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Statutory Rules 1995 No. <sup>1</sup>/<sub>1</sub>

296/

**Family Law (Child Abduction Convention)  
Regulations<sup>2</sup> (Amendment)**

I, ~~THE GOVERNOR-GENERAL~~ of the Commonwealth of Australia,  
acting with the advice of the Federal Executive Council, make the  
following Regulations under the *Family Law Act 1975*.

Administrator of  
the Government/

Dated <sup>1</sup>/<sub>1</sub> 1995.

19 October/

<sup>1</sup>/<sub>1</sub>  
Governor-General  
Administrator

P. R. SINCLAIR/

By His Excellency's Command,

<sup>1</sup>/<sub>1</sub>  
Attorney-General

M. LAVARCH/

**1. Amendment**

1.1 The Family Law (Child Abduction Convention) Regulations are  
amended as set out in these Regulations.

[NOTE: These Regulations commence on gazettal: see *Acts Interpretation Act 1901*, s. 48.]

**2. New heading**

2.1 Before regulation 1, insert:

**“PART 1—PRELIMINARY”.**

**3. Regulation 2 (Interpretation)**

3.1 Subregulation 2 (1) (definition of “Commonwealth Central Authority”):

Omit the definition, substitute:

“ **‘Commonwealth Central Authority’** means the Secretary to the Department;”.

3.2 Subregulation 2 (1) (definition of “removal”):

Omit the definition, substitute:

“ **‘removal’** has the meaning given in subregulation 3 (1);”.

3.3 Subregulation 2 (1) (definition of “rights of access”):

Omit the definition, substitute:

“ **‘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;”.

3.4 Subregulation 2 (1) (definition of “rights of custody”):

Omit the definition, substitute:

“ **‘rights of custody’** has the meaning given in regulation 4;”.

3.5 Insert the following definitions:

“ **‘court’** means a court having jurisdiction under paragraph 39 (5) (d) or 39 (6) (d) of the Act;

**‘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;

**‘retention’** has the meaning given in subregulation 3 (2);”.

3.6 After subregulation 2 (1A), insert:

“(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.”.

#### **4. Regulation 3 (Commonwealth Central Authority—appointment)**

4.1 Omit the regulation, substitute:

##### **Meaning of “removal” and “retention”**

“3. (1) A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:

- (a) were actually exercised, either jointly or alone; or
- (b) would have been so exercised but for the removal of the child.

“(2) A reference in these Regulations to the retention of a child is a reference to the retention of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of retention, those rights:

- (a) were actually exercised, either jointly or alone; or
- (b) would have been so exercised but for the retention of the child.”.

**5. Regulation 4 (Commonwealth Central Authority—resignation)**

5.1 Omit the regulation, substitute:

**Meaning of “rights of custody”**

“4. (1) For the purposes of these Regulations, a person, an institution or another 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 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.”.

**6. Regulation 5 (Commonwealth Central Authority—duties, powers and functions)**

6.1 Subregulation 5 (1):

Add at the end:

“; 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.”.

6.2 Add at the end:

“(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.”.

**7. Regulation 6 (Acting Commonwealth Central Authority)**

7.1 Omit the regulation, substitute:

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

“6. (1) These Regulations are not to be taken as removing or affecting any power of a court, or the right of any person or body to apply to a court, under Part VII of the Act or under any other law in force in Australia.

“(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 to the country in which he or she habitually resided immediately before his or her removal or retention.”.

**8. New heading**

8.1 After regulation 10, insert:

**“PART 2—APPLICATIONS TO CENTRAL AUTHORITIES,  
EXCEPT FOR ACCESS”.**

**9. Regulation 11 (Application for return of child abducted from Australia)**

**9.1 Subregulation 11 (1):**

Omit the subregulation, substitute:

“(1) If a person, an institution or another body claims under a law in force in Australia to have rights of custody of a child who is:

- (a) removed from Australia to a convention country; or
- (b) retained in a convention country;

the person, institution or other body may apply in writing to a responsible Central Authority to have the claim transmitted to the Central Authority in the country to which the child has been removed or in which the child is retained.”.

