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## 1. GENERAL BACKGROUND

Australia is a Federal nation consisting of 6 States and 10 Territories. Both at a Federal level and within the States and Territories, a common law jurisdiction operates. Private family law is governed by Federal law except in Western Australia where State law applies. The main legislation on issues of custody and access of children is the Family Law Act 1975 (Cth).

### 1.1 IMPLEMENTATION OF THE CONVENTION

The 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force for Australia on 1 January 1987. Australia was the seventh Contracting State to the Convention.<sup>1</sup> The Convention extends to all six States and the two mainland Territories. By authority given under the Family Law Act 1975 (Cth), s111B, the Federal government implemented the Convention through Regulations known as the Family Law (Child Abduction Convention) Regulations 1986.<sup>2</sup> These Regulations effectively redraft the Convention, and as such can be amended to take account of judicial decisions. The Regulations have recently been amended by the Family Law Amendment Act 2000.

### 1.2 OTHER CONTRACTING STATES ACCEPTED BY AUSTRALIA

Australia, as a member State of the Hague Conference ratified the Convention and as with all Contracting States Australia must accept all ratifications. Nevertheless, under Article 38, non-Member States may accede to the Convention and Contracting States are not obliged to accept accessions. Australia has operated a policy of automatically accepting accessions to the Convention. However due to difficulties that have been experienced in dealing with countries which have not implemented an adequate framework for dealing with Convention applications, the policy of automatic acceptance of accessions will be reviewed.<sup>3</sup> As of 1 January 2002, the last accessions accepted by Australia were on 1 May 2001 when Australia accepted the accessions of five Contracting States.<sup>4</sup>

\* We particularly thank Stephen Bourke, Head, Family Law Branch, Federal Attorney-General's Department; Jennifer Degeling, Australian Commonwealth Central Authority; Julianna Greenane, Australian Commonwealth Central Authority; Nan Levett, Australian Commonwealth Central Authority; and the NSW Central Authority, for their help with this report.

<sup>1</sup> Luxembourg ratified the Convention on the same day as Australia.

<sup>2</sup> Family Law (Child Abduction Convention) Regulations 1986, SR 1986 No. 85 as amended.

<sup>3</sup> Information in this paragraph taken from Australia's response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter 'Australia's Response to Hague Questionnaire').

<sup>4</sup> Namely, Brazil, Malta, Trinidad and Tobago, Uruguay and Uzbekistan.

For a full list of all States for whom the Convention is in force with Australia, and the dates that the Convention entered into force for the relevant States, see the Appendix.

### **1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES**

An Australian judge at the LAWASIA Conference 1995 commented<sup>5</sup> on the lack of participation in the Hague Convention amongst Islamic, Buddhist and Hindu nations. He suggests that “a series of interlocking bi-lateral arrangements” may be a “possible way forward”. He invited consideration of such agreements as a project for the next few years, recognising that such arrangements take time to negotiate as standards and procedures may differ greatly between countries. Currently Australia has an agreement with Egypt which has been signed but which has not entered into force as Egypt has not yet notified Australia that its administrative arrangements are in place. Australia is also involved in negotiating an agreement with Lebanon, though this has not yet been concluded.

### **1.4 CONVENTION NOT APPLICABLE TO INTERNAL ABDUCTIONS**

The Convention does not apply to internal abductions within Australia. The Family Law Act 1975 provides for court ordered location<sup>6</sup> and recovery<sup>7</sup> of the child. The Act provides a range of powers to assist in recovering the child and also powers of arrest and powers to remove, or take possession of the child.<sup>8</sup> Parental abduction either internally within Australia, or on an international level is not a criminal offence in Australia.<sup>9</sup>

## **2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION**

### **2.1 THE CENTRAL AUTHORITIES**

Australia has designated more than one Central Authority as allowed under Article 6 of the Convention. Part 1 of the implementing Regulations establishes the Commonwealth and State Central Authorities. The Commonwealth Central Authority is located in the International Family Law Section of the Family Branch of the Attorney General’s Department in Canberra. All incoming and outgoing applications are processed by this Central Authority. There are four full time lawyers in the Section, and four full time caseworkers, none of whom deal solely with Convention applications.<sup>10</sup> The functions of the Commonwealth Central Authority are:

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<sup>5</sup> Hon. Justice John Fogarty, A.M. Judge of the Family Court of Australia, *The Hague Convention and International Problems Arising from the Wrongful Removal or Retention of Children* LAWASIA Conference on Children’s Rights, Kuala Lumpur, Malaysia, October 1995.

<sup>6</sup> Family Law Act 1975 s 67J (1).

<sup>7</sup> Family Law Act 1975 s 67Q.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Family Law Council *Parental Child Abduction - A report to the Attorney-General* Prepared by the Family Law Council January 1998. Available at <http://www.gov.au/flc/reports/CHILDAB2.htm>

<sup>10</sup> National Report for Australia – Common Law Judicial Conference on International Parental Child Abduction, Washington, DC, September 2000. (Hereafter ‘National Report for Australia’).

- To provide legal and policy advice on the operation of the Convention.
- To provide guidance to the State Central Authorities on conduct.
- To locate children whose whereabouts are unknown.
- To advise members of the public and private practitioners on legal and practical aspects of the Convention.
- To keep left-behind parents informed of developments in the other country.
- To assist left-behind parents with travel arrangements to the other country.
- To maintain regular liaison with the State Central Authorities and foreign Central Authorities.
- To maintain a public information role by publishing an abduction pamphlet, a guidebook and a newsletter.<sup>11</sup>

There are also nominated government bodies in each of the six States and two Territories, which have delegated power to act as State Central Authorities.<sup>12</sup> In Western Australia and South Australia the State Central Authority is the Commissioner of Police, and in Tasmania it is the Crown Law Office. Most other Central Authorities are government departments whose remit is to handle every aspect of child protection. As well as having varying bureaucratic structures, each Central Authority has a different level of funding and resources and a different practical approach to Convention applications. The Central Authorities can be contacted at the following addresses:<sup>13</sup>

#### **COMMONWEALTH CENTRAL AUTHORITY**

International Family Law Section

Family Law and Legal Assistance Division

Attorney-General's Department

Robert Garran Offices

BARTON, ACT 2600

Tel: +61 (2) 6250 6724

01800 100 480 (toll free)

Fax: +61 (2) 6250 5917

Email: *childabduction@ag.gov.au*

#### **NEW SOUTH WALES**

The Director-General

Department of Community Services

Legal Branch, 164-167 Liverpool St.

ASHFIELD, NSW 2131

Tel: +61 (2) 9716 2490

Fax: +61 (2) 9716 2355

#### **TASMANIA**

Office of Solicitor General

15 Murray Street

HOBART, TAS 7000

Tel: +61 (3) 6233 3408 / 3406

Fax: +61 (3) 6233 2510

<sup>11</sup> List taken from <http://www.law.gov.au/childabduction/Aboutaustca.htm>

<sup>12</sup> Regulation 8.

