

## QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE 1996 CONVENTION

Wherever your replies to this Questionnaire make reference to domestic legislation, rules, guidance or case law relating to the practical operation of the 1996 Convention, **please provide a copy of the referenced documentation** in (a) the original language and, (b) wherever possible, accompanied by a translation into English and / or French.

<b>Name of State or territorial unit:<sup>1</sup></b>	Australia
<i>For follow-up purposes</i>	
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### **PART I – FOR STATES PARTIES**

#### **Recent developments in your State**

1. Since the 2011 / 2012 Special Commission, have there been any significant developments in your State regarding the legislation or procedural rules applicable in cases of international child protection? Where possible, please state the reason for the development in the legislation / rules, and, where possible, the results achieved in practice.

- ☒ No  
☐ Yes, please specify:  
[Please insert text here](#)

2. Please provide a brief summary of any significant decisions concerning the interpretation and application of the 1996 Convention rendered since the 2011 / 2012 Special Commission by the relevant authorities<sup>2</sup> in your State including in the context of the 20 November 1989 United Nations Convention on the Rights of the Child and other relevant instruments:

[Zegna and Zegna \[2015\] FamCA 340](#) was a decision of Watts J delivered 11 May 2015 in which he, as a single judge, interpreted the legislative equivalent of Article 10. His Honour analysed the meaning of proceedings concerning divorce, separation or annulment. Watts J disagreed with an interpretation of another single judge of the family court delivered about a year earlier (in [Duckworth v Jamieson \[2014\] FamCA 40](#)), where that judge preferred a broad interpretation which allowed him to exercise jurisdiction to make a protective measure contemporaneously with making final financial orders. Watts J declined to adopt that course. His Honour referred to authorities dealing with Brussels II bis and the Lagarde Report and concluded (at [63] to [67]) that the words must be construed narrowly and related to the end of the relationship and not to ancillary or related proceedings.

In [Cape and Cape \(2013\) 50 Fam LR 1](#) the Full Court made orders to ensure that Family Court orders obtained in Australia would be recognised in Germany following the permitted relocation of a child. The discussion by the court, commencing at [73] expresses the limited experience of the Australian courts thus far in dealing with matters under the 1996 Convention. In that case, the Full Court made an order requiring the mother to return the child to Australia if the father's appeal against the relocation was successful. The Full Court made an order permitting the mother to relocate with the child to Germany pending the outcome of the father's appeal provided she first served on the father and the independent children's lawyer proof that she has obtained recognition of the relocation orders and the orders of the Full Court in a court of competent jurisdiction in Germany (pursuant to Article 24 of the Child Protection Convention); or that she has obtained a declaration of enforceability from a court of competent jurisdiction in Germany of the relocation orders and the orders of the Full Court (pursuant to Article 26 of the Child

<sup>1</sup> The term "State" in this Questionnaire includes a territorial unit, where relevant.

<sup>2</sup> The term "relevant authorities" is used in this Questionnaire to refer to the judicial or administrative authorities with decision-making responsibility under the 1996 Convention. Whilst in the majority of States Parties such "authorities" will be courts (*i.e.*, judicial), in some States Parties administrative authorities remain responsible for decision-making in Convention cases.

Protection Convention); or that she has registered the relocation orders and the orders of the Full Court in a court of competent jurisdiction in Germany (pursuant to Article 26 of the Child Protection Convention)

The cases illustrate that our jurisprudence in this area of private international law concerning children is embryonic because of Australia's lack of experience in dealing with other treaties such as Brussels II bis. They further illustrate the need for judicial education and the value of the role of the Network Judge in that regard.

3. Please provide a brief summary of any other significant developments in your State since the 2011 / 2012 Special Commission relating to international child protection:

Not applicable

### Scope

4. Have competent authorities in your State experienced any challenges, or have questions arisen, in determining the scope of the Convention under **Article 2** (meaning of "child")\_or **Article 3** (meaning of "protective measures")?

☐

No

☒

Yes, please specify:

Only peripherally, we have had an enquiry (from a non-Convention country) where the question was asked about registering an overseas agreement (not a court order) on the basis that such a thing may be a protective measure. We did not have to reach a conclusion on that issue because it was a non-Convention matter, however, our tentative view was that an overseas agreement might be a 'protective measure' if it is legally enforceable in the country where it was concluded.