**10. Regulation 12 (Language of applications under regulation 11)**

**10.1 Omit the regulation.**

**11. Regulation 13 (Application for return of child abducted to Australia)**

**11.1 Omit the regulation, substitute:**

**Application for return of child abducted to Australia**

“13. (1) If the Commonwealth Central Authority:

- (a) receives an application in relation to a child who has been removed from a convention country to, or retained in, Australia; and
- (b) is satisfied that the application is in accordance with the Convention and with these Regulations;

the Commonwealth Central Authority must take action under the Convention to secure the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention.

“(2) The Commonwealth Central Authority may refuse to accept an application received by it if it is satisfied that the application is not in accordance with the Convention.

“(3) As soon as possible after the Commonwealth Central Authority refuses under subregulation (2) to accept an application, it must inform the applicant, or the Central Authority through which the application was made to the Commonwealth Central Authority, of the refusal and of the reason for the refusal.

“(4) For the purposes of subregulation (1), action that must be taken by the Commonwealth Central Authority includes seeking:

- (a) an amicable resolution of the differences between the applicant and the person opposing return of the child in relation to the removal or retention of the child; and
- (b) the voluntary return of the child; and
- (c) an order under Part 3.”

## **12. New heading**

12.1 After regulation 13, insert:

**“PART 3—COURT APPLICATIONS, EXCEPT FOR  
ACCESS”.**

## **13. Regulation 14 (Applications to court)**

13.1 Omit the regulation, substitute:

### **Applications to court**

“14. (1) In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:

- (a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or
- (b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

- (i) stop, enter and search any vehicle, vessel or aircraft; or
  - (ii) enter and search premises;
- if the person reasonably believes that:
- (iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and
  - (iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or
- (c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or
  - (d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or
  - (e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.

“(2) In relation to a child who is removed from Australia to, or retained in, a convention country, the responsible Central Authority may apply to a court in accordance with Form 2 for:

- (a) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:
  - (i) stop, enter and search any vehicle, vessel or aircraft; or
  - (ii) enter and search premises;

if the person reasonably believes that:

  - (iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and
  - (iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or



- (b) an order that the responsible Central Authority considers to be 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
- (c) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.

“(3) A person on whom a copy of an application is served by a responsible Central Authority may file an answer, or an answer and a cross application, in accordance with Form 2A.

“(4) If an answer, or an answer and a cross application, is made, the responsible Central Authority may file a reply in accordance with Form 2B.”.

#### **14. Regulation 15 (Orders)**

14.1 Omit the regulation, substitute:

##### **Orders**

“15. (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.

“(3) If a court is satisfied that there is an appreciable possibility or a threat that a child will be removed from Australia, the court may order the delivery of the passport of the child, and of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police, or such other person as the court considers appropriate, on such conditions as the court considers to be appropriate to give effect to the Convention.

“(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 made:

- (a) the responsible Central Authority who made the application may request 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 a request is made, the Registrar must give the statement to the responsible Central Authority.”.

## **15. Regulation 16 (Orders for the return of children)**

15.1 Omit the regulation, substitute:

### **Orders for the return of children**

“16. (1) Subject to subregulations (2) and (3), on application under regulation 14, a court must make an order for the return of a child:

- (a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or
- (b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

“(2) A court must refuse to make an order under subregulation (1) if it is satisfied that:

- (a) the removal or retention of the child was not a removal or retention of the child within the meaning of these Regulations; or

- (b) the child was not an habitual resident of a convention country immediately before his or her removal or retention; or
- (c) the child had attained the age of 16; or
- (d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country; or
- (e) the child is not in Australia.

“(3) A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

- (a) the person, institution or other body making application for return of a child under regulation 13:
  - (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 to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
- (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child’s 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 to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.”.