<sup>13</sup> Contact details for the Federal and State and Territory Central Authorities are available on the Internet. <http://law.gov.au/childabduction/infoforparents.html>

**SOUTH AUSTRALIA**

Commissioner of Police  
 South Australian Police Department  
 60, Wakefield Street  
 ADELAIDE, SA 5001  
 Tel: + 61 (8) 8207 5464  
 Fax: +61 (8) 8231 3905

**VICTORIA**

The Secretary  
 Department of Human Services  
 555, Collins Street  
 MELBOURNE, VIC 3000  
 Tel: +61 (3) 9616 9865  
 Fax: +61 (3) 9616 7012

**QUEENSLAND**

The Director, Department of Families  
 Court Services  
 Children's Court Building  
 30-40 Quay Street  
 BRISBANE, QLD 4000  
 Tel: +61 (7) 3235 9862  
 Fax: +61 (7) 3235 9860

**WESTERN AUSTRALIA**

Commissioner of Police, Western Australia  
 Officer in Charge  
 Missing Persons Bureau  
 250, Adelaide Terrace  
 PERTH, WA 6000  
 Tel: +61 (8) 9492 5471  
 Fax: +61 (8) 9492 5470

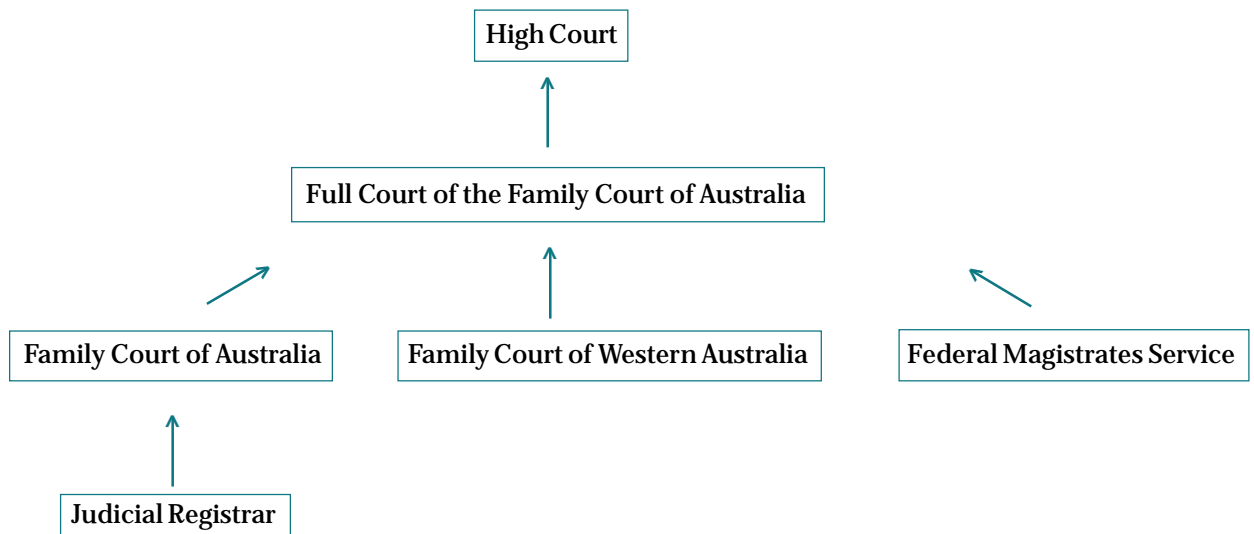
**AUSTRALIAN CAPITAL TERRITORY**

Chief Executive  
 Department of Education and  
 Community Services  
 Level 7, 197 London Circuit  
 CANBERRA CITY, ACT 2601  
 Tel: +61 (2) 6207 1503  
 Fax: +61 (2) 6207 1091

**NORTHERN TERRITORY**

The Secretary  
 Territorial Health Services  
 Family and Children's Services  
 Cnr Zanderlin & Trower Roads  
 CASUARINA, NT 0810  
 Tel: +61 (8) 8922 7268  
 Fax: +61 (8) 8922 7165

**2.2 COURTS AND JUDGES EMPOWERED TO HEAR CONVENTION CASES**



Jurisdiction to deal with Convention applications is vested in both the Federal and the State Courts. The relevant Federal courts are the Family Court of Australia and, since 1 July 2000, the Federal Magistrates Service.<sup>14</sup> Within the State systems the various courts of summary jurisdiction and also the Family Court of Western Australia have jurisdiction to hear Convention applications.

The Family Court of Australia has original jurisdiction throughout Australia except for in Western Australia where jurisdiction is vested in the Family Court of Western Australia. In the Northern Territory, the Supreme Court of the Northern Territory and the Family Court of Australia exercise concurrent original jurisdiction. In practice, applications are not made before the courts of summary jurisdiction. Consequently although there is no legislation formally restricting jurisdiction, as for example in the United Kingdom,<sup>15</sup> in practice there are a limited number of judges who will hear a Convention application.

In total there are about 54 judges,<sup>16</sup> including the Chief Justice, who will hear Hague cases.<sup>17</sup> Additionally, seven Judicial Registrars are empowered to hear proceedings. Judicial Registrars do not hold the equivalent permanent appointment of a judge but they exercise the delegated power of the judges. Their decisions are subject to an automatic rehearing if either of the parties wish. Generally, in Convention applications, jurisdiction is exercised by judges and not Judicial Registrars.

There are 15 Federal Magistrates in the Federal Magistrate Service including the Chief Federal Magistrate. Magistrates can transfer matters of complexity to the Family Court and apart from making preliminary holding orders, they are unlikely to hear a Convention case where a Family Court judge is available to hear it.

In Western Australia, there are five judges of the Family Court of Western Australia, each of whom hold a dual Federal and State Commission. There are also Magistrates who have jurisdiction to hear Hague cases but like the Federal Magistrates they are unlikely to hear Hague cases where judges of the Family Court of Western Australia are available. They may, however, make holding orders in relevant cases.

Appeals from a Judicial Registrar are to a single judge of the Family Court of Australia. Appeals from a judge of the Family Court of Western Australia or the Family Court of Australia or a magistrate from the Federal Magistrates Service are heard by the Full Court of the Family Court of Australia. Including the Chief Justice there are seven judges in the Appeal Division. Normally three judges sit together, and the appeal bench must have at least two members of the Appeal Division on it. The Full Court sits throughout Australia approximately on a fortnightly basis. Appeals from the Full Court are heard by the High Court of Australia.<sup>18</sup> To appeal to that court, special leave of the High Court is required or a certificate from the Family Court of Australia that the matter involves an important question of law or of public interest. To date there has only been one certificate granted by the Family Court in respect of a Hague matter and special leave has only been granted twice.

<sup>14</sup> Established by the Federal Magistrates Act 1999.

<sup>15</sup> See Child Abduction and Custody Act 1985 s 4.

<sup>16</sup> This figure includes the judges for the Family Court of Western Australia. See National Report for Australia, op. cit., n. 10.

<sup>17</sup> It remains to be seen what influence the new Federal Magistrates Service will have on this practice.

<sup>18</sup> This court is the highest court in the land, equivalent to the United States Supreme Court or the House of Lords in the United Kingdom.

### 3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN

#### 3.1 LOCATING THE CHILD

If the whereabouts of the child are unknown, several bodies may be called upon to help locate the child. The Federal and / or State police, the Department of Immigration, the Secretary of Foreign Affairs and Trade and the relevant Embassies or High Commissions may be required to assist. A warrant may also be issued to the Federal and / or State police for the possession of the child. Where such a warrant has been issued, the court may overrule any secrecy regulations on government documentation which may hold information on the whereabouts of the child. Any person believed to have knowledge of the child's whereabouts can be subpoenaed and questioned by the court.<sup>19</sup>

The Commonwealth Central Authority can also apply to the court for a location order<sup>20</sup> requiring a person to give information to the court about the whereabouts of the child which he may have and which he may obtain. When a child is located a recovery order<sup>21</sup> will enable authorities to recover and return the child to the person seeking recovery.

#### 3.2 CENTRAL AUTHORITY PROCEDURE

Australia made no reservation to Article 24 and consequently, documents can be translated into French or English.<sup>22</sup>

Applications should be made to the Commonwealth Central Authority in Australia. Normally, these will come from the relevant foreign Central Authority but alternatively, the applicant may apply directly to the Commonwealth Central Authority. Applications should be in the standard Hague Convention application form which is found in Schedule 3 to the Regulations.<sup>23</sup> There are some useful pages on the Internet explaining what information an application should contain.<sup>24</sup> All new incoming applications are assessed by the Commonwealth Central Authority to ensure that they meet the requirements of the Convention. Usually this takes about 48 hours. After being checked, the application is sent to the Central Authority in the State where the child is believed to be.

Australia's implementing Regulations require the Central Authority to seek amicable resolution and voluntary return.<sup>25</sup> However, in the light of *MHP v Director General Department of Community Services*,<sup>26</sup> they will be altered to remove the obligation, the word "must" being replaced by the word "may".<sup>27</sup>

<sup>19</sup> Information received from New South Wales Central Authority, July 2000.

<sup>20</sup> See Family Law Act 1975 s 67J, 67K, 67L, 67M, 67N, 67P.

