, and is in each case a question of fact. The courts generally require that the child has lived in that country for an 'appreciable period'.

Judicial Communication

Judicial communication occurs through the International Network of Hague Judges. It may be in writing and/or by telephone. It can only occur with the consent of the parties.

Prescribed Forms

Prescribed forms are set out in the Regulations.

Protection Convention

Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.

Removal

An abduction is construed as a removal where the applicant alleges that the child was removed from the country of habitual residence without their consent and in breach of their rights of custody.

Retention

An abduction is construed as a retention where an abducting party has removed a child from the country of their habitual residence with the consent of the applicant for a distinct period of time, and the applicant alleges that the child was then retained outside their habitual residence beyond the period of consent or without ongoing consent, in breach of their rights of custody.

Return Application

A Return Application must be made within one year of the child's removal or retention. The Regulations set out the mechanisms by which applications are brought before and determined by the Australian courts, and outgoing applications are transmitted to overseas Central Authorities.

Return Order

Unless an exception is established, a court is obliged to make a Return Order if the application is made within 12 months of the wrongful removal or retention of a child under the age of 16. A court may also impose conditions in Return Orders so as to meet any suggestion of risk or other impediment that might otherwise arise.

Right of Access

Under Article 5 of the Abduction Convention, Rights of Access shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Rights of Custody

Under Article 5 of the Abduction Convention, Rights of Custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

State Central Authority

Regulation 8 empowers the Commonwealth Attorney-General to appoint Central Authorities in any State or Territory, which under regulation 9 then have all the duties, and are empowered to exercise all the powers and functions, of the Commonwealth Central Authority.

The Act

Family Law Act 1975 (Cth).

The Regulations

Family Law (Child Abduction) Regulations 1986.

UNCROC

United Nations Convention on the Rights of the Child 1989.

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A (by her next friend) and GS and Ors [2005] FamCA 785

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Brown and Burke [2007] FamCA 1421

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C v C (Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 654 INCADAT cite HC/E/UKe 34

CV v LMAD, 2009 PESC 26

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Director-General, Department of Families, Youth and Community Care and Bennett [2000] FamCA 253

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Jiang and Director-General, Department of Community Services [2003] FamCA 929

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Korutowska-Wooff v Wooff 2004 CanLII 5548 (ON C.A.), (2004), 5 R.F.L. (6th) 104 (QL)

Laing and The Central Authority [1999] FamCA 100

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McDonald & Director-General, Department of Community Services NSW [2006] FamCA 1400

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PCR and BEM [2001] FamCA 136

Perkis [2010] FamCA 649

P v Director General, Department of Community Services [2002] FamCA 321

RCB as Litigation Guardian of EKV, CEV, CIV and LRV v the Honourable Justice Colin James Forrest, one of the Judges of the Family Court of Australia & Ors (2012) FLC 93-517

Re C (A Minor) (Abduction) [1989] 1 FLR 403

Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC

Re F (a minor) (Child Abduction) (1992) 1 FLR 548

Re F (Hague Convention: Child's Objections) [2006] FamCA 685

Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562

Re K (Abduction: Consent) [1997] 2 FLR 212

Re R (A Minor: Abduction) [1992] 1 FLR 105

Re S (a Child) [2012] UKSC 10

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Re W (A Child) [2004] EWCA Civ 1366; [2005] 1 FLR 727

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State Central Authority and Young [2012] FamCA 563

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TB v JB (formerly JH) [2000] EWCA Civ 337

Thomson v Thomson [1994] 3 SCR 551

Townsend and Director-General, Department of Families, Youth and Community Care [1999] FamCA 285

Wenceslas and Director-General, Department of Community Services; [2007] FamCA 398

W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211

Zotkiewicz & Commissioner of Police (No 2) [2011] FamCAFC 147

Appendix 1

Convention on the Civil Aspects of International Child Abduction

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION¹

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

¹ This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Child Abduction Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

- (1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
- (2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
- (2) the accessions referred to in Article 38;
- (3) the date on which the Convention enters into force in accordance with Article 43;
- (4) the extensions referred to in Article 39;
- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Appendix 2

*Family Law (Child Abduction Convention)
Regulations 1986*



Family Law (Child Abduction Convention) Regulations 1986

Statutory Rules 1986 No. 85 as amended

made under the

Family Law Act 1975

This compilation was prepared on 24 July 2007
taking into account amendments up to SLI 2007 No. 213

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Regulation 1

Part 1 Preliminary

1 Name of Regulations [see Note 1]

These Regulations are the *Family Law (Child Abduction Convention) Regulations 1986*.

1A Purpose

- (1) The purpose of these Regulations is to give effect to section 111B of the Act.
- (2) These Regulations are intended to be construed:
 - (a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention; and
 - (b) recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and
 - (c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries.

2 Interpretation

- (1) In these Regulations, unless the contrary intention appears:

Article 3 applicant means a person, institution or other body that has made an application under paragraph 14 (1) (b) or subregulation 14 (2).

Central Authority has the meaning it has in the Convention.

child means a person who has not attained the age of 16 years.

Commonwealth Central Authority means the Secretary of the Attorney-General's Department.

Regulation 2

Convention means the Convention on the Civil Aspects of International Child Abduction referred to in section 111B of the Act, a copy of the English text of which is set out in Schedule 1.

convention country means a country that under regulation 10 is a convention country.

court means a court having jurisdiction under paragraph 39 (5) (d), 39 (5A) (a) or 39 (6) (d) of the Act.

filed has the same meaning as in the applicable Rules of Court.

Registrar means:

- (a) in relation to the Family Court, or the Family Court of Western Australia — the Registrar, or a Deputy Registrar, of the court; and
- (b) in relation to any other court — the principal officer of the other court.

request means a request made to a responsible Central Authority for the purposes of Article 8 or 21 of the Convention.

responsible Central Authority, in relation to action to be taken in a State or Territory, means the Commonwealth Central Authority or the State Central Authority of that State or Territory, as the case requires.

return order means an order under Part 3 for the return, under the Convention, of a child who has been removed to, or retained in, Australia.

rights of access include the right to take a child for a limited period of time to a place other than the child's habitual residence.

rights of custody has the meaning given in regulation 4.

State Central Authority means a person appointed under subregulation 8 (1) to be the Central Authority of a State or Territory.

the Act means the *Family Law Act 1975*.

Note **applicable Rules of Court** is defined in subsection 4 (1) of the Act.

- (1A) A reference in these Regulations to a form by number is a reference to the form so numbered in Schedule 3.

Regulation 4

- (1B) Unless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these regulations as in the Convention.
- (1C) A reference in these Regulations to a child who is removed:
- (a) from Australia to a convention country; or
 - (b) from a convention country to another convention country or to Australia;
- includes a reference to the removal of the child to the convention country concerned or to Australia, as the case may be, whether or not the child is first removed to another country.
- (2) The removal or retention of a child is *wrongful* in the circumstances mentioned in Article 3 of the Convention.

4 Meaning of *rights of custody*

- (1) For these Regulations, a person, institution or other body has rights of custody in relation to a child if:
- (a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and
 - (b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in Australia or in the convention country in which the child habitually resided immediately before his or her removal or retention.
- (2) For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.
- (3) For the purposes of this regulation, rights of custody may arise:
- (a) by operation of law; or
 - (b) by reason of a judicial or administrative decision; or
 - (c) by reason of an agreement having legal effect under a law in force in Australia or a convention country.

Regulation 6

5 Commonwealth Central Authority — duties, powers and functions

- (1) In addition to the other functions conferred on the Commonwealth Central Authority by these Regulations, the functions of the Commonwealth Central Authority are:
 - (a) to do, or co-ordinate the doing of, anything that is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention; and
 - (b) to advise the Attorney-General, either on the initiative of the Commonwealth Central Authority or on a request made to that Authority by the Attorney-General, on all matters that concern, or arise out of performing, those obligations, including any need for additional legislation required for performing those obligations; and
 - (c) to do everything that is necessary or appropriate to give effect to the Convention in relation to the welfare of a child on the return of the child to Australia.
- (2) The Commonwealth Central Authority has all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention.
- (3) The Commonwealth Central Authority must perform its functions and exercise its powers as quickly as a proper consideration of each matter relating to the performance of a function or the exercise of a power allows.

6 These Regulations do not affect other powers of, or rights of application to, a court

- (1) These Regulations are not intended to prevent a person, institution or other body that has rights of custody in relation to a child for the purposes of the Convention from applying to a court if the child is removed to, or retained in, Australia in breach of those rights.
- (2) These Regulations are not to be taken as preventing a court from making an order at any time under Part VII of the Act or under any other law in force in Australia for the return of a child.

Regulation 7

7 Immunity of Commonwealth Central Authority etc in respect of orders to pay costs

A court must not make an order that requires the Commonwealth Central Authority or a State Central Authority to pay costs in relation to his or her exercising the powers, or performing the functions, of the Commonwealth Central Authority.

8 State Central Authority — appointment

- (1) The Attorney-General may appoint a person to be the Central Authority of a State or Territory for the purposes of these Regulations.
- (2) The power to appoint a person under subregulation (1) includes a power to appoint any person from time to time holding, occupying or performing the duties of a specified office or position of the Commonwealth or of a State or Territory.
- (3) An appointment of a person under subregulation (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.

9 State Central Authority — duties, powers and functions

Subject to subregulation 8 (3), a State Central Authority has all the duties, may exercise all the powers, and may perform all the functions, of the Commonwealth Central Authority.

10 Convention countries

Subject to Article 40 of the Convention, each of the following countries is a convention country:

- (a) a country specified in Schedule 2, being a country:
 - (i) as between Australia and which the Convention entered into force on the date specified in column 2 in relation to that country; and

Regulation 10

- (ii) that has acceded to the Convention with reservations in accordance with Article 42 of the Convention in respect of any provisions specified in column 3 in relation to that country;
- (b) any other country in respect of which the Convention has entered into force for Australia.