#### **16. Regulation 17 (Requests for orders: wrongful removal)**

16.1 Omit the regulation, substitute:

##### **Requests for orders—wrongful removal or retention**

“17. (1) On application, a court may by order declare that:

- (a) the removal of a child from Australia to a convention country; or
- (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 request a responsible Central Authority to arrange for the person, institution or other body making application in relation to the return of a child to a convention country, or the retention of a child in Australia, 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.”.

#### **17. Regulation 18 (Effect of other custody orders in Australia or overseas)**

17.1 Omit the regulation, substitute:

##### **Effect of other custody orders in Australia or overseas**

“18. The following rules apply to the hearing of an application made under subregulation 14 (1) or (2):

- (a) the court must not refuse to make an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention 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.”.

**18. Regulation 19 (Hearings)**

18.1 Omit the regulation, substitute:

**When a court not to make certain orders**

“19. If an application for the return of a child is made, a court must not make an order, except an interim order, for the custody, guardianship, care or control of the child until the application is determined.”.

**19. Regulation 20 (Arrangements for return of child)**

19.1 Subregulations 20 (1) and (2):

Omit “the applicant.”, substitute “the country in which he or she habitually resided immediately before his or her removal or retention.”.

**20. Regulation 21 (Security for costs &c.)**

20.1 Omit “instituted or anything done for the purposes of the performance by Australia of its obligations under”, substitute “falling within the scope of”.

**21. Regulation 22 (Costs of applications)**

21.1 Omit the regulation.

**22. Regulation 23 (Evidentiary provisions)**

22.1 Omit the regulation.

**23. New heading**

23.1 Before regulation 24, insert:

**“PART 4—APPLICATIONS FOR ACCESS”.**

**24. Regulation 24 (Access—convention countries)**

24.1 Subregulation 24 (1):

Omit the subregulation, substitute:

“(1) If a person, an institution or another body claims under a law in force in Australia to have rights of access to a child, the person, institution or other body may apply in writing to a responsible Central Authority to have arrangements made for organising or securing effective exercise of the rights by the Central Authority in a convention country.”.

24.2 Subregulations 24 (5), (5A), (5B), (6) and (7):

Omit the subregulations, substitute:

“(5) The responsible Central Authority may refuse to accept an application if it is satisfied that the application is not in accordance with the Convention.

“(6) As soon as practicable after the responsible Central Authority refuses to accept an application, it must inform the applicant, or the Central Authority through which the application was made, of the refusal and of the reason for the refusal.”.

**25. Regulation 25 (Power of court to make order for return of child)**

25.1 Omit the regulation, substitute:

**Access—Australia**

“25. (1) A Central Authority may apply to a court for an order that is necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia by a person, an institution or another body having rights of access to the child, being:

- (a) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:
  - (i) stop, enter and search any vehicle, vessel or aircraft; or
  - (ii) enter and search premises;if the person reasonably believes that:
  - (iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and
  - (iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or
- (b) any other order that the Central Authority considers to be appropriate to give effect to the Convention.

“(2) An application must be in accordance with Form 4.

“(3) If an application is made, the respondent may file an answer, or an answer and a cross application, in accordance with Form 4A.

“(4) A court may, in respect of:

- (a) an application made under subregulation (1); or
- (b) an answer, or an answer and a cross application, made under subregulation (3);

make any order in relation to rights of access to a child that the court considers appropriate to give effect to the Convention.

“(5) If an answer, or an answer and a cross application, is made under subregulation (3), the applicant may file a reply in accordance with Form 4B.

**26. New Part 5**

26.1 Before Schedule 1, insert:

**“PART 5—GENERAL****Reports by court counsellors and welfare officers**

“26. (1) In proceedings under these Regulations in a court, the court may:

- (a) direct a court counsellor or welfare officer 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 court counsellor or welfare officer may include in a report, in addition to the matters required to be included in the report, any other matter that relates to the welfare 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 court counsellor or welfare officer 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 court counsellor or welfare officer must report the failure to the court.

“(5) If, under subregulation (4), a court counsellor or welfare officer 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.