<sup>21</sup> See Family Law Act 1975 s 67Q, 67R, 67S, 67T, 67U, 67V, 67W, 67X, 67Y.

<sup>22</sup> <http://www.hcch.net/e/status/stat28e.html>

<sup>23</sup> Or see Attachment 1 of The Child Abduction Kit available on the Internet at [http://law.gov.au/aghome/legalpol/cld/int\\_judicial\\_asst/international\\_child\\_abduction/AbductionKit/Welcome.html](http://law.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_abduction/AbductionKit/Welcome.html)

<sup>24</sup> [http://law.gov.au/aghome/legalpol/cld/...\\_abduction/countriesA\\_D/Australia.html](http://law.gov.au/aghome/legalpol/cld/..._abduction/countriesA_D/Australia.html)

<sup>25</sup> Regulation 13 (4) (a) and (b) Family Law (Child Abduction Convention) Regulations 1986.

<sup>26</sup> See *MHP v Director General Department of Community Services* [2000] Fam CA 673 available at <http://www.familycourt.gov.au>

<sup>27</sup> Email correspondence from Jenny Degeling in the Attorney General's Department, 9 May 2001.



When the relevant State Central Authority has received the application, a preliminary decision is made as to whether it is appropriate to negotiate a voluntary return. Even where it is considered appropriate to negotiate a voluntary agreement, the Central Authority may still obtain urgent *ex parte* restraining orders. These orders protect the Central Authority if the negotiations break down and the abducting parent tries to flee with the child. The orders may include interim orders for the surrender of passports, preventing the removal of children from Australia, placing children's names on the airport "watch list", orders for interim residence of the child and orders for the issuing of warrants to apprehend children. A child may be removed from an abducting parent but only as a last resort. If a voluntary return is negotiated after obtaining these orders, the matter is resolved by consent orders for return. In Queensland, the State Central Authority is more inclined to pursue a voluntary return before filing the application or obtaining holding orders.<sup>28</sup>

### **3.3 LEGAL REPRESENTATION**

If negotiations for a voluntary return are inappropriate or fail, the Central Authority will forward the case to the Crown Solicitor. Legal proceedings are conducted by the Central Authority which applies in its own name as the applicant. This is an unusual procedure and we are not aware of any other Central Authorities which apply as the applicant. The State Central Authority initiates proceedings, but does so on behalf of the Commonwealth Central Authority.

As applicant, the Central Authority is bound by rules issued by the Attorney General, which require the Commonwealth to act as a model litigant. The Central Authority must place all relevant information before the court and explain the case to the court having regard to Australia's international obligations. The Central Authority must keep all parties informed of any developments. Applicants are not permitted to directly brief the Central Authority's lawyers as their legal representative and all communications should go through the Commonwealth Central Authority. Nevertheless, the views and wishes of the left-behind parent will be taken into account. The first duty of the Central Authority lawyers is to the court and then to the Central Authority as the client. Occasionally this may cause difficulties for the left-behind parent, particularly if their case is weak or they wish to withhold evidence. As a general rule the aims of the Central Authority and the left-behind parent are the same, to seek the return of the child to the requesting country, and consequently the system appears to work well.

As a "repeat player" in litigation the Central Authority can build up expertise and as such it may be in a better position than the respondent who must seek their own representation. Additionally, this role as the applicant means that the Central Authority is more understandably concerned with their overall responsibility towards the child. There are also potential difficulties involved in such a system. It is conceivable that having the Central Authority as the applicant in Convention proceedings may lead to a conflict of interests. In one recent case<sup>29</sup> an applicant father later retained the children and became an abductor. He objected to the involvement of a Central Authority officer in the mother's application because the officer was aware of personal information which could now be used against him. However according to the Australian response to the

<sup>28</sup> Australia's Response to Hague Questionnaire, *op. cit.*, n. 3.

<sup>29</sup> *Ibid.*

Hague Questionnaire, “if the relationship between a left-behind parent seeking the return of the children overseas and Central Authority remains one of member of the public / public servant carrying out their statutory duty, there should not be any conflict of interest”.<sup>30</sup>

### 3.4 COSTS AND LEGAL AID

Australia made no reservation under Article 26<sup>31</sup> and therefore an applicant seeking return of a child from Australia will not have to pay legal costs if they apply through the Central Authority and allow the Central Authority to conduct legal proceedings. Legislation permits private applications outside of the Central Authorities. However, in such cases legal costs will not be paid for by the State. In appropriate cases, costs associated with legal proceedings will also be met by the Central Authority or the Federal Legal Aid System, including psychologists’ reports, translations and separate representation for the child.<sup>32</sup>

Respondents in proceedings may engage a lawyer at their own expense. They will be directed towards legal aid which is provided throughout Australia but on a strict means and merits test. Eligibility depends on the criteria adopted within the relevant State or Territory. Lawyer’s fees are charged on a court-regulated scale of costs.<sup>33</sup> In family proceedings each party tends to bear their own costs and orders for costs are rare.

Repatriation costs for a child and abducting parent may have to be paid by the person who has successfully sought return. However, the applicant can request that the Central Authority obtain a court order directing that the necessary expenses incurred by or on behalf of the applicant, including travel expenses and costs incurred in respect of locating a child be paid by the person who removed the child to Australia. The Family Law Amendment Act 2000 has strengthened the position of the left-behind parent as regards to obtaining orders for costs against the other party.<sup>34</sup>

The Australian Central Authority used to have a policy of insisting that an overseas left-behind person from the UK or New Zealand had to deposit sufficient funds with their legal advisors to cover the costs of airfares, prior to processing an application through the courts. However, since the current Head of the Central Authority has been appointed, the policy has not been completed due to criticisms.

### 3.5 LEGAL PROCEEDINGS

Usually, in Convention hearings, applications are determined on the basis of documentary evidence alone and the majority of applicants are not required to attend the full hearing. Evidence in the Family Court is by way of affidavits with

<sup>30</sup> Ibid.

<sup>31</sup> <http://www.hcch.net/e/status/stat28e.html>

<sup>32</sup> Degeling, J. *Provisions of Legal Representation in Hague Cases*. Presented at the Second International Forum on Parental Child Abduction 1-2 November 2000.

<sup>33</sup> In 1998 the hourly rate was Aus \$117, see Hutchinson, A; Roberts, R and Setright, H. *International Parental Child Abduction Family Law 1998*, p. 68.

<sup>34</sup> Item 98, Schedule 3 to the Family Law Amendment Act 2000.



a right of cross-examination in certain limited circumstances.<sup>35</sup> Decisions in both the High Court and the Family Court have recognised that in most cases, cross-examination is not appropriate and is rarely allowed.<sup>36</sup> Consequently, it is unusual for the left-behind parent to be required to attend the hearing. Oral evidence is only required where there is widely conflicting evidence.

As the left-behind parent is not the applicant they do not give direct evidence but all communications must go through the Central Authority. We also understand that children are never directly heard. Although this facilitates speed, one disadvantage is that lawyers who present cases are often hindered by the lack of documentary evidence from the left-behind parent or the requesting State. Failure to produce adequate evidence has resulted in criticism of the Central Authority by the court.<sup>37</sup>

Where defences under Article 13 and Article 20 are raised, the onus of proof is on the person opposing return. Similarly, if lack of rights of custody is raised as a defence, the onus of proof is on the person opposing return. The burden of proof is the civil standard, that is, on the balance of probabilities. Where the child's objections have been raised as a defence, the court will usually require a report to determine the child's views.<sup>38</sup> The Family Law Amendment Act 2000 states that, a separate representative for the child can only be appointed in "exceptional circumstances".<sup>39</sup> This was introduced to minimise potential delay but was highly criticised as it was against Australian jurisprudence.<sup>40</sup> In Queensland, the State Central Authority has successfully avoided the appointment of a child's representative in most cases where the child's objections are the only reason for the appointment of the separate representative, upon the basis that a report is sufficient. The Family Court has interpreted the Regulations strictly with regard to defences, which are narrowly construed.<sup>41</sup>

The Convention obligation to act expeditiously is reflected in Regulations 15 (2) and 15 (4). Where possible cases are prioritised to the extent allowed by court lists and due process requirements. Holding orders can therefore be made on the day that the application is received and a return hearing can be fully determined within two or three weeks of the first court appearance.<sup>42</sup>

### 3.6 APPEALS

The system also endeavours to expedite appeal procedures. An appeal may be heard as early as one week after the appeal has been filed but is usually heard

<sup>35</sup> Regulation 29 provides for the admissibility of an application, attachments to and other documents forwarded in support of, that application as evidence of the facts stated in the application or document.