Regulation 11

Part 2 Requests to Central Authorities, except for access

11 Request for return of child abducted from Australia

- (1) A person, institution or other body that claims under a law in force in Australia to have rights of custody in relation to a child who, in breach of those rights, has been:
 - (a) removed from Australia to a convention country; or
 - (b) retained in a convention country;may request a responsible Central Authority to have the claim sent to the Central Authority in the country to which the child has been removed or in which the child is retained.
- (2) A request must be:
 - (a) in accordance with Form 1; and
 - (b) in accordance with the Convention.
- (3) A State Central Authority that is satisfied that a request received by it complies with subregulation (2) must send the request to the Commonwealth Central Authority.
- (4) If the Commonwealth Central Authority is satisfied that a request received by it complies with subregulation (2), the Commonwealth Central Authority must, on behalf of the person, institution or other body, take any action required to be taken by a Central Authority under the Convention.
- (5) A responsible Central Authority that is satisfied that a request received by it does not comply with subregulation (2) may, by notice in writing, refuse to accept the request.
- (6) A notice under subregulation (5) from the Commonwealth Central Authority must:
 - (a) be sent to the person, institution or other body that made the request; and

Regulation 13

- (b) if the Commonwealth Central Authority received the request from a State Central Authority — be sent to the State Central Authority; and
 - (c) include the reason for the refusal.
- (7) A notice under subregulation (5) from a State Central Authority must:
- (a) be sent to the person, institution or other body that made the request; and
 - (b) include the reason for the refusal.

13 Request for return of child abducted to Australia

- (1) The Commonwealth Central Authority must take action to secure the return of a child under the Convention if:
- (a) it receives a request from:
 - (i) a person, institution or other body that claims to have rights of custody in relation to the child who, in breach of those rights, has been removed from a convention country to Australia or has been retained in Australia; or
 - (ii) a Central Authority on behalf of a person, institution or other body mentioned in subparagraph (i); and
 - (b) it is satisfied that the request is in accordance with the Convention.
- (2) The Commonwealth Central Authority may, by notice in writing, refuse to accept a request received by it if it is satisfied that the request is not in accordance with the Convention.
- (3) A notice under subregulation (2) must:
- (a) be sent to the person, institution or other body that made the request; and
 - (b) if the Commonwealth Central Authority received the request from a Central Authority — be sent to the Central Authority; and
 - (c) include the reason for the refusal.

Regulation 13

- (4) For subregulation (1), the action taken may include any of the following:
- (a) transferring the request to a State Central Authority;
 - (b) seeking an amicable resolution of the differences, in relation to the removal or retention of the child, between the person making the request for the child's return and the person opposing the child's return;
 - (c) seeking the voluntary return of the child;
 - (d) applying for an order under Part 3.

Part 3 Court applications, except for access

14 Applications to court

- (1) If a child is removed from a convention country to, or retained in, Australia:
 - (a) the responsible Central Authority may apply to the court, in accordance with Form 2, for any of the following orders:
 - (i) a return order for the child;
 - (ii) an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention;
 - (iii) an order for the issue of a warrant mentioned in regulation 31;
 - (iv) an order directing that:
 - (A) the child not be removed from a specified place; and
 - (B) members of the Australian Federal Police prevent the child being removed from that place;
 - (v) an order requiring that arrangements be made (as necessary) to place the child with an appropriate person, institution or other body to secure the welfare of the child, until a request under regulation 13 is determined;
 - (vi) any other order that the responsible Central Authority considers appropriate to give effect to the Convention; or

Regulation 14A

- (b) a person, institution or other body that has rights of custody in relation to the child for the purposes of the Convention may apply to the court, in accordance with Form 2, for an order mentioned in subparagraph (a) (i), (ii), (iii), (iv) or (v).
- (2) If the responsible Central Authority, or a person, institution or other body that has rights of custody in relation to a child for the purposes of the Convention, has reasonable grounds to believe that there is an appreciable possibility or a threat that the child will be removed from Australia, the responsible Central Authority or person, institution or other body may:
 - (a) apply to the court, in accordance with Form 2, for an order for the issue of a warrant mentioned in regulation 31; or
 - (b) apply to the court for an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention.
- (3) If a child is wrongfully removed from Australia to, or retained in, a convention country, the responsible Central Authority may apply to the court, in accordance with Form 2, for:
 - (a) an order that the responsible Central Authority considers necessary or appropriate to give effect to the Convention in relation to the welfare of the child after his or her return to Australia; or
 - (b) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.
- (4) If a copy of an application made under subregulation (1), (2) or (3) is served on a person:
 - (a) the person must file an answer, or an answer and a cross-application, in accordance with Form 2A; and
 - (b) the applicant may file a reply in accordance with Form 2B.

14A Further applications to court

- (1) A responsible Central Authority or person, institution or other body that has made an application under subregulation 14 (1),

Regulation 16

- (2) or (3) may make a further application for an order mentioned in those subregulations.
- (2) An application under subregulation (1) must be in accordance with Form 2 in Schedule 2 to the *Family Law Rules 2004*.

15 Orders

- (1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:
- (a) make an order of a kind mentioned in that regulation; and
 - (b) make any other order that the court considers to be appropriate to give effect to the Convention; and
 - (c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.
- (2) A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.
- (4) If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is filed:
- (a) the responsible Central Authority or Article 3 applicant who made the application may ask the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and
 - (b) as soon as practicable after being asked, the Registrar must give the statement to the responsible Central Authority or Article 3 applicant.

16 Obligation to make a return order

- (1) If:
- (a) an application for a return order for a child is made; and
 - (b) the application (or, if regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention; and

Regulation 16

- (c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);
the court must, subject to subregulation (3), make the order.
- (1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:
 - (a) the child was under 16; and
 - (b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and
 - (c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and
 - (d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and
 - (e) at the time of the child's removal or retention, the person, institution or other body:
 - (i) was actually exercising the rights of custody (either jointly or alone); or
 - (ii) would have exercised those rights if the child had not been removed or retained.
- (2) If:
 - (a) an application for a return order for a child is made; and
 - (b) the application is filed more than one year after the day on which the child was first removed to, or retained in, Australia; and
 - (c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;the court must, subject to subregulation (3), make the order.
- (3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:
 - (a) the person, institution or other body seeking the child's return:

Regulation 17

- (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
 - (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or
 - (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
 - (c) each of the following applies:
 - (i) the child objects to being returned;
 - (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
 - (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or
 - (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.
- (4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.
- (5) The court is not precluded from making a return order for the child only because a matter mentioned in subregulation (3) is established by a person opposing return.

17 Declaration that removal or retention was wrongful

- (1) On application, a court may by order declare that:
- (a) the removal of a child from Australia to a convention country; or

Regulation 18

- (b) the retention of a child in a convention country;
was wrongful within the meaning of Article 3 of the Convention.
- (2) The court may ask a responsible Central Authority to arrange for the person, institution or other body making a request in relation to the return of a child under the Convention to obtain an order of a court, or a decision of a competent authority, of the country in which the child habitually resided immediately before his or her removal or retention declaring that the removal or retention was wrongful within the meaning of Article 3 of the Convention.

18 Effect of other custody orders in Australia or overseas

- (1) The following rules apply to the hearing of an application made under subregulation 14 (1):
 - (a) the court must not refuse to make a return order for the child only because there is in force or enforceable in Australia an order relating to the custody of the child;
 - (b) the court may take into account the reasons for the making of any order relating to the custody of the child;
 - (c) an order for the return of the child does not determine the merits of any custody issue in relation to the child.
- (2) In this regulation:
custody, in relation to a child, includes:
 - (a) guardianship of the child; and
 - (b) responsibility for the long-term or day-to-day care, welfare and development of the child; and
 - (c) responsibility as the person or persons with whom the child is to live.

19 When a court not to make certain orders

If an application for a return order for a child is made, a court must not make an order, except an interim order, providing for the custody of the child, within the meaning of regulation 18, until the application is determined.

Regulation 20

19A Discharge of return order

- (1) If a court makes a return order, the responsible Central Authority, the Article 3 applicant or a respondent to the proceeding may apply to the court, in accordance with Form 2D, for the discharge of the order.
- (2) The court may make an order discharging a return order, or a part of a return order, only if it is satisfied that:
 - (a) all the parties consent to the return order being discharged; or
 - (b) since the return order was made, circumstances have arisen that make it impracticable for the order to be carried out; or
 - (c) exceptional circumstances exist that justify the return order being discharged; or
 - (d) the day on which the application for the discharge of the return order was made is more than 1 year after the return order was made or any appeal in relation to the return order was determined.
- (3) In considering whether to make an order discharging a return order, the court must have regard to section 111CE of the Act if the convention country from which the child was removed is also a Convention country within the meaning of subsection 111CA (1) of the Act.

20 Arrangements for return of child

- (1) If the responsible Central Authority applies to the court for a return order for a child, and the order is made, the responsible Central Authority must coordinate the making of the arrangements that are necessary to give effect to the order.
- (2) If:
 - (a) a return order for a child is made; and
 - (b) within 7 days after the order is made, the responsible Central Authority or Article 3 applicant has not been notified that the order has been stayed;the child must be returned in accordance with the order.

Regulation 21

- (3) Subregulation (1) does not require the Commonwealth Central Authority or the State Central Authority to make or pay for the arrangements that are necessary to give effect to the order.

21 Security for costs etc

A responsible Central Authority or a court must not require any security or bond for the payment of costs or expenses of, or incidental to, proceedings falling within the scope of the Convention.

Part 4 Requests to Central Authorities and court applications for access

23 Request for access to child in convention country

- (1) A person who claims under a law in force in Australia to have rights of access to a child in a convention country may request a responsible Central Authority to have arrangements made for establishing, organising or securing the effective exercise of those rights in that convention country.

Note For persons who should be regarded as having a right of access to a child, see paragraph 111B (4) (d) of the Act.

- (2) A request must be:
- (a) in accordance with Form 3; and
 - (b) in accordance with the Convention.
- (3) A State Central Authority that is satisfied that a request received by it complies with subregulation (2) must send the request to the Commonwealth Central Authority.
- (4) If the Commonwealth Central Authority is satisfied that a request received by it complies with subregulation (2), it must take any action required to be taken by a Central Authority under the Convention.
- (5) A responsible Central Authority that is satisfied that a request received by it does not comply with subregulation (2) may, by notice in writing, refuse to accept the request.
- (6) A notice under subregulation (5) from the Commonwealth Central Authority must:
- (a) be sent to the person who made the request; and
 - (b) if the Commonwealth Central Authority received the request from a State Central Authority — be sent to the State Central Authority; and
 - (c) include the reason for the refusal.

Regulation 24

- (7) A notice under subregulation (5) from a State Central Authority must:
- (a) be sent to the person who made the request; and
 - (b) include the reason for the refusal.

