

EXPLANATORY STATEMENT

Family Law Act 1975

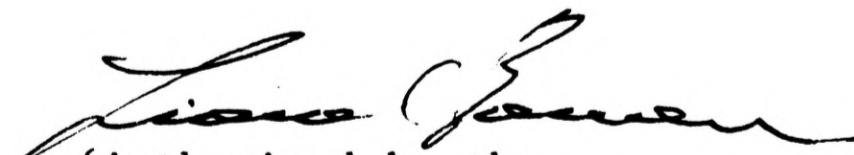
Family Law (Child Abduction Convention) Regulations

(Statutory Rules 1986 No. 85)

Section 111B of the Act provides that the regulations may make such provision as is necessary to enable the performance of Australia's obligations under the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 (the Convention). The purpose of the proposed regulations is to provide for the establishment of the legal framework and facilitate administrative arrangements which will enable the performance of Australia's obligations under the Convention.

Under section 111B of the Act the proposed regulations shall not come into operation until the day on which the Convention enters into force for Australia.

Details of the proposed regulations are at attachment A.


(Authorized by the
Attorney-General)

ATTACHMENT A

NOTES ON REGULATIONS

Regulation 1 provides that the new regulations may be cited as the Family Law (Child Abduction Convention) Regulations.

Regulation 2 provides for the interpretation of:

"applicant"
"Commonwealth Central Authority";
"Central Authority";
"child";
"Convention" or "Convention on the Civil Aspects of
International Child Abduction";
"convention country";
"filed";
"removal";
"responsible Central Authority";
"rights of access";
"Rules of Court";
"State Central Authority"; and
"the Act";

for the purposes of the regulations. It also provides that the purpose of the regulations is to give effect to section 111B of the Act.

Regulation 3 provides that the Attorney-General shall appoint an officer of the Australian Public Service to be the Commonwealth Central Authority.

Regulation 4 provides that the Commonwealth Central Authority may resign his or her office by writing signed by that Authority and delivered to the Attorney-General.

Regulation 5 sets out the general functions of the Commonwealth Central Authority. These include the doing of anything that is necessary to enable the performance of the obligations of Australia under the convention and advising the Attorney-General on all matters concerning those obligations including the need for additional legislation.

Sub-regulation (2) provides that the Commonwealth Central Authority shall have, and may exercise, all the powers and duties, and shall perform all the functions, of a Central Authority under the Convention.

Regulation 6 provides that the Attorney-General may appoint an Acting Commonwealth Central Authority during a vacancy in the office of the Commonwealth Central Authority or during any absence of the Commonwealth Central Authority. The regulation also specifies the powers, duties and functions of the Acting Commonwealth Central Authority.

Regulation 7 provides for immunity in respect of orders to pay costs of a person who holds office as the Commonwealth Central Authority or who, being a State Central Authority, exercises the powers and duties and performs the functions of that office.

Regulation 8 enables the Attorney-General to appoint a person to be a State Central Authority for the purposes of the regulations, with such limitations as may be specified in the instrument of appointment.

Regulation 9 specifies the powers, duties and functions of a State Central Authority appointed under sub-regulation 8(1). Subject to any limitations specified in the instrument of appointment, these are all the powers, duties and functions of the Commonwealth Central Authority.

Regulation 10 provides that for the purposes of the regulations, convention countries are those specified in Schedule 2 and such other countries in respect of which the Convention has entered into force for Australia.

Regulation 11 makes provision in relation to applications for the return of children removed from Australia.

Sub-regulation (1) provides that where a person claims under Australian law to have rights of custody of a child removed from Australia to a convention country, that person may apply in writing to have the claim transmitted to the Central Authority in that convention country. The application may be made either to the Commonwealth Central Authority direct or to a State Central Authority.

Sub-regulation (2) requires the application to be made in accordance with Form 1 in Schedule 3.

Sub-regulation (3) requires a State Central Authority in receipt of an application which it is satisfied is in accordance with the requirements of the Convention to forward the application to the Commonwealth Central Authority.

Sub-regulation (4) requires the Commonwealth Central Authority in receipt of an application, made to it direct or forwarded by a State Central Authority, which it is satisfied is in accordance with the requirements of the Convention, to take on behalf of the applicant any action required to be taken by a Central Authority under the Convention.

Regulation 12 provides that an application under regulation 11 shall be accompanied by a translation into the appropriate language.

Regulation 13 makes provision in relation to applications for the return of children removed to Australia. It requires the Commonwealth Central Authority in receipt of an application in respect of a child removed from a convention country to Australia, which the Authority is satisfied is an application to which the Convention applies and which is in accordance with the requirements of the Convention, to take action under the Convention to secure the return of the child to the applicant.

Regulation 14 provides that nothing in the Convention or the regulations prevents a person, institution or other body from making an application directly (that is, not through the Commonwealth Central Authority) to a court of competent jurisdiction in respect of the breach of rights or custody of, or breach of rights of access to, a child removed to Australia. This provision gives effect to Article 29 of the Convention.

Regulation 15 relates to the orders which may be sought by the responsible Central Authority in relation to a child removed to Australia.

Sub-regulation (1) lists these orders, which include orders for the detention and temporary placement of the child, and an order for the return of the child to the applicant.