<sup>36</sup> *Gazi v Gazi* (1993) FLC 92 – 341, *Hanbury-Brown* (1996) FLC 92 – 671, *Director-General, Department of Families, Youth and Community Care v Bennett* (2000) Fam CA 253, *De L v Director-General, New South Wales Department of Community Services* (1996) FLC 92 – 706.

<sup>37</sup> See National Report for Australia, op. cit., n. 10.

<sup>38</sup> See Regulation 26.

<sup>39</sup> Item 68, Schedule 3 to the Family Law Amendment Act 2000.

<sup>40</sup> See Bowie, K. M. *International Application and Interpretation of the Convention on the Civil Aspects of International Child Abduction* March 2001. Available at <http://www.familycourt.gov.au/papers/pdf/bowie.pdf>

<sup>41</sup> Information in this paragraph taken from Australia's Response to Hague Questionnaire, op. cit., n. 3. For information on the number of refused cases in 1999 see post at 7.1.2.

<sup>42</sup> For an analysis of the speed of disposal of cases in 1999 see post at 7.1.3.

within one or two months. Conversely, further appeal to the High Court tends to take much more time and can “dramatically cool down the hot pursuit nature of the Convention”.<sup>43</sup> According to research on cases commenced in 1999,<sup>44</sup> 4 out of 34 cases which went to court were appealed. At 12%, this is marginally below the global average of 14%. These cases took a mean average time of 257 days from initial application to final appellate decision.<sup>45</sup>

According to the Family Law Rules 1984, the time-limit for making an appeal to the Full Court is one month after the day on which the decree appealed from was made. An application to appeal “out of time” may be made to a judge of a court having jurisdiction under the Family Law Act 1975.

An appeal is not a hearing *de novo* except where it is an appeal from a Judicial Registrar to a single judge of the Family Court. The appellate court can only interfere with the lower court decision if the appellant can demonstrate that, having regard to all the evidence now before the court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.

### 3.7 ENFORCEMENT OF ORDERS

In proceedings for the return of a child, the Regulations refer to numerous orders that a Central Authority can seek from a court. These include special powers to deal with contempt of court and contravention of orders. They also include the ability to seek “... any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention ...”<sup>46</sup>

There is a general tendency to allow a stay of orders pending an appeal as the subject matter of the appeal needs to be preserved and the failure to grant a stay may render the appeal process nugatory. Execution of a return order can be delayed or not effected at all if:

- After a drawn out appeal process, orders have been made but the requesting parent has either lost interest or is unable to comply with any conditions of return.
- The requesting parent has not complied with relevant undertakings.
- The requesting parent cannot be located.<sup>47</sup>

If there is concern that a parent may abscond with a child, the court can, prior to, or after a return order is issued, direct a parent to report daily to the police, or direct that the child be taken into protective care. Return orders when made are usually very specific and may include details such as flight numbers, the date and time of flight, the departure point and how and when passports are to be returned. If necessary a Central Authority representative or a member of the Australian Federal police will escort a parent and child to the airport to hand over passports or to ensure that they board the relevant flight.

<sup>43</sup> See Australia’s Response to Hague Questionnaire, op. cit., n. 3.

<sup>44</sup> Preliminary Document No. 3 *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias and available at <http://www.hcch.net/e/conventions/reports28e.html> (Hereafter ‘Preliminary Document No. 3’).

<sup>45</sup> See further at 8.1.3 post.

<sup>46</sup> Regulation 14 (1) (e).

<sup>47</sup> Information taken from Australia’s Response to Hague Questionnaire, op. cit., n. 3, p. 27.

A difficulty arises with regard to situations where neither parent is able or willing to pay the requisite airfare for the child and the abductor. In this situation, the order is practically unenforceable, unless the requesting State provides the necessary funds.

## 4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS

### 4.1 CENTRAL AUTHORITY PROCEDURE

Applications should be made to the Commonwealth Central Authority and will usually come from the relevant foreign Central Authority. However, an applicant can apply directly to Australia by completing the form in Schedule 3 to the Regulations.<sup>48</sup> The Central Authorities' powers to organise or secure effective rights of access are set out in Regulations 24 and 25 and reflect Article 21 of the Convention.

When an access application is received from another Contracting State, the Commonwealth Central Authority instructs the relevant State Central Authority to write to inform the parent with whom the child resides of the application. The letter should ascertain the parent's attitude to the child having contact with the applicant. The parent is also invited to discuss the matter with the Central Authority and to negotiate access issues based on the applicant's proposal. In all access cases the Central Authority seeks agreement upon the belief that an agreed outcome has a greater chance of success. If, however, no agreement can be reached, the Central Authority may commence legal proceedings.

### 4.2 LEGAL PROCEEDINGS

The same arrangements for legal representation that apply to return applications also apply to access applications. As with return applications, the Central Authority applies in its own name, as the applicant and bears any legal costs.

Following the decision of the Family Court of Australia in *Castell*,<sup>49</sup> it had been a requirement that in access applications:

- The applicant must have a right of access arising from a court order or statute;
- The right of access must be conferred in another Convention State (i.e. not Australia); and
- There must be a breach of this right.

The court has also refused to accept that where a person has a right of custody, this by definition must include a right of access.<sup>50</sup> These decisions have caused some injustice to foreign applicants and the situation was therefore remedied by the Family Law Amendment Act 2000.<sup>51</sup> As a result section 111B (1) (1E) of the Family Law Act 1975 now reads:

<sup>48</sup> Or see Attachment 2 of The Child Abduction Kit, available on the Internet at [http://law.gov.au/aghome/legalpol/cld/int\\_judicial\\_asst/international\\_child\\_abduction/AbductionKit/Welcome.html](http://law.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_abduction/AbductionKit/Welcome.html)

<sup>49</sup> *Police Commissioner of South Australia v Castell* (1997) FLC 92 – 752.

<sup>50</sup> *Director General, NSW Department of Community Services v Odierna*, unreported decision of Lawrie J. Sydney, 17 March 2000. Taken from Australia's Response to Hague Questionnaire, op. cit., n. 3.

<sup>51</sup> Family Law Act 1975 s 111B (1) (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:

- (a) 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 his section), with respect to rights of access to the child concerned; or
- (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.”

Australian courts are empowered to make substantive access orders under the implementing Regulations, rather than under normal domestic law provisions.<sup>52</sup> This is a different situation to many other Contracting States, where the terms of the Convention itself are implemented into the internal law of the State. In these States Article 21 has been interpreted as only requiring and empowering a Central Authority to assist an applicant to make an access application under domestic law provisions dealing with these matters. It has been suggested that, “[t]he Australian Regulations therefore give ‘added teeth’ to the organising and securing of rights of access in cases which do meet the criteria set out in the regulations”.<sup>53</sup>

In Australia, access cases are not given the same priority as return cases. Regulations 15 (2) and 15 (4), which require the court to prioritise abduction matters, do not apply to access applications. It is also recognised that access applications by their very nature take longer as co-operation and agreement between parents is required to some extent to make arrangements work. Nevertheless, in 1995, the Regulations were amended<sup>54</sup> to take note of the need to expedite access proceedings.