24 Request for access to child in Australia

- (1) The Commonwealth Central Authority must take action to establish, organise or secure the effective exercise of rights of access to a child in Australia if:
- (a) it receives a request from a Central Authority on behalf of a person who claims:
 - (i) to have rights of access to the child under a law in force in a convention country; and
 - (ii) that those rights have been breached; and
 - (b) it is satisfied that the request is in accordance with the Convention.
- (2) The Commonwealth Central Authority may, by notice in writing, refuse to accept a request received by it if it is satisfied that the request is not in accordance with the Convention.
- (3) A notice under subregulation (2) must:
- (a) be sent to the Central Authority that sent the request; and
 - (b) include the reason for the refusal.
- (4) For subregulation (1), the action taken may include any of the following:
- (a) transferring the request to a State Central Authority;
 - (b) applying to a court under regulation 25 for an order that is necessary or appropriate to establish, organise or secure the effective exercise of the rights of access to which the request relates;
 - (c) seeking an amicable resolution in relation to the rights of access to the child.

25 Application for access to child in Australia

- (1) The responsible Central Authority may apply to the court, in accordance with Form 4, for any of the following orders:

Regulation 25A

- (a) an order specifying with whom a child is to spend time or communicate;
 - (b) an order for the issue of a warrant mentioned in regulation 31;
 - (c) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.
- (2) If a copy of an application made under subregulation (1) is served on a person:
 - (a) the person must file an answer, or an answer and a cross-application, in accordance with Form 4A; and
 - (b) the responsible Central Authority may file a reply in accordance with Form 4B.

25A Orders

- (1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under subregulation 25 (1):
 - (a) make an order of a kind mentioned in that regulation; and
 - (b) make any other order that the court considers to be appropriate to give effect to the Convention; and
 - (c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.
- (2) In determining an application made under subregulation 25 (1) seeking an order of the kind mentioned in paragraph 25 (1) (a), the court must have regard to the matters set out in section 111CW of the Act if the convention country under the laws of which the person mentioned in paragraph 24 (1) (a) claims to have access rights to the child is also a Convention country within the meaning of subsection 111CA (1) of the Act.
- (3) The court may make an order under subregulation (1) regardless of:
 - (a) whether an order or determination (however described) has been made under a law in force in another convention country about rights of access to the child concerned; or

Regulation 25A

- (b) if the child was removed to Australia — when that happened; or
 - (c) whether the child has been wrongfully removed to, or retained in, Australia.
- (4) If the responsible Central Authority applies to the court for an order under subregulation (1), and the order is made, the Commonwealth Central Authority or the State Central Authority is not required to make or pay for the arrangements that are necessary to give effect to the order.

Part 5 General

26 Reports by family consultants

- (1) In proceedings under these Regulations in a court, the court may:
 - (a) direct a family consultant to report to the court on such matters that are relevant to the proceedings as the court considers to be appropriate; and
 - (b) adjourn the proceedings until the report is made.
- (2) A family consultant may include in a report, in addition to the matters required to be included in the report, any other matter that relates to the care, welfare or development of the child.
- (3) The court may make such orders, or give such further directions, as it considers appropriate in relation to the preparation of the report including, if the court considers it appropriate, orders or directions in relation to the attendance on the family consultant of a party to the proceedings or of the child.
- (4) If a person fails to comply with any order or direction under subregulation (3), the family consultant must report the failure to the court.
- (5) If, under subregulation (4), a family consultant reports to the court a failure of the kind referred to in that subsection, the court may give such further directions in relation to the preparation of the report as the court considers appropriate.
- (6) A report made to the court in accordance with a direction given under this regulation may be received in evidence in any proceedings under these Regulations.
- (7) The court may direct the Commonwealth Central Authority or a State Central Authority to inform a Central Authority in a convention country about a matter that:

Regulation 27

- (a) relates to the welfare of the child; and
- (b) under subregulation (2) — is included in a report.

27 Service of notice of certain applications

- (1) Subject to subregulation (2), notice of an application under regulation 14, 19A or 25 that includes a copy of the application must be served by the applicant in accordance with the applicable Rules of Court:
 - (a) for an application under regulation 14 — on the person whom the applicant claims has wrongfully removed or retained the child who is the subject of the application; and
 - (b) for an application under regulation 19A — on any other party to the proceeding for return of the child; and
 - (c) for an application under regulation 25 — on the person, institution or other body in possession of the child who is the subject of the application.
- (2) In accordance with the applicable Rules of Court, the court to which an application referred to in subregulation (1) is made may dispense with service of notice of the application under that subregulation.

28 Change of venue

- (1) This regulation applies if:
 - (a) an application (the **original application**) is made to a court in a State or Territory (the **first jurisdiction**) under regulation 14, 19A or 25; and
 - (b) the child who is the subject of the original application is located in another State or Territory (the **second jurisdiction**) before the application is determined.
- (1A) The Central Authority in the second jurisdiction may make a corresponding application (a **later application**) to another registry of the court, or to another court, in the second jurisdiction.
- (2) If a later application is made, the applicant for the later application must:

Regulation 29

- (a) refer in the later application to the original application; and
 - (b) as soon as practicable, inform the Registrar of the court in which the original application was filed, in writing, of the later application.
- (2A) As soon as practicable after receiving information under paragraph (2) (b), the Registrar of the court in which the original application was filed must transfer all records and other documents filed in the court relating to the original application to the Registrar of the court in which the later application is made.
- (3) Subject to subregulation (4), proceedings in relation to an original application are taken to have been discontinued when a later application is made.
- (4) If an order is made before proceedings are discontinued by operation of subregulation (3), the order remains in force until an order is made in relation to a later application.
- (5) In proceedings in relation to a later application, the court may have regard to:
- (a) a record, or another document filed in the court, in relation to an original application; and
 - (b) evidence given to a court in relation to an original application.

29 Evidentiary provisions

- (1) This regulation applies in a proceeding in a court under regulation 14, 19A or 25 in which the applicant is a responsible Central Authority.
- (2) The application under regulation 14, 19A or 25, or a request under regulation 13, 24 or 25 relating to that application, or any document attached to or given in support of that application or request, is admissible as evidence of the facts stated in that application, request or document.

Regulation 29

- (3) An affidavit of a witness who resides outside Australia that is filed in the proceeding is admissible as evidence even if the witness does not attend the proceeding for cross-examination.
- (4) A statement contained in a document that claims:
- (a) to set out or summarise evidence given in a proceeding in a court in a convention country, or before a competent authority of that country, in relation to the custody of a child and to have been signed by the person before whom the evidence was given; or
 - (b) to set out or summarise evidence taken in a convention country for the purpose of a proceeding under these Regulations (whether in response to a request made by the court or otherwise) and to have been signed by the person before whom the evidence was taken; or
 - (c) to have been received as evidence in a proceeding in a court in a convention country or before a competent authority of that country in relation to the custody of a child and to have been signed by a judge, an officer of the court or that authority;
- is admissible as evidence of any fact stated in the document to the same extent as oral evidence of that fact, without proof of that person's signature or official position.
- (5) The court may take judicial notice of the following matters:
- (a) a law in force in a convention country;
 - (b) a decision of a judicial or administrative character made by a judicial or administrative authority of a convention country.
- (6) A document that claims:
- (a) to be an order, or a copy of an order, of a court in a convention country, or a decision of a competent authority of that country, in relation to the custody of a child; and
 - (b) to have been signed by a judge, an officer of the court or that authority;
- is admissible as evidence of that order or decision without proof of that person's signature or official position.

Regulation 30

- (7) In this regulation:
- custody**, in relation to a child, includes:
- (a) guardianship of the child; and
 - (b) responsibility for the long-term or day-to-day care, welfare and development of the child; and
 - (c) responsibility as the person or persons with whom the child is to live.

30 Costs of applications

- (1) This regulation applies if:
- (a) either:
 - (i) a responsible Central Authority has applied to the court for an order in relation to a child under Part 3 or 4; or
 - (ii) an Article 3 applicant has applied to the court for an order in relation to a child under Part 3; and
 - (b) the court makes an order under regulation 15, 17, 19A, 25A or 26.
- (2) The responsible Central Authority may apply to the court for an order that the person who removed or retained the child, or who prevented the exercise of rights of access to the child, must pay to the responsible Central Authority the costs of the application mentioned in subregulation (3).
- (3) For subregulation (2), the costs are the necessary expenses incurred by the responsible Central Authority, including the following:
- (a) costs incurred in locating the child;
 - (b) costs of legal representation;
 - (c) costs incurred in relation to the attendance by the child or an interested party at a family consultant for the preparation of a report by that consultant;
 - (d) costs incurred in coordinating the making of arrangements for the return of the child.

Regulation 31

- (4) The Article 3 applicant may apply to the court for an order that the person who removed or retained the child, or who prevented the exercise of rights of access to the child, must pay to the Article 3 applicant the costs of the application mentioned in subregulation (5).
- (5) For subregulation (4), the costs are the necessary expenses incurred by the Article 3 applicant, including:
 - (a) travelling expenses; and
 - (b) the costs mentioned in paragraphs (3) (a) to (c).

31 Warrants

For subparagraph 14 (1) (a) (iii) and paragraphs 14 (2) (a) and 25 (1) (b), a warrant:

- (a) authorises a person named or described in the warrant, with such assistance as is necessary and reasonable and, if necessary and reasonable, by force:
 - (i) to find and recover the child; and
 - (ii) if the person reasonably believes that the child is in, or on, a vehicle, vessel, aircraft or premises and the circumstances are so serious and urgent that the entry and search of the vehicle, vessel, aircraft or premises is justified:
 - (A) to stop, enter and search the vehicle, vessel or aircraft; or
 - (B) to enter and search the premises; and
 - (iii) to deliver the child to the person named in the warrant; and
- (b) must be in accordance with Form 2C.

Schedule 1 of the Regulations incorporates the text of the Convention, which you will find at Appendix 1 of this Resource, and is not reproduced in this Appendix.