None in relation to "child".

In relation to "protective measures", there has been some confusion. The breadth of the 1996 Convention is achieved by using language and referring to institutions which can accommodate decision making about children in all legal systems. In the result, the 1996 Convention is not written in a way which is as accessible as, say, the 1980 Convention. Generally, terms used in the Australian implementing legislation have the same meaning as they have in the Convention but this will not necessarily assist a judicial officer who is unfamiliar with the 1996 Convention. For example, there may be confusion between domestic concepts of protection measures (for example in the nature of injunctions or family violence orders) and the measures anticipated by the Convention. The example of Cronin J sitting as a single judge confusing an "injunction for the personal protection of the child", as it appears in our domestic family law, with a "Commonwealth personal protection measure in relation to a child", as it appears in Division 4 which implements the 1996 Convention (see Chan & Wu [2010] FamCA 615 at [29]-[31]), demonstrates the desirability of judicial education which focuses on the operation of the 1996 Convention before it comes into operation or as soon as possible thereafter.

The reference to "protection" in the title of the 1996 Convention may lead those who are not familiar with the Convention to assume (wrongly) that it is a Convention concerning orders or measures for the personal protection of children rather than the Convention's much wider purpose of providing rules between and for contracting states as to which state can make decisions about a child, applicable law and the recognition and enforcement of orders.

One of the Australian State Central Authorities has experienced challenges with a case involving a potential domestic adoption in another jurisdiction. The child involved is subject to an order granting a person present in that State sole parental responsibility. However, the child's habitual residence has arguably changed to another Convention country after he has spent a number of years residing with close relatives in that jurisdiction and all interested parties, including the child, wish him to remain there on a long-term basis. The options being explored in the new State include adoption by the relatives. This adoption would not be an adoption subject to the Hague Adoption Convention and would not be possible under the laws of the relevant Australian state, due to the habitual residence of the child and the prospective adoptive parents being in the same jurisdiction. Therefore, the adoption would progress as a domestic adoption in the new State. To facilitate this adoption, there may need to be a transfer of parental responsibility or recognition in the Court system of the new State of the subsisting situation regarding parental responsibility (which is pursuant to an order of the Family Court in Western

Australia). However, Article 4(b) of the Child Protection Convention excludes "measures preparatory to adoption". In cases of this nature, where there is no overlap with the Hague Adoption Convention, it appears sensible that this exclusion should not apply and that the Child Protection Convention should be able to be relied upon for recognition of the subsisting situation regarding parental responsibility for the child.□

## Jurisdiction

5. Have competent authorities in your State experienced any challenges, or have questions arisen, in making a determination whether to exercise jurisdiction under **Articles 5, 6, 7 or 10**?

- ☒ No  
☐ Yes, please specify:

In relation to Article 5 - These matters tend to arise without warning for determination in a court. It is essential that a court that is asked to consider a case with international elements is aware of the existence of the Convention to ensure that it exercises the appropriate jurisdiction only in the relevant case. This also raises training issues, ensuring that both judges and practitioners are informed about the existence of the Convention in order to know to apply it in appropriate cases.

6. Have competent authorities in your State experienced any challenges, or have questions arisen, in implementing and / or applying **Articles 8 and 9**?

- ☒ No  
☐ Yes, please specify:

As to Article 8, the request by this court to a court of competent jurisdiction in France, the Tribunal de Grande Instance de Paris, to assume jurisdiction to make orders over the property of a minor child who was habitually resident in Australia worked seamlessly in the case of Carrick [2013] FamCA 1118. The child's property was from the deceased estate of her father and subject to French law.

As to Article 9, in the matter of Bunyon & Lewis (No.3) [2013] FamCA 888, Bennett J declined to make a request of the competent authority in the Netherlands, where the child was habitually resident, for our court in Australia to be authorised to exercise jurisdiction to take measures of protection (ie. make parenting orders for contact between the young female child and her maternal family members where the child's mother was recently deceased). Her Honour was able to consider the practical implications for all parties of the proceedings being conducted in the Netherlands assisted by detailed responses to her questions about the location of courts, interpreters, court sitting hours, the requirement for legal representation and audio visual connectivity provided promptly through direct judicial communications between the Hague Network judges.