#### 4.3 ENFORCEMENT OF ORDERS

Where there are conditions placed upon an access order, there are measures available to the courts to guarantee adherence to these provisions. These include:

- Depositing a sum of money in a trust account in Australia as a bond or surety against the return of the child following contact.
- Ordering that passports of the parent and child be surrendered to an appropriate authority.
- Ordering that contact should be supervised if appropriate and necessary.
- Ordering that contact should only occur in Australia if necessary.
- Ordering that the child be prohibited from leaving Australia and the child’s name be added to the airport watch list.
- Ordering the requesting parent to report regularly to the police during the period of the contact.
- Ordering that the requesting parent provide to the Central Authority and the custodial parent a detailed itinerary of locations and contact details for the child during the period of contact.<sup>55</sup>

<sup>52</sup> See Regulation 25 (4).

<sup>53</sup> See Australia’s Response to Hague Questionnaire, op. cit., n. 3.

<sup>54</sup> See Family Law Reform Act 1995.

<sup>55</sup> Information taken from Australia’s Response to Hague Questionnaire, op. cit., n. 3, p. 48.

If there is an obvious risk of non-compliance with an access order, the Australian Central Authority will try to ensure that the risk is covered by an order. Where a breach of an order occurs, the non-custodial parent may request the assistance of the Central Authority to enforce the order. There are several new sanctions available to the Central Authority to be used in these situations.<sup>56</sup> Sections 111B (1) (1C) and (1D) of the Family Law Act 1975 state that:

“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.

A Central Authority may do so despite any orders made by a court before the child’s return to Australia.”

There have been cases where an older child has refused to have contact with the applicant. This creates problems as a court is unlikely to make an order contrary to the child’s wishes. In some cases, counselling has been sought for the child, but the court cannot force an older child to have contact with the applicant.

## **5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN**

### **5.1 PREVENTING THE REMOVAL OF THE CHILD FROM THE JURISDICTION**

#### **5.1.1 CIVIL LAW**

Where an applicant has a residence or contact order or an order prohibiting the removal of a child from Australia, the Federal police, if in possession of a copy of the order, can put the child’s name on an “Airport Watch List”. In emergency situations the police can also act if the applicant has applied for such an order but is not yet in possession of it. The effect of having the child’s name on a “Watch List” is that if someone then attempts to remove a child from the jurisdiction, the Federal police have authority to hold the child. The details of a residence or contact order entered on the “Watch List” must be renewed every six months to remain effective. The person with the order may also serve a copy of the order and a statutory declaration upon international carriers who can then be fined if they ignore such notification. If a parent does not have an order they should contact a solicitor, community legal centre or legal aid body for advice on obtaining an order.<sup>57</sup> All registries of the Family Court have an emergency telephone service.<sup>58</sup>

Normally, both parents are required to give their consent to the issuing of their child’s passport. Courts, however, have authority both to restrain parents from obtaining a passport for the child, and also to dispense with the need for parental consent where appropriate.

<sup>56</sup> Family Law Act 1975 s 111B (1C) (1D).

<sup>57</sup> See <http://www.law.gov.au/childabduction/contatemerg.html>

<sup>58</sup> Telephone numbers are available in local directories. See Degeling, J and Levett, N. *International Child Abduction – A Guide for Parents and Practitioners*, November 2001. An earlier version of the report is available at <http://www.gov.au/childabduction/guide.pdf>

If the court is satisfied that there is a threat that the child may be removed from the jurisdiction, they can order the surrender of the child's, and any other person's, passport at any time during proceedings.<sup>59</sup> The Department of Foreign Affairs and Trade will warn the issuing passport authority to examine a named person's application for an Australian passport or travel document.<sup>60</sup>

### 5.1.2 CRIMINAL LAW

Parental child abduction as such is not a criminal offence in Australia. However, under the Family Law Act 1975 it is an offence for a person who was a party to proceedings in which an order was made to take or send a child from Australia to an overseas country in contravention of that order.<sup>61</sup> The offence was also extended to cover situations where proceedings are pending.<sup>62</sup> The penalty for both these offences is three years imprisonment.<sup>63</sup> Also, under the 1975 Act, the Family Court has the power to punish for contempt including committal to prison, or a fine or both.<sup>64</sup>

### 5.2 CENTRAL AUTHORITIES PROCEDURE

To make an application for the return of a child from Australia it is necessary for the applicant to complete the application form in Schedule 3 to the Regulations<sup>65</sup> or alternatively contact a solicitor to make an application on behalf of the applicant, or contact the State or Territorial Central Authority, Legal Aid Office or Community Legal Centre in the nearest State capital city for advice and assistance. The application will then be faxed to the Commonwealth Central Authority<sup>66</sup> which will transmit the application to the authorities in the relevant foreign State. It is not necessary for the applicant to translate the application into another language, as the Commonwealth Central Authority organises this.

The Commonwealth Central Authority has produced a guide which is also available on the Internet detailing specific procedure in specific States.<sup>67</sup> Usually a lawyer is required in the foreign State and in most cases the Commonwealth Central Authority can arrange this through the relevant foreign Central Authority. Where this is not possible, the Commonwealth Central Authority may be able to arrange a lawyer through the Australian Embassy in the relevant State. The relevant Australian State Central Authority will keep the applicant informed of any developments.

The Consular Operations Section of the Australian Department of Foreign Affairs and Trade may assist parents of abducted children by arranging consular assistance in foreign States. The Department may also provide a list of lawyers in overseas States who may assist. For more information contact:

Tel: +61 (2) 6261 3305

Fax: +61 (2) 6261 3491

<sup>59</sup> Regulation 15 (3).

<sup>60</sup> Information taken from Hutchinson, et al., op. cit., n. 33, p. 65.

<sup>61</sup> Family Law Act 1975 s 65Y (1).

<sup>62</sup> Family Law Act 1975 s 65Z (1).

<sup>63</sup> See Family Law Act 1975 s 65Y (1) and 65Z (1).

<sup>64</sup> Family Law Act 1975 s 112AP.

<sup>65</sup> It is also reproduced in Attachment 1 of The Child Abduction Kit available on the Internet at [http://law.gov.au/aghome/legalpol/cld/int\\_judicial\\_asst/international\\_child\\_abduction/AbductionKit/Welcome.html](http://law.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_abduction/AbductionKit/Welcome.html)

<sup>66</sup> See Regulation 11 (3).

<sup>67</sup> <http://www.law.gov.au/childabduction>



### 5.3 PROTECTION AND ASSISTANCE ON RETURN

The Family Law Amendment Act 2000 authorises a Central Authority to make arrangements to place a child with an appropriate person, institution or other body to secure the welfare of the child pending proceedings in the Family Court.<sup>68</sup> Even before the new provisions, the Regulations already imposed a statutory obligation on the Australian Central Authorities to do everything necessary or appropriate under the Convention to protect the welfare of a child returned to Australia.<sup>69</sup>

The Central Authority also sends out an information sheet with each application, detailing services such as social security, legal aid, emergency accommodation and domestic violence protection in the relevant State or Territory to which the child and abductor will be returning. The Central Authority has also compiled a booklet for parents who bring children back to Australia. The following numbers may be of help to returning parents:<sup>70</sup>

- Emergency accommodation
  - Homeless Persons 9 am – 5 pm +61 (2) 9265 9081
  - Family Service Crisis Unit 9 am – 12 am +61 (2) 9622 0522
- Counselling services
  - Domestic Violence Advocacy Service +61 (2) 9637 3741
- Enforcement of undertakings 1800 100 480 or +61 (2) 6250 6724
- Help with cost of airfares +61 (2) 6250 6724

Free legal advice (but not representation) may also be available from Community Legal Centres, Welfare Rights Centres and Women's Legal Centres. Legal aid is provided for returning parents to commence legal proceedings in Australia on a means and merits tested basis. Applications should be made to:

Legal Aid Commission of NSW  
323 Castlereagh Street  
SYDNEY  
Tel: +61 (2) 9219 5000

Where a left-behind parent has given undertakings to a foreign court, the Australian Central Authorities will try to ensure that these are made enforceable in Australia through mirror orders, undertakings or consent orders given to the courts.

Australia also has agreements concluded by exchanges of letters with certain foreign States stating that overseas orders with conditions, or undertakings, can be registered and enforced in Australia and in a “prescribed overseas jurisdiction”. At present the prescribed jurisdictions are New Zealand, Austria, Switzerland, Papua New Guinea and most States of the USA.<sup>71</sup> These agreements are seen to be a useful adjunct to the Convention.