Schedule 2 Convention countries

(regulation 10)

Country	Date	Provision(s)
Argentina	1 June 1991	
Austria	1 October 1988	
Bahamas	1 September 1994	
Belarus	1 November 1998	Article 26, third paragraph
Belgium	1 May 1999	
Belize	1 March 1990	Article 24 and Article 26, third paragraph
Bosnia and Herzegovina	1 December 1991	
Brazil	1 May 2001	Article 24
Bulgaria	1 October 2004	Article 26, third paragraph
Burkina Faso	1 April 1993	
Canada:		
(a) all Provinces and Territories not mentioned in paragraphs (b) to (f)	1 January 1987	Article 26, third paragraph
(b) Alberta	1 February 1987	Article 26, third paragraph
(c) Manitoba	1 January 1987	
(d) Northwest Territories	1 April 1988	Article 26, third paragraph
(e) Nunavut	1 January 2001	Article 26, third paragraph
(f) Quebec	1 January 1987	Article 24 and Article 26, third paragraph
Chile	1 November 1994	

Country	Date	Provision(s)
China — in relation only to the following Special Administrative Regions:		
(a) Hong Kong	1 September 1997	Article 26, third paragraph
(b) Macau	1 March 1999	
Colombia	1 December 1997	
Costa Rica	1 May 2000	
Croatia	1 December 1991	
Cyprus	1 November 1995	
Czech Republic	1 March 1998	Article 26, third paragraph
Denmark	1 July 1991	Article 24 and Article 26, third paragraph
Ecuador	1 April 1993	
El Salvador	1 January 2003	Article 26, third paragraph
Estonia	1 January 2003	Article 24 and Article 26, third paragraph
Fiji	1 May 2000	
Finland	1 August 1994	Article 24 and Article 26, third paragraph
France — the whole of the territory of the French Republic	1 January 1987	Article 24 and Article 26, third paragraph
Georgia	1 January 1998	
Germany	1 December 1990	Article 26, third paragraph
Greece	1 June 1993	Article 24 and Article 26, third paragraph
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Country	Date	Provision(s)
Guatemala	1 October 2004	Article 24 and Article 26, third paragraph
Honduras	1 September 1994	Article 26, third paragraph
Hungary	1 March 1988	
Iceland	1 December 1997	Article 24 and Article 26, third paragraph
Ireland	1 October 1991	
Israel	1 December 1991	Article 26, third paragraph
Italy	1 May 1995	
Latvia	1 January 2003	Article 24
Lithuania	1 October 2004	Article 24 and Article 26, third paragraph
Luxembourg	1 January 1987	Article 26, third paragraph
Macedonia, the Former Yugoslav Republic of	1 December 1991	
Malta	1 May 2001	
Mauritius	1 January 1994	Article 26, third paragraph
Mexico	1 June 1992	
Moldova	1 November 1998	Article 26, third paragraph
Monaco	1 January 1994	Article 26, third paragraph
Netherlands	1 September 1990	Article 26, third paragraph
New Zealand	1 June 1992	Article 24 and Article 26, third paragraph
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Country	Date	Provision(s)
Nicaragua	1 October 2004	
Norway	1 April 1989	Article 24 and Article 26, third paragraph
Panama	1 September 1994	Article 26, third paragraph
Paraguay	1 April 1999	
Peru	1 January 2003	
Poland	1 January 1994	Article 26, third paragraph
Portugal	1 January 1987	
Romania	1 January 1994	
Saint Kitts and Nevis	1 November 1995	Article 26, third paragraph
Serbia	1 December 1991	
Slovakia	1 February 2001	Article 26, third paragraph
Slovenia	1 November 1994	
South Africa	1 January 1998	Article 24 and Article 26, third paragraph
Spain	1 October 1987	
Sri Lanka	1 January 2003	Article 24 and Article 26, third paragraph
Sweden	1 June 1989	Article 26, third paragraph
Switzerland	1 January 1987	
Thailand	1 October 2004	Article 24
Trinidad and Tobago	1 May 2001	
Turkey	1 August 2000	Article 26, third paragraph

Country	Date	Provision(s)
Turkmenistan	1 November 1998	
United Kingdom — extended to include the following territories:	1 January 1987	Article 26, third paragraph
(a) Bailiwick of Jersey	1 March 2006	Article 26, third paragraph
(b) Bermuda	1 March 1999	Article 26, third paragraph
(c) Cayman Islands	1 August 1988	Article 26, third paragraph
(d) Falkland Islands	1 June 1998	Article 26, third paragraph
(e) Isle of Man	1 September 1991	Article 26, third paragraph
(f) Montserrat	1 March 1999	Article 26, third paragraph
United States of America	1 July 1988	Article 24 and Article 26, third paragraph
Uruguay	1 May 2001	
Uzbekistan	1 May 2001	Article 26, third paragraph
Venezuela	1 January 1997	Article 24 and Article 26, third paragraph
Zimbabwe	1 April 1996	Article 26, third paragraph

Schedule 3 Forms

(subregulation 2 (1A))

Form 1 Request for return of child abducted from Australia

(subregulation 11 (2))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

REQUEST IN ACCORDANCE WITH THE HAGUE CONVENTION
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD
ABDUCTION FOR THE RETURN OF A CHILD ABDUCTED FROM
AUSTRALIA

REQUESTING CENTRAL AUTHORITY OR APPLICANT:	REQUESTED AUTHORITY:
---	-------------------------

Concerning the child (*full name*),
who will turn 16 on the day of (year)

Note Please give the following particulars in as much detail as possible.

NOTE: The following particulars should be completed insofar as possible.

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names
date and place of birth
habitual residence before removal or retention
passport or identity card No., if any
description and photo, if possible (see annexes)

2 *Parents*

2.1 Mother: name and first names
date and place of birth
nationality
occupation
habitual residence
passport or identity card
No., if any

2.2 Father: name and first names
date and place of birth
nationality
occupation
habitual residence
passport or identity card
No., if any

2.3 Date and place of marriage

II — REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised custody before the removal or retention)

3 Name and first names
nationality of individual
applicant
occupation of individual
applicant
address
passport or identity card No.,
if any
relation to the child
name and address of legal
adviser, if any

III — PLACE WHERE THE CHILD IS THOUGHT TO BE

4.1 Information concerning the
person alleged to have removed
or retained the child
name and first names
date and place of birth, if
known
nationality, if known

occupation
last known address
passport or identity card No., if
any
description and photo, if
possible (see annexes)

4.2 Address of the child
.....

4.3 Other persons who might be
able to supply additional
information relating to the
whereabouts of the child
.....
.....
.....

IV — TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

.....
.....
.....
.....
.....

V — FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

.....
.....
.....
.....
.....

VI — CIVIL PROCEEDINGS IN PROGRESS

.....
.....
.....
.....
.....

VII — CHILD IS TO BE RETURNED TO:

- a* name and first names
 date and place of birth
 address
 telephone number
- b* proposed arrangements for
 return of the child

VIII — OTHER REMARKS

.....
.....
.....
.....
.....

IX — LIST OF DOCUMENTS ATTACHED*

.....
.....
.....
.....
.....

I authorise the requested Central Authority and its agents to act
on my behalf and to do all things reasonable and necessary in
connection with this application.

Date.....

Place.....

Signature and/or stamp of the requesting Central Authority or
applicant

.....

* e.g. Certified copy of relevant decision or agreement concerning rights of custody or rights of access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

Form 2 Application initiating proceedings (other than for access)

(subregulations 14 (1), (2) and (3))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

APPLICATION INITIATING PROCEEDINGS (OTHER THAN FOR ACCESS)

(Title as under applicable Rules of Court)

DATE OF FILING:

*APPLICANT'S ADDRESS FOR SERVICE:

To: *(Full name of respondent)*

TAKE NOTICE that the attached application HAS BEEN SET DOWN FOR HEARING by the Court at

on the day of (year)

at *am/*pm

AND FURTHER TAKE NOTICE THAT—

- (a) if you wish to defend this application but to raise no new issues, you may, at the earliest practicable date before the return day set out above, file and serve an affidavit setting out briefly the matters on which you rely;

- (b) if you wish to defend this application and to seek some order other than the order sought in this application, you may, at the earliest practicable date before the return day set out above, file and serve a cross-application and an affidavit in support; and
- (c) if you do not appear at the hearing, the Court may proceed to make the orders sought, or similar orders, in your absence,

Dated this day of (year)

.....
Registrar.

APPLICATION

(Full name of applicant) ,
whose occupation is ,
applies for the following orders:

- (a)
 - (b)
- (if insufficient space attach statement of orders sought)

Details concerning child

1. The child, (full name) ,
was born on the day of (year).
2. The habitual residence of the child immediately prior to the removal or retention of the child was , a
convention country.
3. The child has been wrongfully removed or retained from the country referred to in paragraph 2.
4. The child is now residing with (full name) ,
(relationship, if any, to child) ,
at .

Details concerning child's custodian

5. The applicant under the Convention, (full name) ,
(relationship, if any, to child) , of

(address) , has rights of custody in respect of the child by reason of the following factual and legal circumstances:

(include details of any custody order)

Details concerning child's removal or retention

6. The child was removed or retained on the day of (year), in the following circumstances:

Pending proceedings in Australia

- *7. The following are particulars of pending family law or child welfare proceedings concerning the child:

(set out brief particulars of any pending proceedings and the court in which the proceedings are pending)

or

- *7. There are no pending family law or child welfare proceedings concerning the child.

Attachments

8. The request for return of the child under the Convention is attached.

9. The following documents are also attached:

- *(a) certified copy of relevant decision or agreement concerning rights of custody or rights of access;
- *(b) certificate or affidavit as to the applicable law;
- *(c) information relating to the social background of the child;
- *(e) authorization empowering the Central Authority to act on behalf of the applicant;
- *(f) other (*specify*).

Dated this day of (year)

.....
(Signature of applicant)

* Cross out whichever is not applicable.

AFFIDAVIT

I, *(full name, address and occupation)*
make oath and say/affirm:

1. I am the applicant in, and I have read, this application.
2. The facts stated in this application that are within my personal knowledge are true. All other facts stated in this application are true to the best of my knowledge, information and belief.

SWORN *(or AFFIRMED)* by the
applicant at

on the day of *(year)*

.....
(Signature of applicant)

Before me:

.....
*(Signature and title of person
before whom affidavit is sworn)*

Form 2A Answer/*and cross application

(subregulation 14 (4))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

ANSWER/*AND CROSS APPLICATION

(Title as under applicable Rules of Court)

In answer to the application filed on the day of *(year)*,
and served on the day of *(year)*,
the respondent states that:

(set out matters to be pleaded)

1.
2.

AFFIDAVIT

I, *(full name, address and occupation)*

make oath and say/affirm:

1. I am the respondent in, and I have read, this answer.
2. The facts stated in this answer that are within my personal knowledge are true. All other facts stated in this answer are true to the best of my personal knowledge, information and belief.

