

Août / August 2009



**Groupe de travail sur la médiation dans le cadre du processus de Malte  
Questionnaire II**

*établi par le Bureau Permanent*

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**Working Party on Mediation in the Context of the Malta Process  
Questionnaire II**

*drawn up by the Permanent Bureau*

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**Identification**

State: Australia

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Name of Authority / Office: Australian Central authority

Telephone number:

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The Permanent Bureau kindly requests responses to the Questionnaire to be sent to < secretariat@hcch.net > by 25 September 2009 at the latest.

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<b>ENFORCEABILITY OF MEDIATED AGREEMENTS</b>	
1. Are there legal restrictions on the content of mediated agreements regarding family law matters in your country?	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. Please specify: See Appendix 1.
2. Are mediated agreements in a family dispute involving children enforceable in your country without any additional formalities such as notarisations or approval by court?	<input checked="" type="checkbox"/> No. In Australia, mediated agreements involving parenting arrangements are not enforceable unless formalised through court orders. <input type="checkbox"/> Yes
3. Can agreements mediated in your country in a family dispute involving children be approved by or registered with a court? (If the answer is "No" please continue with question 4.)	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes, please see Appendix 1. <input type="checkbox"/> Other. Please specify:
3. a) Is the agreement once approved by or registered with a court treated as a decision of that court?	<input checked="" type="checkbox"/> Yes, see Appendix 1. <input type="checkbox"/> No <input type="checkbox"/> Other. Please specify:
3. b) What exact steps are needed to make a mediated agreement into a court order?	Please specify: Parents need to complete an 'Application for Consent Orders' form. A copy of the kit that can be used to apply for parenting orders can be obtained from the Family Court of Australia's website ( <a href="http://www.familycourt.gov.au">www.familycourt.gov.au</a> ).

3. c) Which court would be competent?	Please specify: See Appendix 1.
3. d) What are the costs for having a mediated agreement made into a court order in your country?	Please specify: There are no fees imposed by the Courts for the making of parenting orders. If parties engage lawyers to assist them with the drafting of the parenting orders then they are personally responsible for those costs.
4. Are there any other method(s) by which a mediated agreement can be rendered enforceable in your country (e.g. by being notarised)	Please specify: No.
4. a) What are the possible costs for this other method(s)?	Please specify: Not applicable.
5. Can agreements mediated in another country in a family dispute involving children be approved by a court or otherwise formalised in your country?	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes, see Appendix 1. <input type="checkbox"/> Other. Please specify:
5. a) If so, will the agreement mediated abroad be treated exactly as an agreement mediated in your country?	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes, see Appendix 1. <input type="checkbox"/> Other. Please specify:
6. In what circumstances, if any, can an agreement which has been approved by or registered with a court abroad, be recognised and enforced in your country?	Please specify: See Appendix 1.
7. What specific measures are available in your country for enforcing an agreement on child custody or contact?	Please specify: See Appendix 1.

Thank you.

## **APPENDIX 1**

### **Question 1**

There are no restrictions on the content of mediated agreements regarding family law matters in Australia. However, some legal requirements must be observed where the parties seek to have agreements recognised by a court. For example, a court will not make a parenting order that is contrary to the best interests of the child or which addresses child maintenance when an application could be properly made under the *Child Support (Assessment) Act 1989*. In making parenting orders (including by consent), the court must ensure that, to the extent possible and consistently with the child's best interests being paramount, the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.

### **Question 3**

In Australia, mediated agreements involving children can be approved by a court with the consent of the parties. Parenting orders deal with parenting arrangements for a child including with whom a child is to live, spend time or communicate, the allocation of parental responsibility for a child and its exercise, child maintenance, variation, dispute resolution and any other aspect of the care, welfare or development of the child.

Alternatively, the parties can formalise a mediated agreement by entering into a parenting plan, which is a written agreement that deals with parenting arrangements for children. A Parenting plan cannot be registered in a court. However, parenting plans registered in a court prior to 14 January 2004 continue to have effect.

### **Question 3(a)**

Once a parenting order has been made the mediated agreement is treated as a decision of that court. Parenting orders are legally enforceable but are subject to the terms of a subsequent parenting plan (unless the order provides otherwise). The Family Law Act 1975 ("the Act") requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

### **Question 3(c)**

The Act confers jurisdiction on the Family Court of Australia, the Federal Magistrates Court, State Family Courts (currently only the Family Court of Western Australia), State and Territory courts exercising summary jurisdiction and State and Territory Supreme Courts.

### **Question 5**

An agreement mediated in another country in a family dispute involving children could be approved by an Australian court as a parenting order. Only a court can document a parenting order.

### **Question 5(a)**

Once the agreement mediated in another country has been detailed in either a parenting order or a parenting plan it will be treated exactly as an agreement mediated in Australia which has been documented in the same way.

**Question 6**

An overseas child order can be registered by a competent Australian court. An overseas child order is defined as being an order from a prescribed overseas jurisdiction (a list of which is at Appendix 2) or an order made for the purposes of the Convention on the Civil Aspects of International Child Abduction by a judicial or administrative authority of a convention country. To enable such orders to be registered the following documents must accompany a request for registration:

1. A certified copy of an overseas child order that was made in that jurisdiction; and
2. A certificate of enforceability. Our court relies on the certificate as proof that the order for which registration is sought has not been modified or discharged in the jurisdiction in which it was made.

**Question 7**

A mediated agreement that has been formalised in a parenting order is enforceable in an Australian family law court if the court finds that a party has failed to comply with the order without reasonable excuse. Depending on the circumstances of the case and the seriousness of any breach, a court may make one or more of the following orders:

- (a) a variation suspension or discharge of the original order
- (b) attendance at a post-separation parenting program
- (c) compensation for time lost with a child as a result of the contravention
- (d) compensation for reasonable expenses incurred as result of the contravention
- (e) payment of all or some of the legal costs of another party
- (f) the entering into of a bond (with or without surety or security)
- (g) participation in community service
- (h) imposition of a fine
- (i) imposition of a suspended sentence or a sentence of imprisonment (as a last resort)

Where a contravention is not found—a family law court may order the person who brought proceedings pay all or some of the legal costs of the other party or parties.

A mediated agreement set out in a parenting plan is not legally enforceable. However, the court must have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

## APPENDIX 2

### FAMILY LAW REGULATIONS 1984 - SCHEDULE 1A

**Countries or parts of countries, declared to be prescribed overseas jurisdictions for certain purposes**

Column 1 Item No	Column 2 Country or part of a country
1	Alabama
2	Alaska
3	Arizona
4	Arkansas
4A	Austria
5	California
6	Colorado
7	Connecticut
8	Delaware
9	District of Columbia
10	Florida
11	Georgia
12	Hawaii
13	Idaho
14	Illinois
15	Indiana
16	Iowa
17	Kansas
18	Kentucky
19	Louisiana
20	Maine
21	Maryland
22	Massachusetts
23	Michigan
24	Minnesota
25	Mississippi
26	Montana
27	Nebraska
28	Nevada
29	New Hampshire

<b>Column 1 Item No</b>	<b>Column 2 Country or part of a country</b>
30	New Jersey
31	New York
31A	New Zealand
32	North Carolina
33	North Dakota
33A	Ohio
34	Oklahoma
35	Oregon
36	Papua New Guinea
37	Pennsylvania
38	Rhode Island
39	South Carolina
39A	Switzerland
40	Tennessee
41	Texas
42	Utah
43	Vermont
44	Virginia
45	Washington
46	West Virginia
47	Wisconsin
48	Wyoming