<sup>68</sup> Family Law Act 1975 s 111B (1C) (1D).

<sup>69</sup> See Family Law Act 1975 s 111B (1) (1C) and Regulation 5 (1) (c).

<sup>70</sup> Information taken from appendix sent with Australia's Response to Hague Questionnaire, op. cit., n. 3.

<sup>71</sup> These countries are listed in Schedule 1A to the Family Law (Child Abduction Convention) Regulations 1986.

#### 5.4 COSTS AND LEGAL AID

The Australian system is generous in offering legal aid on a means and merits tested basis to parents whose children have been removed from Australia.<sup>72</sup> This may cover overseas legal fees, travel costs for a child ordered to return and travel and related costs for a left-behind parent to travel to the requested State to bring an abducted child back to Australia. Legal costs incurred in Australia with respect to overseas proceedings are not covered. However an applicant may be eligible for assistance from their local State or Territorial legal aid authority for these costs. Where applicants are required to attend court proceedings in foreign States financial assistance may be given for travel and related costs. Applications should be made to:<sup>73</sup>

Financial Assistance Section,  
Legal Assistance Branch,  
Attorney General's Department,  
National Circuit, Barton,  
ACT 2600  
Tel: +61 (2) 6250 6770

#### 5.5 OPERATING THE CONVENTION - OUTGOING APPLICATIONS FOR ACCESS

Applicants should either use the form in Schedule 3 to the Regulations,<sup>74</sup> or see a solicitor who can make the application on the applicants behalf, or contact the Central Authority, Legal Aid Office or Community Legal Centre in the nearest capital city for advice and assistance. The procedure for making an outgoing access application is similar to that for a return application, except that the Central Authority uses a different application form. Where the two systems differ is mainly in relation to costs. Under the Overseas Custody (Child Removal) Scheme, financial assistance for access cases is not provided.<sup>75</sup>

As with return applications, foreign access orders from States with which Australia has reciprocal arrangements can be registered and enforced in Australia. The arrangements do not include interim or ex parte orders. The States covered by these arrangements are the same as in return applications, namely, New Zealand, Austria, Switzerland, Papua New Guinea and most States of the USA.<sup>76</sup> In States where these reciprocal arrangements do not exist, it is common for parents to file mirror orders in the Family Court of Australia.

<sup>72</sup> See The Overseas Custody (Child Removal) Scheme.

<sup>73</sup> It is also reproduced in Attachment 3 of the Child Abduction Kit available on the Internet at [http://law.gov.au/aghome/legalpol/cld/int\\_judicial\\_asst/international\\_child\\_abduction/AbductionKit/Welcome.html](http://law.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_abduction/AbductionKit/Welcome.html)

<sup>74</sup> It is also reproduced in Attachment 2 of The Child Abduction Kit, available on the Internet at [http://law.gov.au/aghome/legalpol/cld/int\\_judicial\\_asst/international\\_child\\_abduction/AbductionKit/Welcome.html](http://law.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_abduction/AbductionKit/Welcome.html)

<sup>75</sup> See The Overseas Custody (Child Removal) Scheme, para. 18.

<sup>76</sup> See ante at 5.3.

## 6. AWARENESS OF THE CONVENTION

### 6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS

There are regular conferences within Australia for practitioners and the judiciary, and invariably at these conferences there will be a paper on the Hague Convention.<sup>77</sup> The Commonwealth Central Authority also produces a quarterly newsletter on the operation of the Convention and recent decisions made under it.<sup>78</sup> The Family Court has a web site where decisions and papers on the Convention can be viewed.<sup>79</sup>

The concept of judicial co-operation is alien to most Australian judges, and is not an accepted part of the Australian legal system. However, it is recognised that judicial co-operation can be a useful instrument in ensuring that the Convention operates effectively. This view is consequently being disseminated in Australia and the purpose and procedures of such co-operation are being clarified. Justice Kay has been nominated by the Chief Justice to act as a liaison judge for the purpose of judicial co-operation on an international level in Convention cases.

A practitioner<sup>80</sup> has suggested that there is a need for further education amongst practitioners. Many do not accept that a Convention case is a forum and not a merits hearing. It has also been suggested that the abductor is sometimes the subject of bad advice. Parents may seek advice from legal professionals as to whether they are allowed to remove their child from the jurisdiction. When given positive affirmation they then may unwittingly find themselves considered as abductors.

### 6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC

Australia has produced many Internet sites which inform parties how to apply under the Hague Convention. They also contain reports of cases and recent publications which can be easily viewed. The Internet sites are easy to use and clearly set out. There are also Child Abduction Kits available on the Internet which set out the necessary application forms and give detailed information on how to complete them. They also contain advice for both the left-behind parent and the abductor.

## 7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999<sup>81</sup>

The Central Authorities in Australia handled a total of 172 applications in 1999, making Australia the fourth busiest Convention jurisdiction in that year.<sup>82</sup>

<sup>77</sup> See National Report for Australia, op. cit., n. 10.

<sup>78</sup> This can be accessed on the Internet at <http://law.gov.au/childabduction>

<sup>79</sup> <http://www.familycourt.gov.au/html/childabduction1.html>

<sup>80</sup> Sally Nicholes, *Identifying Best Practices in Hague Convention Cases* presented at the Second International Forum on Parental Child Abduction, hosted by NCMEC 1-2 November 2000.

<sup>81</sup> The following analysis is based on Preliminary Document No. 3, op. cit., n. 44.

<sup>82</sup> USA, England and Wales and Germany each handled more cases in 1999.

|                                     |            |
|-------------------------------------|------------|
| Incoming return applications        | 64         |
| Outgoing return applications        | 81         |
| Incoming access applications        | 14         |
| Outgoing access applications        | 13         |
| <b>Total number of applications</b> | <b>172</b> |

## 7.1 INCOMING APPLICATIONS FOR RETURN

### 7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

| Requesting States    |                        |             |
|----------------------|------------------------|-------------|
|                      | Number of Applications | Percent     |
| New Zealand          | 22                     | 34          |
| UK-England and Wales | 14                     | 22          |
| USA                  | 11                     | 17          |
| Greece               | 4                      | 6           |
| Canada               | 2                      | 3           |
| Israel               | 2                      | 3           |
| Italy                | 2                      | 3           |
| Macedonia            | 1                      | 2           |
| Germany              | 1                      | 2           |
| Ireland              | 1                      | 2           |
| Sweden               | 1                      | 2           |
| UK-Scotland          | 1                      | 2           |
| Mexico               | 1                      | 2           |
| South Africa         | 1                      | 2           |
| <b>Total</b>         | <b>64</b>              | <b>~100</b> |

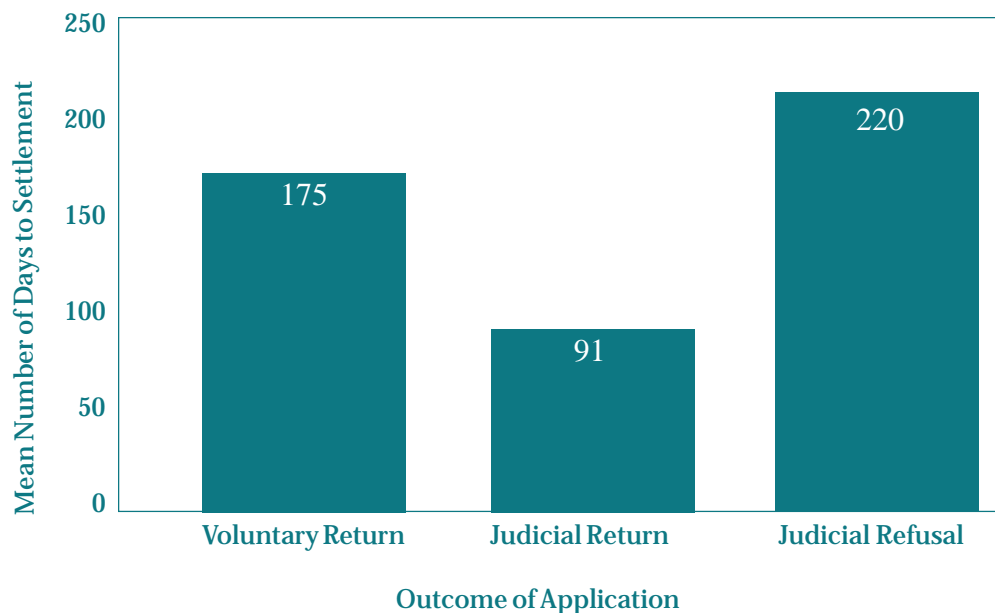
Over a third of the return applications received by Australia in 1999 were made by New Zealand. England and Wales and the USA also made a significant number of applications to Australia in that year.