SWORN (or AFFIRMED) by the

respondent at

on the

day of

(year)

.....
(Signature of respondent)

Before me:

.....
(Signature and title of person before
whom affidavit sworn or affirmed)

*CROSS APPLICATION

(Title as under applicable Rules of Court)

(Full name of respondent)

whose occupation is

applies for the following orders:

(a)

(b)

(if insufficient space attach statement of orders sought)

Details concerning child

1. The child, *(full name)*, was born on the
day of (year).
2. The child is now residing with *(full name)*
(relationship, if any, to child)
at

Details concerning respondent's rights to custody/access

3. The respondent, *(full name)*, ,

(relationship, if any, to child) _____, of
(address) _____,
has rights of *custody/*access in respect of the child by reason of
the following factual and legal circumstances:
(include details of any custody/access order)

Pending proceedings in Australia

4. The following are particulars of pending family law or child welfare proceedings concerning the child:
(set out brief particulars of any pending proceedings and the court in which the proceedings are pending)

Attachments

5. The following documents are also attached:
- *(a) certified copy of relevant decisions or agreement concerning rights of custody or rights of access;
 - *(b) information relating to the social background of the child;
 - *(c) other (specify).

Dated this _____ day of _____ (year)

.....
(Signature of respondent)

* Cross out if not applicable.

AFFIDAVIT

I, (full name, address and occupation)
make oath and say/affirm:

1. I am the respondent in, and I have read, this cross application.
2. The facts stated in this cross application that are within my personal knowledge are true. All other facts stated in this cross application are true to the best of my personal knowledge, information and belief.

SWORN (or AFFIRMED) by the
respondent at

on the _____ day of _____ (year)

(Signature of respondent)

Before me:

(Signature and title of person
before whom affidavit sworn or affirmed)

Form 2B Reply

(subregulation 14 (4))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

REPLY TO ANSWER/*AND CROSS APPLICATION

(Title as under applicable Rules of Court)

In reply to the answer/*and cross application filed on the _____ day of _____ (year) and served on the _____ day of _____

(year), the applicant states:
(set out matters in reply to answer/cross application)

1.
2.

* Cross out if not applicable.

AFFIDAVIT

I, (full name, address and occupation)

make oath and say/affirm:

1. I am the applicant in, and I have read, this reply.
2. The facts stated in this reply that are within my personal knowledge are true. All other facts stated in this reply are true to the best of my knowledge, information and belief.

SWORN (or AFFIRMED) by the
applicant at

on the

day of

(year)

.....
(Signature of applicant)

Before me:

.....
(Signature and title of person
before whom affidavit sworn)

Form 2C Warrant for the apprehension or detention of a child

(regulation 31)

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

WARRANT FOR THE APPREHENSION OR DETENTION OF A
CHILD

File No:	Applicant:
At:	Respondent:

TO: *The Marshal
 *All Agents of the Australian Federal Police
 *All Officers of the Police Forces of the States and Territories
 of Australia

In compliance with the order of the Court dated [date] under
*regulation 15/*regulation 25A of the *Family Law (Child
Abduction Convention) Regulations 1986*, and on the
application of [name of applicant], THIS WARRANT
DIRECTS THAT:

1. You are authorised, with such assistance as is necessary and
reasonable, and, if necessary and reasonable, by force, to find

and recover the child [*name of child*] born on [*date of child's birth*].

2. You are required to deliver the child to [*name and address of person or agency to whom the child is to be delivered*].
3. If the circumstances of the child's removal or retention are so serious or urgent as to justify search and entry of a vehicle, vessel, aircraft or premises, you are authorised, with such assistance as is necessary and reasonable, and, if necessary and reasonable, by force, to stop, enter and search any vehicle, vessel or aircraft, and to enter and search any premises, that you reasonably believe the child is in or on.
- *4. This warrant remains in force until [*date*].

DATED:

By the Court

.....

Registrar

**Omit if not applicable*

Form 2D Application to discharge return order

(subregulation 19A (1))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

APPLICATION TO DISCHARGE RETURN ORDER

(Title as under applicable Rules of Court)

Details concerning child

1. The child, (*full name*)
was born on the day of (*year*) .
2. The habitual residence of the child immediately before the removal or retention of the child was , a convention country.

3. The child is now residing with (full name) _____ ,
(relationship, if any, to child) _____ ,
at _____ .

Details concerning child's custodian

4. The applicant under the Convention, (full name) _____ ,
(relationship, if any, to child) _____ , of
(address) _____ , has rights of
custody in respect of the child by reason of the following factual
and legal circumstances:
(include details of any custody order)

Details concerning child's removal or retention

5. The child was removed or retained on the _____ day
of _____ (year), in the following circumstances:

Judicial proceedings in Australia

- *6. The following are particulars of any family law or child welfare
proceedings concerning the child:
(set out brief particulars of any proceedings and the court in which
the proceedings)

or
*6. There are no pending family law or child welfare proceedings
concerning the child.

Attachments

7. The request for the discharge of the return of the child under the
Convention is attached.
8. The following documents are also attached:
- *(a) certified copy of relevant decision or agreement concerning
rights of custody or rights of access;
 - *(b) certificate or affidavit as to the applicable law;
 - *(c) information relating to the social background of the child;
 - *(d) authorisation empowering the Central Authority to act on
behalf of the applicant;

*(e) other (*specify*).

Dated this day of (year)

.....
(*Signature of applicant*)

AFFIDAVIT

I, (*full name, address and occupation*)

make oath and say/affirm:

1. I am the applicant in, and I have read, this application.
2. The facts stated in this application that are within my personal knowledge are true. All other facts stated in this application are true to the best of my knowledge, information and belief.

SWORN (or AFFIRMED) by

the applicant at

on the

day of

(year)

.....
(*Signature of applicant*)

Before me:

.....
(*Signature and title of person
before whom affidavit sworn*)

* Omit if not applicable

Form 3 Request for access to a child in a convention country

(subregulation 23 (2))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

REQUEST IN RELATION TO RIGHTS OF ACCESS IN
ACCORDANCE WITH THE HAGUE CONVENTION ON THE CIVIL
ASPECTS OF INTERNATIONAL CHILD ABDUCTION

REQUESTING CENTRAL
AUTHORITY OR APPLICANT:

REQUESTED AUTHORITY:

Concerning the child (*full name*)
who will turn 16 on the day of (year)

Note Please give the following particulars in as much detail as possible.

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names
date and place of birth
habitual residence
passport or identity card No., if any
description and photo, if possible (see
annexes)

2 *Parents*

2.1 Mother: name and first names
date and place of birth
nationality
occupation
habitual residence
passport or identity card No., if any
2.2 Father: name and first names
date and place of birth
nationality

- occupation
habitual residence
passport or identity card No., if any
2.3 Date and place of marriage

II — REQUESTING INDIVIDUAL OR INSTITUTION

- 3 Name and first names
nationality of individual applicant
occupation of individual applicant
address
passport or identity card No., if any
relation to the child
name and address of legal adviser, if any

III — PLACE WHERE THE CHILD IS THOUGHT TO BE

- 4.1 Information concerning the person alleged to have prevented the
exercise of rights of access or denied the enjoyment of access
name and first names
date and place of birth, if known
nationality, if known
occupation
last known address
passport or identity card No., if any
description and photo, if
possible (see annexes)
4.2 Address of the child.
.....
.....
4.3 Other persons who might be able to supply
additional information relating to the
whereabouts of the child
.....
.....
.....

IV — CIRCUMSTANCES RELATING TO THE PREVENTION OF
EXERCISE OF RIGHTS OF ACCESS

.....
.....
.....
.....
.....

V — FACTUAL OR LEGAL GROUNDS JUSTIFYING THE
REQUEST

.....
.....
.....
.....
.....

VI — CIVIL PROCEEDINGS IN PROGRESS

.....
.....
.....
.....
.....

VII — PROPOSED ARRANGEMENTS TO SECURE EXERCISE OF
RIGHTS OF ACCESS

.....
.....
.....
.....
.....

VIII — OTHER REMARKS

.....
.....
.....
.....
.....

IX — LIST OF DOCUMENTS ATTACHED*

.....
.....

Date.....
Place.....
Signature and/or stamp of the requesting Central Authority or
applicant

Form 4 Application initiating proceedings for access

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AND FURTHER TAKE NOTICE THAT—

- (a) if you wish to defend this application but to raise no new issues, you may, at the earliest practicable date before the return day set out above, file and serve an affidavit setting out briefly the matters on which you rely;
- (b) if you wish to defend this application and to seek some order other than the order sought in this application, you may, at the earliest practicable date before the return day set out above, file and serve a cross-application and an affidavit in support; and
- (c) if you do not appear at the hearing, the Court may proceed to make the orders sought, or similar orders, in your absence.

Dated this day of (year)
.....
Registrar

APPLICATION

(Full name of applicant) ,
whose occupation is ,
and who represents the responsible Central Authority, applies for the following orders:—

- (a)
- (b)

(if insufficient space attach statement of orders sought).

Details concerning child

1. The child, (full name) , was born
on the day of (year).
2. The habitual residence of the child immediately prior to any breach of rights of access was , a convention country.
3. The child is now residing with (full name) ,
(relationship, if any, to child) ,
at .

Details concerning rights of custody of child

4. (Full name) , (relationship,

if any, to child , of
(*address*) has rights of
custody in respect of the child by reason of the following factual
and legal
circumstances:
(*include details of any custody order*)

Details concerning rights of access/time spent or communication with the child

- *5. The applicant under the Convention on the Civil Aspects of International Child Abduction,
(*full name*) , (*relationship, if any, to child*), of (*address*) , has rights of access in respect of the child by reason of the following factual and legal circumstances:
(*include details of any access order*)
or

- *5. The applicant under the Convention (*full name*) ,
(*relationship, if any, to child*) ,
of
(*address*) , has no existing rights of access in respect of the child but wishes to establish or secure a parenting order under Australian law specifying with whom a child is to spend time or communicate..

6. The following are the circumstances in which rights of access have been breached or enjoyment of access denied:

Pending proceedings in Australia

- *7. The following are particulars of pending family law or child welfare proceedings concerning the child:
(*set out brief particulars of any pending proceedings and the court in which the proceedings are pending*)
or
*7. There are no pending family law or child welfare proceedings concerning the child.

Attachments

8. The request in relation to rights of access to the child under the Convention is attached.
9. The following documents are also attached:
- *(a) certified copy of relevant decision or agreement concerning rights of custody or rights of access;
 - *(b) certificate or affidavit as to the applicable law;
 - *(c) information relating to the social background of the child;
 - *(d) authorization empowering the responsible Central Authority to act on behalf of the applicant;
 - *(e) other (*specify*).

Dated this _____ day of _____ (year)

(*Signature of applicant*)

* Cross out whichever is not applicable.

AFFIDAVIT

I, (*full name, address and occupation*)

make oath and say/affirm:

1. I am the applicant in, and I have read, this application.
2. The facts stated in this application that are within my personal knowledge are true. All other facts stated in this application are true to the best of my knowledge, information and belief.