7. Have judicial or administrative procedures, guidelines or protocols been adopted in your State to facilitate the application of **Articles 8 and 9**?<sup>3</sup>

- ☒ No  
☐ Yes, please describe them and also provide a link or attach them, preferably translated into English or French:  
 Please insert text here

8. Have competent authorities in your State had experience with urgent measures of protection taken under **Article 11**? (See also Question No 35.)

- ☒ No  
☐ Yes, please describe in which situations a competent authority in your jurisdiction has applied Article 11:

We are not aware of specific experience in our Court with urgent measures under Article 11.

Article 11 measures could be used to regulate and implement conditions for the return of a child to the state of habitual residence following a wrongful removal or retention of a child to, or in, Australia or to make provision for a child who is habitually resident in Australia to have access with a person in another country. In those circumstances, we would be relying on recognition of the protective measure as a matter of law pursuant to Article 23(1). However, if a matter has been contentious enough to require intervention by a family court in Australia, the relationship between the parents is usually such that the

<sup>3</sup> See, e.g., Direct Judicial Communications - [Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications \(2013\)](#).

court and/or one of the parents requires that the protective measure taken in Australia will be enforceable, as opposed to merely recognised, in the other contracting state. Likewise, if our court intends to impose conditions on the return of a child to another contracting state under the 1980 Convention, it would want to avoid the implementation of the condition being defeated by a subsequent challenge and refusal of recognition under Article 23(2).

9. Have competent authorities in your State experienced any challenges, or have questions arisen, with respect to the application of **Article 11**?

- ☒ No  
☐ Yes, please describe:

10. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying **Articles 12, 13 or 14**?

- ☒ No  
☐ Yes, please describe:

Measures of a provisional character (Article 12) are routinely taken to regulate the placement and safety of a child who is present in Australia in respect of whom an application for return under the 1980 Convention has been made but has not been determined.

### Applicable law

11. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying **Articles 15, 16, 17 or 18**?

- ☒ No  
☐ Yes, please describe:

a

12. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying the other articles in **Chapter III**?

- ☒ No  
☐ Yes, please describe them:

### Recognition and enforcement

13. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying **Article 23** from the perspective of the requested State?

- ☐ No  
☒ Yes, please describe:

Occasionally, the orders are for arrangements that simply cannot work, for example, for contact to occur weekly over weekends. We are also finding that we have an increased number of requests for the registration of surrogacy orders, which are specifically excluded from the Convention by Art.4. Some parents whose children were born through a surrogacy arrangement point to the fact that many surrogacy orders also deal with the attribution of parental responsibility, which, of course, is one of the measures within the scope of the Convention.

Our court also comments that it awaits with interest cases on the interpretation of Article 23(2)(d) as to the extent to which "the best interests of the child" may defeat recognition of a protective measure.

14. Have judicial or administrative procedures, guidelines or protocols been adopted in your State to facilitate the application of **Article 24**?

- ☒ No  
☐ Yes, please describe and also provide a link or attach them, preferably translated into English or French:

Article 24 is frequently discussed in the context of relocation cases and requiring the parties to prepare for outcomes. If an Australian court allows a child to be relocated to another country, it recognises that the child's place of habitual residence will eventually change to the country to which the child is relocated. However, relocation will usually be allowed after a contested hearing only after a thorough consideration of how a meaningful relationship can be maintained between the child and the non-resident parent. If relocation is ordered, specific orders will also be made for ongoing access arrangements. There is a

natural scepticism about a relocating parent's intention to abide parenting orders and/or promote a meaningful relationship between the child and the parent who remains in Australia as expressed to the court before the relocation is allowed and what will occur once the child and resident parent have relocated. It is not uncommon for a party to say frankly that he/she was prepared to agree to any arrangement or order so as to be able to relocate but then assert subsequently and post-relocation, that the arrangement so ordered is not in the best interests of the subject child and will not be followed by him/her or should be decided by the competent authorities of the state to which the child has relocated.