### Service of notice of certain applications

“27. (1) Subject to subregulation (2), notice of an application under regulation 14, 24 or 25 that includes a copy of the application must be served by the applicant in accordance with the Rules of Court on:

- (a) the person or persons who removed or retained the child in relation to whom the application is made; and
- (b) the person, institution or other body in possession of the child;

as each case requires.

“(2) In accordance with the 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.

### Change of venue

“28. (1) If, before an application (in this regulation called an ‘**original application**’) made under regulation 14, 24 or 25 to a court in a State or Territory is determined the child who is the subject of the application is located in another State or Territory:

- (a) the responsible Central Authority for the other State or Territory may make a corresponding application to another registry of the court, or to another court, in the other State or Territory (in this regulation called a ‘**later application**’); and
- (b) if a later application is made—the responsible Central Authority for the other State or Territory:
  - (i) must refer in the later application to the original application; and
  - (ii) must, as soon as practicable, inform the Registrar of the first-mentioned court in writing of the later application.

“(2) As soon as practicable after being informed under subparagraph (1) (b) (ii), the court to which an original application is made must transfer all records, and other documents filed in the court, relating to the original application to the Registrar of the court to which a 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 (2), 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.

### **Evidentiary provisions**

“29. (1) In proceedings under these Regulations in a court:

- (a) an application under regulation 13, 14, 24 or 25 or any document attached to or forwarded in support of that application is admissible as evidence of the facts stated in the application or document; and
- (b) the affidavit of a witness that is filed in the proceedings is admissible as evidence in the proceedings despite his or her non-attendance for cross-examination in the proceedings.

“(2) In proceedings under these Regulations in a court, a statement contained in a document that purports:

- (a) to set out or summarise evidence given in proceedings 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;
- (b) to set out or summarise evidence taken into a convention country for the purposes of proceedings 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 proceedings 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 or other 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 the signature of the person purporting to have signed it or of the official position of that person.

“(3) In proceedings under these Regulations in a court, 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.

“(4) In proceedings under these Regulations in a court, a document that purports:

- (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 or other officer of the court or by that authority;

is admissible as evidence of that order or decision, as the case may be, without proof of the signature of the person purporting to have signed it or of the official position of that person.

### **Costs of applications**

“30. If a court makes an order under regulation 15, 17, 24 or 25 the court may, on the application of the responsible Central Authority, make an order directing that the necessary expenses incurred by or on behalf of the applicant, including:

- (a) travelling expenses; and
- (b) costs incurred in respect of locating a child; and
- (c) costs of legal representation of the applicant; and

(d) expenses incurred in respect of the return of the child;  
be paid by the person who removed the child to, or retained the child in, Australia or who prevented the exercise of rights of access, as the case may be.”.

## 27. Schedule 3 (Forms)

### 27.1 Form 1:

Before “Date.....”, insert:  
“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.”.

### 27.2 Form 2 (Application initiating proceedings):

Omit “\*APPLICANT’S”.

### 27.3 Form 2 (Application initiation initiating proceedings):

Omit all the words following paragraph (c) and before paragraph (d).

### 27.4 Form 2 (Application initiating proceedings):

Omit paragraphs (d), (e), (f), (g) and (h).

### 27.5 Form 2 (Application):

Omit “(Full name of applicant) whose  
occupation is and  
who is represented by the”, substitute “The”.

### 27.6 Form 2 (Application, clause 2):

After “removal”, insert “or retention”.

### 27.7 Form 2 (Application, heading to clause 6):

After “removal”, insert “or retention”.

### 27.8 Form 2 (Application):

After “removed”(wherever occurring), insert “or retained”.

27.9 Form 3:

Before "Date.....", insert:  
"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."

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**NOTES**

1. Notified in the *Commonwealth of Australia Gazette* on *26 October* 1995.
2. Statutory Rules 1986 No. 85 as amended by 1989 No. 206; 1990 No. 37; 1992 Nos. 34 and 159; 1993 Nos. 263 and 358; 1994 Nos. 252, 275 and 344.