SWORN (or AFFIRMED) by

the applicant at

on the _____ day of _____ (year)

.....
(*Signature of applicant*)

Before me:

.....
(*Signature and title of person
before whom affidavit sworn*)

Form 4A Answer/*and cross application (access)

(subregulation 25 (2))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

ANSWER/*AND CROSS APPLICATION (ACCESS)

(Title of proceedings as under applicable Rules of Court)

In answer to the application filed on the day of (year)
and served on the day of (year), the respondent
states that:

(set out matters to be pleaded)

1.
2.

AFFIDAVIT

I, *(full name, address and occupation)*

make oath and say/affirm:

1. I am the respondent in, and I have read, this answer.
2. The facts stated in this answer that are within my personal knowledge are true. All other facts stated in this answer are true to the best of my personal knowledge, information and belief.

SWORN (or AFFIRMED) by the applicant at
on the day of (year)

Before me:
(Signature of applicant)

.....
*(Signature and title of person before
whom affidavit sworn or affirmed)*

***CROSS APPLICATION**

(Title of proceedings as under applicable Rules of Court)

(Full name of respondent)

whose occupation is
applies for the following orders:

- (a)
- (b)

(if insufficient space, attach statement of orders sought).

Details concerning child

1. The child, *(full name)* , was born on
the day of (year).
2. The child is now residing with *(full name)*
(relationship, if any, to child)
at

Details concerning rights of access/custody

- *3. The respondent, *(Full name)* , *(relationship, if any, to child)* , of
(address) has rights of
*access/*custody in respect of the child by reason of the following
factual and legal circumstances:
(include details of any access/custody order)
or

Pending proceedings in Australia

4. The following are particulars of pending family law or child welfare
proceedings concerning the child:
*(set out brief particulars of any pending proceedings and the court
in which the proceedings are pending)*

Attachments

5. The following documents are attached:
 - *(a) certified copy of relevant decision or agreement
concerning rights of custody or rights of access;
 - *(b) information relating to the social background of the child;
 - *(c) other *(specify)*.

Dated this day of (year)

(Signature of respondent)

* Cross out if not applicable.

AFFIDAVIT

I, *(Full name, address and occupation)*

make oath and say/affirm:

1. I am the respondent in, and I have read, this cross application.
2. The facts stated in this cross application that are within my personal knowledge are true. All other facts stated in this cross application are true to the best of my knowledge, information and belief.

SWORN (or AFFIRMED) by the

respondent at

on the

day of

(year)

Before me:

.....
(Signature of respondent)

.....
(Signature and title of person before
whom affidavit sworn or affirmed)

Form 4B Reply (access)

(subregulation 25 (2))

COMMONWEALTH OF AUSTRALIA

Family Law (Child Abduction Convention) Regulations 1986

REPLY TO ANSWER/*AND CROSS APPLICATION (ACCESS)

(Title of proceedings as under applicable Rules of Court)

In reply to the answer/*and cross application filed on

the day of (year) and served on

the day of (year), the applicant states:

(set out matters in reply)

1.
2.

* Cross out if not applicable.

AFFIDAVIT

I, *(full name, address and occupation)*
make oath and say/affirm:

1. I am the applicant in, and I have read, this reply.
2. The facts stated in this reply that are within my personal knowledge are true. All other facts stated in this reply are true to the best of my knowledge, information and belief.

SWORN (or AFFIRMED) by the
applicant at

on the day of (year)

Before me:

.....
(Signature of applicant)

.....
(Signature and title of person before
whom affidavit sworn or affirmed)

Table of Instruments**Notes to the *Family Law (Child Abduction Convention) Regulations 1986*****Note 1**

The *Family Law (Child Abduction Convention) Regulations 1986* (in force under the *Family Law Act 1975*) as shown in this compilation comprise Statutory Rules 1986 No. 85 amended as indicated in the Tables below.

Under the *Legislative Instruments Act 2003*, which came into force on 1 January 2005, it is a requirement for all non-exempt legislative instruments to be registered on the Federal Register of Legislative Instruments. From 1 January 2005 the Statutory Rules series ceased to exist and was replaced with Select Legislative Instruments (SLI series). Numbering conventions remain the same, ie Year and Number.

Table of Instruments

Year and number	Date of notification in <i>Gazette</i> or FRLI registration	Date of commencement	Application, saving or transitional provisions
1986 No. 85	1 May 1986	1 May 1986	
1989 No. 206	7 Aug 1989	7 Aug 1989	—
1990 No. 37	27 Feb 1990	27 Feb 1990	—
1992 No. 34	7 Feb 1992	7 Feb 1992	—
1992 No. 159	12 June 1992	12 June 1992	—
1993 No. 263	7 Oct 1993	7 Oct 1993	—
1993 No. 358	23 Dec 1993	23 Dec 1993	—
1994 No. 252	13 July 1994	13 July 1994	R. 3
1994 No. 275	2 Aug 1994	2 Aug 1994	—
1994 No. 344	18 Oct 1994	18 Oct 1994	—
1995 No. 296	26 Oct 1995	26 Oct 1995	—
1995 No. 334	6 Nov 1995	6 Nov 1995	—
1996 No. 74	5 June 1996	11 June 1996	—
1997 No. 98	7 May 1997	7 May 1997	—
1997 No. 292	8 Oct 1997	8 Oct 1997	—
1997 No. 315	17 Nov 1997	17 Nov 1997	—
1997 No. 347	15 Dec 1997	15 Dec 1997	—
1998 No. 59	9 Apr 1998	9 Apr 1998	—

Table of Instruments

Year and number	Date of notification in <i>Gazette</i> or FRLI registration	Date of commencement	Application, saving or transitional provisions
1998 No. 340	22 Dec 1998	22 Dec 1998	—
1998 No. 341	22 Dec 1998	22 Dec 1998	—
1999 No. 222	29 Sept 1999	29 Sept 1999	—
2000 No. 208	31 July 2000	31 July 2000	—
2000 No. 275	18 Oct 2000	18 Oct 2000	—
2002 No. 110	5 June 2002	5 June 2002	—
2003 No. 340	23 Dec 2003	23 Dec 2003	—
2004 No. 371	23 Dec 2004	23 Dec 2004	—
2006 No. 139	26 June 2006 (<i>see</i> F2006L01899)	1 July 2006	—
2007 No. 213	23 July 2007 (<i>see</i> F2007L02252)	24 July 2007	—

Table of Amendments**Table of Amendments**

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part 1	
Heading to Part 1	ad. 1995 No. 296
R. 1	rs. 1998 No. 340
R. 1A	ad. 2004 No. 371 am. 2007 No. 213
R. 2	am. 1992 No. 34; 1995 No. 296; 2000 No. 208; 2004 No. 371; 2007 No. 213
Note to r. 2 (1)	ad. 2000 No. 208 rs. 2007 No. 213
R. 3	rs. 1995 No. 296 rep. 2004 No. 371
R. 4	rs. 1995 No. 296 am. 2007 No. 213
R. 5	am. 1995 No. 296; 2007 No. 213
Heading to r. 6	rs. 2007 No. 213
R. 6	rs. 1995 No. 296 am. 2004 No. 371; 2007 No. 213
R. 7	rs. 2007 No. 213
R. 8	am. 2007 No. 213
R. 10	am. 1989 No. 206 rs. 2003 No. 340
Part 2	
Heading to Part 2	ad. 1995 No. 296 rs. 2004 No. 371; 2007 No. 213
Part 2	rs. 2007 No. 213
R. 11	am. 1992 No. 34; 1995 No. 296 rs. 2004 No. 371; 2007 No. 213
R. 12	rep. 1995 No. 296
R. 13	rs. 1995 No. 296; 2004 No. 371; 2007 No. 213
Part 3	
Heading to Part 3	ad. 1995 No. 296
R. 14	rs. 1995 No. 296 am. 1998 No. 341 rs. 2004 No. 371; 2007 No. 213
R. 14A	ad. 2007 No. 213
R. 15	am. 1992 No. 34 rs. 1995 No. 296 am. 2004 No. 371; 2007 No. 213

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading to r. 16	rs. 2004 No. 371; 2007 No. 213
R. 16	rs. 1995 No. 296 am. 2004 No. 371; 2007 No. 213
Heading to r. 17	rs. 2004 No. 371
R. 17	rs. 1995 No. 296 am. 2004 No. 371; 2007 No. 213
R. 18	rs. 1995 No. 296 am. 1996 No. 74; 2004 No. 371; 2007 No. 213
R. 19	rs. 1995 No. 296 am. 1996 No. 74; 2007 No. 213
R. 19A.....	ad. 2004 No. 371 rs. 2007 No. 213
R. 20	am. 1995 No. 296; 2000 No. 208 rs. 2004 No. 371 am. 2007 No. 213
R. 21	am. 1995 No. 296 rs. 2007 No. 213
Rr. 22, 23.....	rep. 1995 No. 296
Part 4	
Heading to Part 4.....	ad. 1995 No. 296 rs. 2004 No. 371; 2007 No. 213
Part 4	rs. 2007 No. 213
R. 23	ad. 2004 No. 371 rs. 2007 No. 213
Note to r. 23	rs. 2006 No. 139 rep. 2007 No. 213
R. 24	am. 1992 No. 34; 1995 No. 296 rs. 2004 No. 371; 2007 No. 213
R. 25	rs. 1995 No. 296 am. 1998 No. 341 rs. 2004 No. 371 am. 2006 No. 139 rs. 2007 No. 213
R. 25A.....	ad. 2007 No. 213
Part 5	
Part 5	ad. 1995 No. 296
Heading to r. 26	rs. 2006 No. 139
R. 26	ad. 1995 No. 296 am. 1996 No. 74; 2006 No. 139; 2007 No. 213
R. 27	ad. 1995 No. 296 am. 2000 No. 208; 2004 No. 371; 2007 No. 213
R. 28	ad. 1995 No. 296 am. 2004 No. 371; 2007 No. 213