Article 24 is a mechanism whereby a court in Australia could allow a relocation conditional upon the relocating parent obtaining a decision on recognition or non-recognition of access arrangements in the country to which the child will relocate. If the orders will not be recognised under Article 24, the relocation will not take place or the proceedings can be reopened.

15. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying **Article 24** (e.g., in terms of procedure, formalities, time frames, etc.)?

- ☒ No  
☐ Yes, please describe:  
 Please insert text here

16. Please describe the "simple and rapid procedure" (see **Article 26(2)**) in place in your State for declaring enforceable or registering for the purpose of enforcement measures of protection taken in another State Party and enforceable there, in particular:

- a) Which authority declares enforceable or registers a measure of protection taken in another State Party?
- b) What time frames are applied to ensure that the procedure is rapid?
- c) Is legal representation required?

Please explain:

Foreign measures relating to family law issues are registered by the Registrars of the Family Court of Australia and the Family Court of Western Australia. The process is usually very quick, taking a couple of weeks. No legal representation is required. Individuals seeking to enforce the orders, once registered, must do so in proceedings initiated at their own expense.

The Family Court of Australia registers measures as enforceable pursuant to Regulation 12 Family Law (Child Protection) Regulations 2003. A registrar provides a certified copy of the registered order and sends it under cover of correspondence confirming that it has been done.

As at the time of the last Special Commission, it came to the attention of the Hague Network Judges for Australia that there had been delays in registration. The Chief Justice, the Hon Diana Bryant AO, directed that henceforth three specialist registrars be responsible for registration and attend to that function without undue finality, simply and quickly. It is unlikely that the process would take longer than 14 days if all documentation is provided and is correct. The three specialist registrars have direct access to the Hague Network Judges for Australia and can seek the assistance of one of them at any time.

No legal representation is "required". However, the court in which the measure was taken in the overseas jurisdiction must provide a certificate of enforceability which specifies that the document is a true and correct copy of the measure and is enforceable in the other jurisdiction.

In relation to foreign measures relating to child protection issues the registration is in the relevant State or Territory court or courts. While involving different courts, the registration follows the same simple and fast procedure that is used for family law matters, which is described above.

17. Are you aware of any challenges, or have questions arisen, in applying **Article 26** in your State?

- ☐ No  
☒ Yes, please describe:

It appears that in some instances measures taken in other contracting states have been rendered enforceable in Australia notwithstanding that the measure was taken prior to the 1996 Convention entering into force between Australia and the other contracting state and, therefore, contrary to Article 53.

18. Are you aware of any challenges, or have questions arisen, in applying **Article 28** in your State?

- ☒ No  
☐ Yes, please describe:

A foreign measure, once registered, has effect in Australia as if it were an order made by an Australian court.

It is anticipated that there may be difficulty when dealing with jurisdictions which do not provide for enforcement or who have a regime of enforcement of parenting orders which is significantly different from our own. In these instances, the measure may be recognised under Article 23 but be of no effect because it cannot be enforced. Lack of enforcement mechanisms or the unpreparedness of the competent authorities to take enforcement measures would have to be the subject of expert evidence.

### Co-operation

19. Are you aware of any challenges, or have questions arisen, in applying **Article 30** in your State (e.g., in relation to the timeliness of responses to requests)?

- ☒ No  
☐ Yes, please describe:

We have generally found overseas Central Authorities responsive to requests.

Our experience has been favourable. In the Hague return case of State Central Authority & Varaczki [2016] FamCA 333, there was direct judicial communication about whether the mother would be prosecuted for kidnapping the subject child on her return to Hungary. Later in the proceedings Justice Bennett sought to have information provided by Hungarian officials, via the Hungarian and Australian Central Authorities, as to the psychological support and intervention that would be available to the child at the father's request, in the event that he was returned to Hungary without the mother. Detailed information was quickly provided. That information is worth setting out in full because of its exemplary specificity:

<NAME AND ADDRESS OF RELEVANT AUTHORITY>

Dear <NAMED OFFICIAL> <TITLE><POSITION>

In response to your letter dated 19 August 2016, reference number: XX-XXX/XXX/XXX-XX/2016 I wish to inform you as follows:

In the event that a court decision were passed ordering the return of the minor [L] ... and in case the mother should decide not to return to Hungary ... the father of the minor child ... could turn to the institutions and persons listed below for psychological assistance and educational guidance for his child:

- <NAME AND ADDRESS OF SERVICE AVAILABLE>. (Distance from the parent's residence: 20 kms)
- This institute provides a range of services, among other things it provides educational counselling and school psychology and kindergarten psychology services to children living in the area of its competence.