### 7.1.2 THE OUTCOMES OF THE APPLICATIONS

| Outcome of Application |           |             |
|------------------------|-----------|-------------|
|                        | Number    | Percent     |
| Rejection              | 8         | 13          |
| Voluntary Return       | 7         | 11          |
| Judicial Return        | 26        | 41          |
| Judicial Refusal       | 8         | 13          |
| Withdrawn              | 12        | 19          |
| Pending                | 3         | 5           |
| Other                  | 0         | 0           |
| <b>Total</b>           | <b>64</b> | <b>~100</b> |

These outcomes were roughly proportionate to the global findings. Globally, 18% of applications ended in a voluntary return, whereas in Australia only 11% of applications were so concluded. The judicial return rate at 41% was however, higher than the global average of 32% and the overall percentage of children returned either voluntarily or by court order was 52% which is above the global average of 50%. Thirteen percent of cases resulted in a judicial refusal which is above the global average of 11%. Altogether, 34 cases went to court, 76% of which ended in a judicial return. This is similar to the global figure where 74% of cases going to court ended in the return of the child. Nineteen percent of applications were withdrawn which is above the global average of 14%. The proportion of rejections at 13% was also above the global average of 11%. Three cases were still pending at 30 June 2001, which may give pause for thought.

### 7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



Information regarding timing was available for 4 of the 7 voluntary returns, 24 of the 26 judicial returns and 7 of the 8 judicial refusals. The chart above, therefore, relates to these cases only.

Globally voluntary returns were concluded in a mean average of 84 days. The voluntary returns from Australia took on average more than twice as long to reach conclusion. Indeed Australia was one of the slowest Contracting States with regard to reaching voluntary settlements in 1999. Conversely, the mean average time taken to reach judicial return was below the global average of 107 days. Judicial refusals took considerably longer than the global average of 147 days.

The figures above are mean average figures for what is generally a small number of cases in each category. Consequently one difficult and long case will have a disproportionate effect on the mean average overall, as will one particularly quick case. The table following shows the minimum and maximum number of days taken in each category as well as the mean and median average times.

| <b>Number of Days Taken to Reach Final Outcome</b> |                               |                        |                         |
|--|-------------------------------|------------------------|-------------------------|
|  | <b>Outcome of Application</b> |                        |                         |
|  | <b>Voluntary Return</b>       | <b>Judicial Return</b> | <b>Judicial Refusal</b> |
| Mean   | 175                           | 91                     | 220                     |
| Median   | 141                           | 53                     | 181                     |
| Minimum  | 24                            | 1                      | 53                      |
| Maximum  | 392                           | 609                    | 606                     |
| <b>Number of Cases</b>                             | <b>4</b>                      | <b>24</b>              | <b>7</b>                |

Four cases were appealed, which is 12% of all the cases which went to court, and is similar to the global proportion of 14% of cases being appealed. Two of these ended in judicial return and two in judicial refusal. The appeal cases took an average of 257 days from application to final outcome. As might be expected return decisions took marginally less time than refusals at 204 days compared with 312 days.

## **7.2 INCOMING APPLICATIONS FOR ACCESS**

### **7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS**

| <b>Requesting States</b> |                               |                |
|--------------------------|-------------------------------|----------------|
|                          | <b>Number of Applications</b> | <b>Percent</b> |
| USA                      | 4                             | 29             |
| New Zealand              | 3                             | 21             |
| Argentina                | 1                             | 7              |
| Finland                  | 1                             | 7              |
| Macedonia                | 1                             | 7              |
| France                   | 1                             | 7              |
| Italy                    | 1                             | 7              |
| Netherlands              | 1                             | 7              |
| UK-England and Wales     | 1                             | 7              |
| <b>Total</b>             | <b>14</b>                     | <b>~100</b>    |

The proportion of return to access applications followed the global average, with access accounting for less than 20% of all applications received. Combining return and access, applications from New Zealand amounted to 32% of the total number received, the USA and England and Wales both made 15 applications to Australia. Applications from these three Contracting States accounted for 71% of all applications received by Australia in 1999.



## 7.2.2 THE OUTCOMES OF THE APPLICATIONS

| Outcome of Application             |           |            |
|------------------------------------|-----------|------------|
|                                    | Number    | Percent    |
| Rejection by the Central Authority | 0         | 0          |
| Access Voluntarily Agreed          | 4         | 29         |
| Access Judicially Granted          | 3         | 21         |
| Access Judicially Refused          | 4         | 29         |
| Pending                            | 0         | 0          |
| Withdrawn                          | 3         | 21         |
| <b>Total</b>                       | <b>14</b> | <b>100</b> |

All the access cases commenced in 1999 had reached a conclusion by the time of data collection. Seven of the 14 applications went to court, 3 further applications were withdrawn. Of the applications that went to court, access was granted in three cases and refused in four cases. In four other cases access was voluntarily agreed.

## 7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION

| Timing to Judicial Decision |          |            |
|-----------------------------|----------|------------|
|                             | Number   | Percent    |
| 0-6 weeks                   | 0        | 0          |
| 6-12 weeks                  | 1        | 14         |
| 3-6 months                  | 2        | 29         |
| Over 6 months               | 4        | 57         |
| <b>Total</b>                | <b>7</b> | <b>100</b> |

| Timing to Voluntary Settlement |          |            |
|--------------------------------|----------|------------|
|                                | Number   | Percent    |
| 0-6 weeks                      | 2        | 50         |
| 6-12 weeks                     | 0        | 0          |
| 3-6 months                     | 1        | 25         |
| Over 6 months                  | 1        | 25         |
| <b>Total</b>                   | <b>4</b> | <b>100</b> |

The first table shows that most of the judicially determined access decisions took over six months to be concluded. Interestingly, there was no significant difference with regards to time between cases which ended in a judicial order and those which ended in a judicial refusal. The voluntary agreements tended to be resolved quicker with half being resolved in under six weeks. Compared with the applications for return, applications for access tended to take marginally longer, to reach an outcome. However, there were over four times as many return cases as cases for access.

## 8. CONCLUSIONS

Overall, Australia has implemented the Convention effectively, if unusually. Australia's implementing Regulations, effectively redraft the Convention, and while the use of Regulations allows for flexibility providing the opportunity to amend or expand the power and responsibilities of the Central Authorities and the courts where necessary, rewriting the Convention means that decisions are based on the Regulations and not the Convention itself.

The Commonwealth Central Authority is efficient and has provided useful information which is easily accessible on the Internet to benefit applicants. The fact that the Central Authority brings proceedings in its own name does not appear to have caused too many difficulties in Australia and may have led to greater expertise as a small group of practitioners are involved in cases. Australia has also limited the courts able to hear Convention cases, not by legislation but by practice. This is a model which could be copied by other jurisdictions for whom limiting jurisdiction by legislation is not a viable option.

Nevertheless, there are also problems related to having the Central Authority acting as applicant. It is possible that there will be a conflict of interests in certain cases. Also difficulties may arise if the left-behind parent wants to appeal but the Central Authority is not willing to lodge an appeal. Left-behind parents can bring private applications, but they would have to pay for legal representation.

Legal aid provisions in Australia are extremely generous in Convention cases and are the most generous of any Contracting State we have analysed. This is especially true with regards to expenses for people ordinarily resident in Australia seeking return of their children to Australia from States which do not offer legal aid.