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
R. 29	ad. 1995 No. 296 am. 1996 No. 74 rs. 2004 No. 371
R. 30	ad. 1995 No. 296 rs. 2004 No. 371 am. 2006 No. 139 rs. 2007 No. 213
R. 31	ad. 2007 No. 213
Schedule 1	
Schedule 1	am. 2004 No. 371
Schedule 2	
Schedule 2	rs. 1989 No. 206; 1990 No. 37 am. 1992 Nos. 34 and 159; 1993 Nos. 263 and 358; 1994 Nos. 252, 275 and 344; 1995 No. 334; 1997 Nos. 98, 292, 315 and 347; 1998 Nos. 59, 340; 1999 No. 222; 2000 No. 275; 2002 No. 110 rs. 2003 No. 340 am. 2007 No. 213
Schedule 3	
Heading to Schedule 3	rs. 2004 No. 371
Heading to Form 1	rs. 2004 No. 371
Form 1	1986 No. 85 am. 1995 No. 296; 1996 No. 74; 2000 No. 208; 2004 No. 371; 2007 No. 213
Heading to Form 2	am. 1998 No. 341 rs. 2007 No. 213
Form 2	1986 No. 85 am. 1995 No. 296; 1996 No. 74; 2000 No. 208; 2004 No. 371; 2007 No. 213
Heading to Form 2A	am. 1998 No. 341 rs. 2007 No. 213
Form 2A	ad. 1992 No. 34 am. 1996 No. 74; 2000 No. 208; 2004 No. 371; 2007 No. 213
Heading to Form 2B	am. 1998 No. 341 rs. 2004 No. 371; 2007 No. 213
Form 2B	ad. 1992 No. 34 am. 2000 No. 208; 2004 No. 371; 2007 No. 213
Heading to Form 2C	rs. 2004 No. 371; 2007 No. 213
Form 2C	ad. 1998 No. 341 am. 2004 No. 371; 2007 No. 213
Form 2D	ad. 2004 No. 371

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Heading to Form 3.....	rs. 2004 No. 371; 2007 No. 213
Form 3	1986 No. 85 am. 1995 No. 296; 1996 No. 74; 2004 No. 371; 2007 No. 213
Heading to Form 4.....	am. 1998 No. 341 rs. 2007 No. 213
Form 4	1986 No. 85 am. 1996 No. 74; 2000 No. 208; 2004 No. 371; 2006 No. 139; 2007 No. 213
Heading to Form 4A	am. 1998 No. 341 rs. 2004 No. 371; 2007 No. 213
Form 4A.....	ad. 1992 No. 34 am. 1996 No. 74; 2000 No. 208; 2004 No. 371; 2007 No. 213
Heading to Form 4B	am. 1998 No. 341 rs. 2004 No. 371; 2007 No. 213
Form 4B.....	ad. 1992 No. 34 am. 2000 No. 208; 2004 No. 371; 2007 No. 213

Appendix 3

Countries in respect of which the Child Abduction
Convention is in force with Australia

Countries in respect of which the Child Abduction Convention is in force with Australia. The shaded countries in the table have designated a judicial officer or officers to the International Hague Network of Judges.

Albania	Germany	Peru
Argentina	Greece	Poland
Armenia	Guatemala	Portugal
Austria	Honduras	Romania
Bahamas	Hong Kong (China)	San Marino
Belarus	Hungary	Serbia
Belgium	Iceland	Singapore
Belize	Ireland	Slovakia
Bosnia and Herzegovina	Israel	Slovenia
Brazil	Italy	South Africa
Bulgaria	Japan	Spain
Burkina Faso	Korea, Republic of	Sri Lanka
Canada	Latvia	Sweden
Chile	Lithuania	Switzerland
Colombia	Luxembourg	Thailand
Commonwealth of Dominica	Macau (China)	The Former Yugoslav Republic of Macedonia (FYROM)
Costa Rica	Malta	Trinidad and Tobago
Croatia	Mauritius	Turkey
Cyprus	Mexico	Turkmenistan
Czech Republic	Moldova, Republic of	United Kingdom
Denmark	Monaco	United States of America
Ecuador	Montenegro	Ukraine
El Salvador	Netherlands	Uruguay
Estonia	New Zealand	Uzbekistan
Fiji	Nicaragua	Venezuela
Finland	Norway	Zimbabwe
France	Panama	
Georgia	Paraguay	

This table is reproduced by kind permission of the Honourable Justice Bennett from her 2013 paper *Improving the operation of the 1980 Hague Convention: National and International Networking and new approaches to relocation*.

List of Contracting States as updated June 2015 - http://www.hcch.net/index_en.php?act=conventions.status&cid=24.

List of Network Judges as updated June 2015 - <http://www.hcch.net/upload/haguenetwork.pdf>.

Appendix 4

List of Central Authority contacts in Australia

LIST OF CENTRAL AUTHORITY CONTACTS IN AUSTRALIA

FOR THE COMMONWEALTH CENTRAL AUTHORITY*

The Director
International Family Law Section
Access to Justice Division
Commonwealth Attorney-General's Department
3-5 National Circuit
BARTON, ACT 2600
Australia

T: +61 (2) 6141 3100 or 1800 100 480

F: +61 (2) 6141 3246

E: australiancentralauthority@ag.gov.au

W: www.ag.gov.au/childabduction

Person to contact:

- Tracy Ballantyne
Director
T: +61 (2) 6141 3110
F: +61 (2) 6141 324
- Ms Tamsyn Harvey
Assistant Secretary
Family Law Branch
T: +61 (2) 6141 3110
F: +61 (2) 6141 3246

* Note: The Convention extends to the legal system applicable only in the Australian States and mainland Territories. Some Australian State and Territory agencies have been appointed to carry out some functions under the Convention but are not authorised to receive or transmit applications. Communications should be sent in the first instance to the Attorney-General's Department.

FOR THE STATE OF QUEENSLAND

Department of Communities, Child Safety and Disability Services
Legal Services
GPO Box 806
BRISBANE Qld 4001
E: QLDCentralAuthority@communities.qld.gov.au

FOR THE NORTHERN TERRITORY

Department of the Attorney General and Justice
Child Protection and Community Services Team
GPO Box 1722
DARWIN NT 0801
E: LegalServices.SFNT@nt.gov.au

FOR THE STATE OF VICTORIA

Department of Health and Human Services
Legal Services
GPO Box 4057
MELBOURNE VIC 3000
E: enquiries@dhhs.vic.gov.au

FOR THE STATE OF NEW SOUTH WALES

Department of Family and Community Services
Child Law and General Litigation
Locked Bag 4028
ASHFIELD NSW 2131
W: www.facs.nsw.gov.au

FOR THE STATE OF TASMANIA

Department of Health and Human Services
GPO Box 125
HOBART TAS 7001
W: www.dhhs.tas.gov.au

FOR THE STATE OF WESTERN AUSTRALIA

Western Australian Commissioner of Police
Missing Persons Bureau
Major Crime Squad
Hatch Building
144 Stirling Street
PERTH WA 6000
W: www.police.wa.gov.au

FOR THE STATE OF SOUTH AUSTRALIA

The Commissioner of Police
South Australian Police Department
GPO Box 1539
ADELAIDE SA 5001
E: SAPOLenquiries@police.sa.gov.au

FOR THE AUSTRALIAN CAPITAL TERRITORY

Community Services Directorate
Legal Services, Care and Protection Services
GPO Box 817
CANBERRA ACT 2601
E: dhcs@act.gov.au

Appendix 5

Bilateral Agreement: Egypt

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

CANBERRA

**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA
AND THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT
REGARDING COOPERATION ON PROTECTING THE WELFARE
OF CHILDREN**

(Cairo, 22 October 2000)

Entry into force Generally: (1 February 2002)

Entry into force for Australia: (1 February 2002)

AUSTRALIAN TREATY SERIES

[2002] ATS 3

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE
GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT REGARDING
COOPERATION ON PROTECTING THE WELFARE OF CHILDREN
(Cairo, 22 October 2000)
(Preamble)

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE
ARAB REPUBLIC OF EGYPT

IN SUPPORT OF their mutual relations, and desirous to promote cooperation
between their two States to ensure the protection of the welfare of children;

TAKING INTO CONSIDERATION the provisions of the United Nations
Convention on the Rights of the Child, done at New York on 20 November 1989, and
in particular the provisions of Article 11 according to which the State Parties,
including Australia and the Arab Republic of Egypt, shall take the necessary measures
to combat the illicit transfer and non-return of children abroad and to this end,
promote the conclusion of bilateral or multilateral agreements in this respect;

TAKING INTO CONSIDERATION the provisions of the Vienna Convention on
Consular Relations, done at Vienna on 24 April 1963, to which Australia and the Arab
Republic of Egypt are State Parties, and in particular the provisions of Article 5(e) and
(h), according to which consular functions consist, *inter alia*, in helping and assisting
nationals of the sending State and in safeguarding, within the limits imposed by the
laws and regulations of the receiving State, the interests of children who are nationals
of the sending State;

RECOGNISING that questions relating to personal status matters, including questions of child custody and access, can often represent human tragedies and present a particular challenge to bilateral efforts for a just and humane solution;

DESIRING to promote and enhance consular cooperation and judicial co-operation between their two States to deal with these issues;

HAVE AGREED as follows:

PART 1

APPLICATION AND OBJECTS

Article 1

1. The objects of this Agreement include, consistent with the laws of both Parties:

(a) ensuring that the best interests of children are treated as of primary importance in matters relating to parents' rights of custody and access to their children;

(b) ensuring respect for the rights of children who are separated from one or both parents to maintain personal relations and direct access with both parents on a regular basis, except if it is contrary to a child's best interests, as provided for in the United Nations Convention on the Rights of the Child;

(c) ensuring respect for the rights of a parent who is separated from a child to maintain personal relations and direct access with the child on a regular basis as provided for in the United Nations Convention on the Rights of the Child;

(d) assisting a child to recover from any harmful effects suffered in the removal of the child by a parent from the territory of one Party to the territory of the other Party.

Article 2

For the purposes of this Agreement the word child shall include a child of Egyptian or Australian nationality and/or children of dual Australian and Egyptian nationality. In particular, consular access and assistance shall be made available to children of dual Australian and Egyptian nationality.

PART 2

JOINT CONSULTATIVE COMMISSION

Article 3

1. A Joint Consultative Commission shall be established comprising representatives of the Ministries of Foreign Affairs, Justice and the Interior for the Arab Republic of Egypt and representatives of the Department of Foreign Affairs and Trade and the Attorney-General's Department for Australia.

2. A Party may appoint additional persons to represent other concerned authorities of that Party in respect of cases submitted for consideration by the Commission.

Article 4

The Commission shall be consultative in nature.