The parent within his or her own discretion, as well as kindergartens and schools - with the parent's - consent may request the institute to provide care and treatment for the child in case of psychological, behavioural, integration or learning problems. Initially, when it comes to the assessment of the child, depending on the nature of the problem indicated it will be a psychologist, a psychopedagogue or other professional to examine the child, each from a different perspective. This is necessary for clarifying the reasons underlying the symptoms as thoroughly as possible. Sometimes, when the environment of the child wishes to understand a certain aspect of the child's psychological state, the psychologist will only be asked to establish a diagnosis, but in most cases a therapy will also begin to reach a positive change in the child.

Educational counselling is offered free of charge. To avoid waiting it is advisable to book an appointment in advance, and appointments are normally scheduled within 30 days. Currently children's psychological assistance is provided by one clinical child



psychologist and one psychologist, and other professional team up with them (such as special needs teachers and speech therapists).

- Child and Youth Psychiatric and Mental Health Services of <NAME OF HOSPITAL> Hospital of <NAME OF HOSPITAL><ADDRESS OF HOSPITAL> (Distance from the parent's residence: 26 kms)

A team of experts (child and adolescent psychiatrists, clinical child psychologists, psychopedagogists, special needs teachers and speech therapists) provide treatment for children and teenagers with mental and psychological problems up to eighteen years of age, for example in case of anxiety and depressive disorders, compulsive behaviour, panic disorders, phobias, integration disorders, adjustment disorders, elimination disorders, pervasive development disorders, conduct disorders, language (speech) development problems, eating disorders, learning, school performance and ADHD disorders. Each of the above professionals provides assistance within the specific area of his or her specialisation. If necessary, the members of the team of experts will jointly determine the course of the therapy. The treatment is offered to everybody free of charge and without referral from a doctor, the only prerequisite is scheduling an appointment in advance, which is normally granted within thirty days.

- Family Support and Child Welfare Services: <ADDRESS OF SERVICE> (Distance from the parent's residence: 25 kms)

This institute provides primary family and child welfare care free of charge for the residents of its territory of competence, and in the form of personal treatment. As part of the above care this institute offers psychological counselling, for which it has one psychologist and supervisor. This centre can schedule appointments within 7 to 14 days.

- <NAME OF CLINICIAN> clinical psychologist and mental health professional (private practitioner): <ADDRESS>. (Distance from the parent's residence: 26 kms)

Those who need counselling can schedule an appointment and if necessary start a therapy with this health professional within 7 to 10 days. Subsequently an agreement will be made concerning the number of therapeutic sessions needed.

The parents may also request assistance outside <NAME OF REGION> in the city of <NAME OF CITY>, where they can turn to the institutes operating under the umbrella of the University of <NAME OF UNIVERSITY>, as well as to the Consultation and Treatment Centre for Child and Youth Psychiatry in <NAME OF CITY>, <ADDRESS>. As mentioned above, no referral form is needed from a doctor and the treatment is free of charge, but as this centre is outside the county limits, the times for scheduling an appointment will be longer, approximately from 4 to 6 weeks. Its distance from Felsnana is 69 kms.

Round seal of the <NAME OF AUTHORITY> This document has been sent to:  
 1. Ministry of Justice (of Hungary), <ADDRESS> to the attention of <NAMED OFFICIAL>, <ADDRESS>.  
 2. Archives

20. In your view, would it facilitate the task of Central Authorities under **Article 30(2)** if States Parties provided information as to their laws and available services in relation to the practical implementation of the 1996 Convention, e.g., in the form of a Country Profile or a similar tool published on the HCCH website?

