

Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 1998 No. 249

EXPLANATORY STATEMENT

Statutory Rules 1998 No. 249

Issued by the Authority of the Attorney-General

Family Law Act 1975

Family Law (Hague Convention on Intercountry Adoption) Regulations

Subsection 125(1) of the *Family Law Act 1975* (the Act) empowers the Governor-General to make Regulations prescribing all matters necessary to be prescribed for the purposes of the Act.

Sub-section 111C(1) of the Act provides that the Regulations may make such provision as is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit under the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (the Convention). Sub-section 111C(5) of the Act provides that the Regulations may confer jurisdiction on Federal, Territory or State courts.

The purpose of the Regulations is to give effect to the Convention by making provision for the appointment of Central Authorities to carry out Australia's obligations under the Convention, to provide for public notification of bodies accredited to carry out functions under the Convention in Australia, to provide for recognition in Australian law of adoption decisions made in other Convention countries and to confer jurisdiction on courts to make adoption orders under the Convention.

Details of the Regulations are as follows:

Regulation 1 is formal.

Regulation 2 provides that the Regulations commence on the date that the Convention enters into force for Australia. Regulation 2 ensures compliance with sub-section 111C(2) of the Act which provides that the Regulations do not come into force until the day the Convention enters into force for Australia.

Regulation 3 defines the expression accredited body for the purposes of Regulations 12 and 13. Regulation 3 defines the word Act in the Regulations to mean the Family Law Act 1975. Regulation 3 defines the expression adoption compliance certificate for the purposes of Regulations 16, 17 and 19. Regulation 3 defines the word Bureau for the purpose of Regulations 7 and 10. Regulation 3 defines the expression Central Authority for the purpose of the Regulations. Regulation 3 defines the word child for the purposes of the Regulations as an individual who is under 18 years. Regulation 3 defines the expression Commonwealth Central Authority for the purposes of the Regulations. Regulation 3 defines Commonwealth State agreement for the purpose of sub-regulation 6(3). Regulation 3 defines the word Convention for the purposes of the Regulations as the Convention set out in Schedule 1 to the Regulations.

Regulation 3 defines the expression parental authority as having the same meaning as set out in section 61B of the Family Law Act 1975 which provides that in relation to a child parental responsibility means all the duties, powers, responsibilities and authority which by law parents have in relation to children. Regulation 3 defines the expression receiving State for the purposes

of the Regulations by reference to article 2 of the Convention which defines the expression as the country to which a child is moved as a consequence of an intercountry adoption. Regulation 3 defines the word State in the Regulations to include a Territory, which is defined in section 111C(8) of the Family Law Act 1975 as including an external Territory. Regulation 3 defines the expression State Central Authority for the purposes of the Regulations. Regulation 3 defines the expression State of origin for the purposes of the Regulations by reference to article 2 of the Convention which defines the expression as the country from which a child is moved as a consequence of an intercountry adoption.

Regulation 4 provides that for the purpose of the Regulations a Convention country is a country mentioned in Schedule 2 to the Regulations and any other country for which the Convention has entered into force.

Regulation 5 provides that the Secretary to the Attorney-General's Department is designated as the Commonwealth Central Authority and as the Central Authority for Australia to which communications from other Convention countries may be sent.

Regulation 6 sets out the functions of the Commonwealth Central Authority. Subregulation 6(3) excludes certain functions as they to be carried out by State Central Authorities. Sub-regulation 6(6) requires the Commonwealth Central Authority to consult before exercising any of its functions which would affect the exercise of the functions of State Central Authorities.

Regulation 7 requires the name, address and functions of the Commonwealth Central Authority to be notified to the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 8 provides that the State Central Authority for an Australian State is a person designated by the Commonwealth Attorney-General under Regulation 9, by the State under Regulation 8(2)(a) or by the State under State legislation referred to in Regulation 34.

Regulation 9 provides that the Attorney-General may designate a person to be a State Central Authority for a State.

Regulation 10 provides that a State must notify the Commonwealth as soon as possible after the State designates a person to be a State Central Authority for the State under Regulation 8(2)(a) or under State legislation referred to in Regulation 34. Regulation 10 also requires the name, address and functions of the State Central Authority to be notified to the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 11 provides that where a body is accredited by a State to carry out functions under the Convention, the function is deemed to have been carried out by the State Central Authority.

Regulation 12 provides that where a body is accredited by a State to carry out functions under the Convention, the State Central Authority must advise the Commonwealth Central Authority which in turn must notify the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 13 provides that where the accreditation of a body to carry out functions under the Convention is revoked, the State Central Authority must advise the Commonwealth Central Authority which in turn must notify the Permanent Bureau of the Hague Conference on Private International Law.