Article 5

1. In accordance with the laws of each Party, the Commission shall:

- (a) consider problems related to individual cases with a view to facilitating their resolution;
- (b) promote respect for the rights of children who are separated from one or both parents to maintain personal relations and direct access with both parents on a regular basis, except if it is contrary to a child's best interests, as provided for in the United Nations Convention on the Rights of the Child;
- (c) promote respect for the rights of a parent who is separated from a child to maintain personal relations and direct access with the child on a regular basis as provided for in the United Nations Convention on the Rights of the Child;
- (d) follow the progress of cases with a view to providing timely status reports to the concerned authorities of both Parties;
- (e) promote awareness and cooperation between the concerned authorities of both Parties to achieve the objects of this Agreement with respect to cases brought to the attention of the Commission;
- (f) receive and exchange information and documents related to cases and facilitate the transmission of such information and documents to the concerned authorities of either Party as required.

2. The Commission shall not consider matters pertaining to visas or immigration except as provided for in Article 6(e).

Article 6

In particular, either directly or through any intermediary, the Commission may take recommendations to the appropriate authorities to assist in taking all appropriate measures in accordance with the laws of each Party:

- (a) to discover the whereabouts of a child who is subject to this Agreement;
- (b) to encourage an amicable resolution of the issues in cases in which custody of or access to a child is in dispute;
- (c) to assist in finding an amicable resolution of the issues in cases in which a child is removed to or retained in the territory of a Party against the wishes of a parent,

including to encourage and facilitate agreement by the parents on access by a parent to the child or return of the child to the territory of the other Party;

(d) to provide information of a general character as to the law of the Party in connection with the application of the Agreement;

(e) to facilitate the making of applications, and expeditious determination of applications, for visas, exit permits and other travel documentation for parents and children;

(f) to keep each other informed with respect to the operation of this Agreement and, as far as possible, to eliminate any obstacles to its implementation.

Article 7

1. Either Party may present, through diplomatic channels, cases to the Commission for consideration.

2. The usual channel of communication between the Parties shall be the diplomatic channel.

Article 8

The Commission shall meet at the request of either Party, on a date arrived at by mutual decision.

Article 9

The conclusions of the Commission are to be put on record. The Commission shall ensure the confidentiality of information regarding specific cases.

Article 10

The Commission shall report to the Ministry of Foreign Affairs for Egypt and the Department of Foreign Affairs and Trade for Australia regarding the operation of this Agreement.

Article 11

1. Nothing in this Agreement is meant to limit or otherwise affect the rights and obligations of each Party arising from other treaties which apply to both Parties, and in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

2. Nothing in this Agreement is meant to replace or preclude any other means of communication and consideration of cases, including their resolution, between the Parties.

3. Nothing in Part 2 of this Agreement is meant to preclude the commencement of any proceedings before the judicial or administrative authority of a Party in respect of a child.

Article 12

For all written communications pursuant to this Agreement, the Parties shall provide a translation into an official language of the other Party.

Article 13

Any dispute arising out of the interpretation or execution of this Agreement shall be settled by consultation or negotiation through diplomatic channels.

Article 14

This Agreement shall enter into force on the first day of the second month after the date on which the Parties have notified each other that their respective legal requirements for entry into force have been complied with.[\[1\]](#)

Article 15

This Agreement shall apply to cases raised by either party even if the case began before the entry into force of this Agreement.

Article 16

This Agreement shall remain in force until terminated by either Party. Either Party may terminate this Agreement at any time by giving written notice to the other Party to that effect. Termination shall take effect six months after receipt of the notice. Notwithstanding termination, the Commission shall make every effort to finalise cases brought to its attention prior to the giving of the written notice.

IN WITNESS THEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at Cairo on the 22nd day of October Two Thousand in two copies, in English and Arabic, each version being equally authentic.

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF

AUSTRALIA:

THE ARAB REPUBLIC OF EGYPT:

[Signed:]

[Signed:]

MARK VAILE

FAROUK SEIF EL NASR

Appendix 6

Bilateral Agreement: Lebanon



Australian Government

Department of Foreign Affairs and Trade

**AGREEMENT BETWEEN AUSTRALIA
AND
THE REPUBLIC OF LEBANON
REGARDING
COOPERATION ON PROTECTING THE WELFARE OF CHILDREN**

Beirut, 18 March 2009

Entered into force on 1 May 2010

AUSTRALIAN TREATY SERIES
[2010] ATS 14

National Interest Analysis reference: [2009] ATNIA 22

AGREEMENT BETWEEN AUSTRALIA AND THE REPUBLIC OF LEBANON REGARDING COOPERATION ON PROTECTING THE WELFARE OF CHILDREN

The Government of Australia and the Government of the Republic of Lebanon

In support of their mutual relations, and desirous to promote cooperation between their two States to ensure the protection of the welfare of children;

Taking into consideration the provisions of the United Nations Convention on the Rights of the Child, done at New York on 20 November 1989, and in particular the provisions of Article 11 according to which the State Parties, including Australia and the Republic of Lebanon, shall take the necessary measures to combat the illicit transfer and non-return of children abroad and to this end, promote the conclusion of bilateral or multilateral agreements in this respect;

Taking into consideration the provisions of the Vienna Convention on Consular Relations, done at Vienna on 24 April 1963, to which Australia and the Republic of Lebanon are State Parties, and in particular the provisions of Article 5(e) and (h), according to which consular functions consist, inter alia, in helping and assisting nationals of the sending State and in safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of children who are nationals of the sending State;

Recognising that questions relating to personal status matters, including questions of child custody and access, can often represent human tragedies and present a particular challenge to bilateral efforts for a just and humane solution;

Desiring to promote and enhance consular cooperation and administrative cooperation between their two States to deal with these issues;

Have agreed as follows:

Part 1 Application and objects

Article 1

The objects of this Agreement include, consistent with the laws of both Parties:

- (a) ensuring that the best interests of children are treated as of primary importance in matters relating to parents' rights of custody and access to their children;

- (b) ensuring respect for the rights of children who are separated from one or both parents to maintain personal relations and direct access with both parents on a regular basis, except if it is contrary to a child's best interests, as provided for in the United Nations Convention on the Rights of the Child;
- (c) ensuring respect for the rights of a parent who is separated from a child to maintain personal relations and direct access with the child on a regular basis as provided for in the United Nations Convention on the Rights of the Child;
- (d) assisting a child to recover from any harmful effects suffered in the removal of the child by a parent from the territory of one Party to the territory of the other Party.

Article 2

For the purposes of this Agreement the word child shall include a child of either Australian or Lebanese nationality and/or a child of dual Australian and Lebanese nationality. In particular, consular access and assistance shall be made available to children of dual Australian and Lebanese nationality.

Part 2

Joint Consultative Commission

Article 3

1. A Joint Consultative Commission shall be established comprising representatives of the Ministries of Justice, Foreign Affairs & Emigrants and the Ministry of Interior and Municipalities for the Republic of Lebanon and representatives of the Department of Foreign Affairs and Trade and the Attorney-General's Department for Australia.
2. A Party may appoint additional persons to represent other concerned authorities of that Party in respect of cases submitted for consideration by the Commission.

Article 4

The Commission shall be consultative in nature.

Article 5

1. The Commission shall, in accordance with the laws of each Party:

- (a) implement the objects of this Agreement;
 - (b) consider problems related to individual cases with a view to facilitating their resolution;
 - (c) respect the decisions of each Party's religious or civil courts in individual cases;
 - (d) promote awareness and cooperation between the concerned authorities of both Parties to achieve the objects of this Agreement with respect to cases brought to the attention of the Commission;
 - (e) provide information of a general character as to the law of the Party in connection with the application of the Agreement;
 - (f) keep each other informed with respect to the operation of this Agreement and, as far as possible, to eliminate any obstacles to its implementation.
2. The types of cases to be considered by the Commission shall include matters pertaining to personal status such as child custody and those which require measures pertaining to the protection of the child's rights and of basic human rights in general.
3. The Commission shall not consider cases or matters pertaining to visas or immigration except as provided for in Article 6(d).

Article 6

In particular, either directly or through any intermediary, the Commission shall take all appropriate measures in accordance with the laws of each Party:

- (a) to discover the whereabouts of a child who is subject to this Agreement;
- (b) to encourage an amicable resolution of the issues in cases in which custody of or access to a child is in dispute;
- (c) to assist in finding an amicable resolution of the issues in cases in which a child is removed to or retained in the territory of a Party against the wishes of a parent, including to encourage and facilitate agreement by the parents on access by a parent to the child or return of the child to the territory of the other Party;
- (d) to facilitate the making of applications, and expeditious determination of applications, for visas, exit permits and other travel documentation for parents and children;

(e) to follow the progress of cases with a view to providing timely status reports to the concerned authorities of both Parties;

(f) to receive and exchange information and documents related to cases and facilitate the transmission of such information and documents to the concerned authorities of either Party as required.

Article 7

1. Either Party may present, through diplomatic channels, cases to the Commission for consideration.

2. The usual channel of communication between the Parties shall be the diplomatic channel.

Article 8

The Commission shall meet at the request of either Party, on a date arrived at by mutual decision.

Article 9

The conclusions of the Commission are to be put on record. The Commission shall ensure the confidentiality of information regarding individual cases.

Article 10

The Commission shall report to the Ministry of Foreign Affairs and Emigrants for Lebanon and the Department of Foreign Affairs and Trade for Australia regarding the operation of this Agreement.

Article 11

1. Nothing in this Agreement is meant to limit or otherwise affect the rights and obligations of each Party arising from other treaties which apply to both Parties, and in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

2. Nothing in this Agreement is meant to replace or preclude any other means of communication and consideration of cases, including their resolution, between the Parties.

3. Nothing in Part 2 of this Agreement is meant to preclude the commencement of any proceedings before the judicial or administrative authority of a Party in respect of a child.

Article 12

For all written communications pursuant to this Agreement, the Parties shall provide a translation into an official language of the other Party.

Article 13

Any dispute arising out of the interpretation or execution of this Agreement shall be settled by consultation or negotiation through diplomatic channels.

Article 14

This Agreement will enter into force on the first day of the second month after the later of the two notifications has been received.

Article 15

This Agreement shall apply to a case raised by either Party even if the case began before the entry into force of this Agreement.

Article 16

This Agreement shall remain in force until terminated by either Party. Either Party may terminate this Agreement at any time by giving written notice to the other Party to that effect. Termination shall take effect six months after receipt of the notice. Notwithstanding termination, the Commission shall make every effort to finalise cases brought to its attention prior to the giving of the written notice.

In Witness thereof the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done at Beirut on the 18th day of March two thousand and nine, in two originals, in English and Arabic, each version being equally authentic.

For Australia:

For the Republic of Lebanon:

H.E. Lyndall Sachs
Ambassador

H.E. Ibrahim Najjar
Minister of Justice



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