Education and communication about the Convention is also extremely good in Australia. The web pages are easily accessible and informative and the newsheets produced by the Commonwealth Central Authority are a useful commentary on current events and recent case law. Australia is also a prominent presence at international conferences about the Convention and is able to offer useful advice and information. Notably the publication *International Child Abduction – A Guide for Parents and Practitioners*,<sup>83</sup> is a particularly useful source of information.

In practice the Convention appears to be operating well in Australia. In 1999 52% of all cases resulted in the return of the child. There are however, few voluntary returns, only 8 out of 64 cases in 1999. The exceptions to return appear to be allowed in narrow circumstances as required by the Convention, there were only 8 refusals out of 64 cases in 1999. The average timings from application to resolution of cases appear quite slow. However, this seems to be due to one or two difficult cases rather than a generally slow system. Certainly with regard to judicial returns the system appears relatively quick with 24 cases being decided in a mean average of 91 days as against a global average of 107 days. The Regulations have also taken account of the Convention obligation to expedite proceedings.<sup>84</sup> Our general impression is that the system is operating relatively efficiently in Australia.

<sup>83</sup> Degeling and Levett, *op. cit.*, n. 58.

<sup>84</sup> See Regulations 15 (2) and 15 (4).

Australia has accepted most acceding States. Australian officials are also involved in negotiating bilateral agreements with States which are unlikely to accede to the Convention. At the time of writing the Convention is in force between Australia and 63 other States. While many Contracting States to the Convention appear to have stagnated in their acceptance of accessions, Australia is keen to widen the limits of the Convention.

Overall, Australia has implemented and is operating the Convention successfully. The use of Regulations is not to be recommended as decisions can be based on these and not the Convention itself, nevertheless, the Regulations implementing the Convention in Australia are on occasions wider than the Convention, particularly as regards the making of substantive access orders. Similarly, the fact that the Central Authority applies as applicant is perhaps not to be recommended although it has to be noted that the system appears to operate well in Australia. The system is particularly strong with regards to legal aid provisions and the jurisdiction also takes an active role in informing both Australian parents and international audiences about the effect and operation of the Convention with excellent web sites and publications.

## 9. SUMMARY OF CONCERNS

- As the Central Authority acts as the applicant there is a potential conflict of interests.
- As the left-behind parent is not able to directly communicate with the lawyers in the case, the lawyers may lack certain evidentiary requirements and the Central Authority has been criticised by the courts in this regard.
- As the Regulations redraft the Convention, decisions are based on the Regulations and not the Convention itself.

## 10. SUMMARY OF GOOD PRACTICES

- Australia is extremely generous with regards to provisions for legal aid. Notably, offering legal aid for parents seeking return of children from other Contracting States.
- In appropriate cases, costs associated with cases are also covered by legal aid in Australia.
- Australia made no reservation to Article 26 relating to costs under the Convention.
- There are excellent Australian web sites which give information on all areas of abduction.
- The publication *International Child Abduction - A Guide for Parents and Practitioners* is a useful reference.
- A limited number of practitioners are involved in cases and therefore expertise has developed.
- In general the limited number of practitioners utilise a limited number of courts, thus reducing the number of judges who hear Convention cases.
- Courts are empowered to make substantive access orders.
- The Regulations are amended and updated to take account of jurisprudence under the Convention.

- Australia has negotiated agreements with various other States concerning the recognition and enforcement of custody and access orders.
- Return orders are often very specific detailing the date and time of departure from the jurisdiction and often also including a flight number.
- With every outgoing application the Central Authority sends out information detailing welfare services available to the abductor and child on return to the jurisdiction.
- The Regulations recognise the importance of expedition in Convention cases and in relation to judicial return decisions, the Australian system operates relatively quickly.

## APPENDIX

As of 1 January 2002, the Convention is in force between the following 63 Contracting States and Australia.

| <b>Contracting State</b>                      | <b>Entry into Force</b> |
|---|-------------------------|
| ARGENTINA                                     | 1 JUNE 1991             |
| AUSTRIA                                       | 1 OCTOBER 1988          |
| BAHAMAS                                       | 1 SEPTEMBER 1994        |
| BELARUS                                       | 1 NOVEMBER 1998         |
| BELGIUM                                       | 1 MAY 1999              |
| BELIZE  | 1 MARCH 1990            |
| BOSNIA AND HERZEGOVINA                        | 1 DECEMBER 1991         |
| BRAZIL  | 1 MAY 2001              |
| BURKINA FASO                                  | 1 APRIL 1993            |
| CANADA  | 1 JANUARY 1987          |
| CHILE   | 1 NOVEMBER 1994         |
| CHINA-HONG KONG SPECIAL ADMINISTRATIVE REGION | 1 SEPTEMBER 1997        |
| CHINA-MACAU SPECIAL ADMINISTRATIVE REGION     | 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            |
| DENMARK                                       | 1 JULY 1991             |
| ECUADOR                                       | 1 APRIL 1993            |
| FIJI  | 1 MAY 2000              |
| FINLAND                                       | 1 AUGUST 1994           |
| FORMER YUGOSLAV REPUBLIC OF MACEDONIA         | 1 DECEMBER 1991         |
| FRANCE  | 1 JANUARY 1987          |
| GEORGIA                                       | 1 JANUARY 1998          |
| GERMANY                                       | 1 DECEMBER 1990         |
| GREECE  | 1 JUNE 1993             |
| HONDURAS                                      | 1 SEPTEMBER 1994        |
| HUNGARY                                       | 1 MARCH 1988            |
| ICELAND                                       | 1 DECEMBER 1997         |
| IRELAND                                       | 1 OCTOBER 1991          |
| ISRAEL  | 1 DECEMBER 1991         |
| ITALY   | 1 MAY 1995              |
| LUXEMBOURG                                    | 1 JANUARY 1987          |
| MALTA   | 1 MAY 2001              |
| MAURITIUS                                     | 1 JANUARY 1994          |
| MEXICO  | 1 JUNE 1992             |
| REPUBLIC OF MOLDOVA                           | 1 NOVEMBER 1998         |
| MONACO  | 1 JANUARY 1994          |
| NETHERLANDS                                   | 1 SEPTEMBER 1990        |
| NEW ZEALAND                                   | 1 JUNE 1992             |
| NORWAY  | 1 APRIL 1989            |
| PANAMA  | 1 SEPTEMBER 1994        |
| PARAGUAY                                      | 1 APRIL 1999            |
| POLAND  | 1 JANUARY 1994          |
| PORTUGAL                                      | 1 JANUARY 1987          |

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| ROMANIA  | 1 JANUARY 1994   |
| SAINT KITTS AND NEVIS                                | 1 NOVEMBER 1995  |
| SLOVAKIA   | 1 FEBRUARY 2001  |
| SLOVENIA   | 1 NOVEMBER 1994  |
| SOUTH AFRICA   | 1 JANUARY 1998   |
| SPAIN  | 1 SEPTEMBER 1987 |
| SWEDEN   | 1 JUNE 1989      |
| SWITZERLAND  | 1 JANUARY 1987   |
| TRINIDAD AND TOBAGO                                  | 1 MAY 2001       |
| TURKEY   | 1 AUGUST 2000    |
| TURKMENISTAN   | 1 NOVEMBER 1998  |
| UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND | 1 JANUARY 1987   |
| UNITED KINGDOM-BERMUDA                               | 1 MARCH 1999     |
| UNITED KINGDOM-CAYMAN ISLANDS                        | 1 AUGUST 1998    |
| UNITED KINGDOM-FALKLAND ISLANDS                      | 1 JUNE 1998      |
| UNITED KINGDOM-ISLE OF MAN                           | 1 SEPTEMBER 1991 |
| UNITED KINGDOM-MONTSERRAT                            | 1 MARCH 1999     |
| UNITED STATES OF AMERICA                             | 1 JULY 1988      |
| URUGUAY  | 1 MAY 2001       |
| UZBEKISTAN   | 1 MAY 2001       |
| VENEZUELA  | 1 JANUARY 1997   |
| YUGOSLAVIA   | 1 DECEMBER 1991  |
| ZIMBABWE   | 1 APRIL 1996     |





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