Sub-regulation (2) empowers a court to make an order of the kind specified in sub-regulation (1), together with such other order as the court thinks fit.

Sub-regulation (3) enables a court which makes an order in relation to the removal of a child from a specified place to impose such conditions on the removal of the child from that place as it thinks fit.

Sub-regulation (4) requires an application under sub-regulation (1) to be in accordance with Form 2 in Schedule 3.

Regulation 16 deals with orders for the return of children.

Sub-regulation (1) provides that, subject to sub-regulation (3), a court must order the return of a child pursuant to an application made under paragraph 15(1)(d) if at the date of the filing of the application, less than a year has elapsed since the child's removal.

Sub-regulation (2) covers the situation where a year has elapsed between the child's removal and the date of the filing of the application. In this situation, and subject to sub-regulation (3), a court must order the return of a child pursuant to

an application for an order for the return of the child to the applicant unless it is satisfied that the child is settled in its new environment.

Sub-regulation (3) sets out the circumstances in which a court may refuse to make an order for the return of the child under sub-regulation (1) or (2). The sub-regulation gives effect to Article 13 (read together with Article 3) and Article 20 of the Convention. Paragraph 16(3)(a) ensures that a court will not be required to order the return of the child where the conduct of the person or body having the prior care of the child raises doubts as to whether a wrongful removal, in terms of the Convention, has taken place or whether an order for the child's return is justified because of consent to or acquiescence in the child's removal.

Sub-regulation (4) enables a court, for the purposes of its consideration whether to refuse to make an order for the return of the child, to take account of any information relating to the social background of the child as may be provided by the Central Authority of the relevant convention country.

Sub-regulation (5) provides that where a court is satisfied that the child in respect of whom an order for return is sought is no longer in Australia, the court may stay or dismiss the application.

Regulation 17 relates to declarations that a particular removal was wrongful within the meaning of Article 3 of the Convention.

Sub-regulation (1) enables an Australian court, upon request by a responsible Central Authority, to declare that the removal of a child from Australia to a convention country was wrongful.

Sub-regulation (2) deals with requests to a court or competent authority of a convention country for a declaration relating to the removal of a child from that country to Australia.

Regulation 18 provides that the existence of a custody order that is in force or enforceable in Australia shall not prevent the making of an order under sub-regulation 15(2), on the hearing of a responsible Central Authority's application. Nonetheless, the court, in considering the application, may take account of the reasons for the making of the custody order.

Regulation 19 ensures the speedy hearing of an application in relation to a child removed to Australia.

Sub-regulation (2) requires a responsible Central Authority to serve a copy of the application under regulation 15 on the person or persons who removed the child, as well as on the person, institution or other body who has possession of the child.

Regulation 20 relates to the making and putting into effect of arrangements for the return of the child.

Sub-regulation (1) requires the making of necessary arrangements by the responsible Central Authority, when an order is made under regulation 16 for the return of the child.

Sub-regulation (2) provides that the child must be returned to the applicant, unless the responsible Central Authority has been notified of an order under regulation 16 within 7 days that the order has been stayed. The onus thus rests upon the person who proposes to appeal against an order for the return of the child to institute the appeal promptly and to notify the responsible Central Authority of any staying order.

Regulation 21 gives effect to Article 22 of the Convention. It provides that no security or bond is to be required in relation to the payment of costs or expenses of or incidental to proceedings instituted or anything done for Convention purposes.

Regulation 22 permits a court which makes an order under regulation 15, 17 or 24 to also order, on application of the responsible Central Authority, the payment of the applicant's necessary expenses (such as travelling expenses) by the person who removed the child to Australia or who prevented the exercise of rights of access.

Regulation 23 contains evidentiary provisions designed to make easier the proof of relevant matters for the purpose of proceedings under the regulations.

Regulation 24 deals with claims in respect of rights of access to children.

Sub-regulation (1) enables a person who claims to have rights of access in relation to a child in a convention country to apply in writing either to the Commonwealth Central Authority direct or to a State Central Authority to have the claim transmitted to the Central Authority in that country.

Sub-regulation (2) requires a State Central Authority in receipt of an application which it is satisfied is in accordance with the requirements of the Convention to forward the application to the Commonwealth Central Authority. This provision mirrors sub-regulation 11(3).

Sub-regulation (3) requires the application to be in accordance with Form 3 in Schedule 3.

Sub-regulation (4) requires the Commonwealth Central Authority in receipt of an application referred to in sub-regulation (1) or (2), or an application forwarded to it by the Central Authority of a convention country in relation to rights of access to a child in Australia, first to satisfy itself that the application is one to which the Convention applies and which is in accordance with the requirements of the Convention. The Commonwealth Central Authority must then take such steps as are necessary to enable the performance of Australia's obligations under Article 21 of the Convention.

Sub-regulation (5) enables a responsible Central Authority to apply to an Australian court for an order in relation to rights of access to a child in Australia.

Sub-regulation (6) empowers a court hearing an application under sub-regulation (5) to make such orders in relation to rights of access to a child as it thinks fit.

Sub-regulation (7) requires an application under sub-regulation (5) to be in accordance with Form 4 in Schedule 3.

Regulation 25 provides that the regulations do not prevent a court of competent jurisdiction, at any time, from making an order for the return of a child to an applicant otherwise than under the regulations.