Regulation 14 provides that an adoption, of a child habitually resident in Australia by a person resident in another Convention country, must be approved by an Australian court. Regulation 14

specifies the considerations which must be taken into account by the court, including the requirements of section 68F of the Act which refer to matters such as the wishes of the child, the child's relationship with his or her birth parents and the need to protect the child from harm.

Regulation 15 provides that an adoption, of a child habitually resident in Convention country by a person habitually resident in Australia, must be approved by an Australian court. Regulation 15 specifies the considerations which must be taken into account by the court.

Regulation 16 provides that an adoption of a child by a person habitually resident in Australia and granted in accordance with the laws of another Convention country is recognised and effective for the purpose of Australian law.

Regulation 17 provides that an adoption of a child by a person habitually resident in a Convention country and granted in accordance with the laws of another Convention country is recognised and effective for the purpose of Australian law.

Regulation 18 provides that the effect of recognition in Australian law of an adoption is to establish the relationship of parent and child between the adoptive parents and the child, to confer parental responsibility on the adoptive parents, to terminate the relationship between the child and the child's birth parents (if that is the effect of the laws of the Convention country in which the adoption is granted) and to confer on the child rights equivalent to the rights conferred by State laws on an adopted child.

Regulation 19 provides that an adoption compliance certificate issued by authorities in a Convention country is evidence for the purpose of Australian law that the adoption was carried out in accordance with -the laws of the Convention country.

Regulation 20 provides that where the laws of a Convention country in which the adoption is granted do not provide for an adoption to terminate the legal relationship between the child and the child's birth parents, a person may apply to an Australian court for an order terminating that legal relationship. Regulation 20 specifies the considerations which must be taken into account by the court.

Regulation 21 provides that a decision by authorities in another Convention country under article 27 of the Convention, determining that an adoption terminates the legal relationship between the adopted child and the child's birth parents, is recognised and effective for the purpose of Australian law.

Regulation 22 provides that a State Central Authority may apply to a court for a declaration that it is contrary to public policy to recognise a decision by authorities in another Convention country under article 27 of the Convention. Regulation 22 provides that where a declaration is made by a court, the decision by authorities in the Convention country is not recognised for the purpose of Australian law.

Regulation 23 provides that a State Central Authority must notify the Commonwealth Central Authority if it intends to apply to a court for a declaration under Regulation 22. The Commonwealth Central Authority must in turn notify the Permanent Bureau of the Hague Conference on Private International Law and the Central Authority of the Convention country in which the decision was made.

Regulation 24 provides that for the purposes of Regulations 25 to 33 a matter is taken to arise in a State if the adoptive parents are habitually resident in the State. Regulation 3 provides that in the Regulations the word State includes a Territory.

Regulation 25 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in New South Wales is conferred on specified New South Wales courts.

Regulation 26 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in Victoria is conferred on specified Victorian courts.

Regulation 27 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in Queensland is conferred on specified Queensland courts.

Regulation 28 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in South Australia is conferred on specified South Australian courts.

Regulation 29 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in Western Australia, Christmas Island and Cocos (Keeling) Islands is conferred on specified West Australian courts.

Regulation 30 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in Tasmania is conferred on specified Tasmanian courts.

Regulation 31 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in the Australian Capital Territory, the Jervis Bay Territory, Heard and McDonald Islands and the Australian Antarctic Territory is conferred on the Australian Capital Territory Supreme Court and the Federal Court.

Regulation 32 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in the Northern Territory and Ashmore and Cartier Islands is conferred on specified Northern Territory courts.

Regulation 33 provides that jurisdiction to make intercountry adoption decisions under the Regulations in relation to matters arising in Norfolk Island and the Coral Sea Islands Territory is conferred on specified Norfolk Island courts and the Federal Court.

Sub-regulation 34(1) provides that the Regulations do not apply in a State which passes a law having the same or comparable effect as the Regulations. Sub-regulation 34(1) is made pursuant to sub-section 111C(4) of the Family Law Act 1975, which provides that the Regulations may provide that the Regulations do not affect the operation of laws of a State that relate to adoptions. Sub-regulation 34(1) ensures that, where a State chooses to pass its own legislation to give effect to the Convention, there will be no conflict between the State law and the Regulations. Sub-regulation 34(2) provides that nothing in the Regulations affects the jurisdiction of courts in adoption proceedings, court orders in adoption proceedings or the operation of State adoption laws.

Schedule 1 to the Regulations sets out the Convention.

Schedule 2 to the Regulations lists the countries which are, for the purposes of Regulation 4, Convention countries.