☐

No

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Yes, please describe the type of information that would be useful to include (e.g., information with respect to the availability of certain protective measures under internal law (e.g., in relation to **Article 3(e)**), or the procedures applied under, e.g., **Articles 23, 24, 26, 31 or 33**, or information on Central Authority services provided):

Procedures for the various processes established by the Convention.

At the very least information relevant to Article 23(1)(b) and (d), Article 24 and Article 26 would be helpful. This would include whether the child and/or a parent has to be

within the jurisdiction to initiate any necessary proceeding, whether legal representation is required, the costs of filing fees, which court would have jurisdiction and the like. In the interests of certainty and to avoid confusion, identification of relevant legislation and terms used to implement parenting orders (eg. custody/ guardianship/ access/ contact/ communicate) would be of assistance so that the parties can agree to, or consider, measures which are expressed in the language which is used by the courts or authorities by which they will be enforced.

Article 31 information is largely going to be particular to the case but could routinely include information about the criminality of international parental child abduction in that state and what, if any, protection can be afforded to a taking parent against criminal prosecution.

Information about which particular authorities will be responsible for providing information pursuant to Article 32 and likely delays in relation thereto would be of assistance.

Information about the time required for a contracting state to consider a placement under Article 33 and provide or not provide its consent should relieve some pressure on the receiving state and alleviate uncertainty for the child.

21. How does your Central Authority (either directly or through public authorities or other bodies) take appropriate steps under **Article 31(b)** to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the 1996 Convention applies? Please explain:

We can provide the details of suitable agencies experienced with providing mediation in the context of international family law disputes.

22. Have authorities in your State experienced any challenges, or have questions arisen, in applying **Article 33** (e.g., has your State been requested to accept a child under a certain type of placement or institutional care that is not available under your internal law, or was insufficient information provided to you as the Requested State)?

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No

☒

Yes, please describe:

On occasion our relevant child protection agencies have been requested to provide information for pending proceedings (child protection proceedings overseas) where an order placing the child in Australia is imminent. In many cases issues around right of entry/visa/citizenship have not even been considered let alone resolved. This results in the potential for a lot of work to be performed by already overstretched child protection workers to make assessments in short time frames where there will be no chance of a placement actually occurring. We have now begun requiring issues around right of entry to be resolved prior to placement assessments being conducted to avoid this unnecessary burden on child protection resources.

23. Have authorities in your State experienced any challenges, or have questions arisen, in providing or obtaining reports or information under **Articles 32, 33 or 34**?

☐

No

☒

Yes, please describe:

Requests from overseas Central Authorities are often made under a very short time frame. One of our State Central Authorities (a child protection agency) regularly uses Article 34 to obtain overseas child protection histories of children. They find that many States Parties are sending that material through without issue, while others do not send anything.

24. Do authorities in your State use a standard template when providing a report on the (situation of the) child under **Article 32 or 33**?

☒

No

☐

Yes, please attach the template to your response (preferably translated into English or French):

One of our State Central Authorities (a child protection agency) has indicated that they use their own template. They have indicated that something more standardised, particularly for the purposes of Article 32 would be useful. They have also noted that some States are using private agencies to obtain these reports when that authority would prefer that requests came to the Central Authority, at least in the first instance.

Another State Central Authority (also a child protection agency) has indicated



that as other States usually have specific questions they would like answered in relation to the particular child their report will be directed towards answering those and then providing any other comments they consider important for ensuring decisions are made in the child's best interests.

Given these conflicting views we would suggest that perhaps a general template could be developed as a guide upon which to base these reports.

Australia would be happy to provide redacted versions of these reports if they could be of use in designing such a template.

25. Have competent authorities in your State experienced any challenges, or have questions arisen, in applying **Article 35**?

- ☒ No  
☐ Yes, please describe:

The access provisions in the 1996 Convention are superior to those in the 1980 Convention. Of course, the use of those processes require parties to undertake domestic proceedings to seek access rights in the country of the child's habitual residence. They helpfully allow evidence to be provided about a parent residing overseas to enable an informed decision to be reached.

26. Does your State impose charges, as provided under **Article 38(1)**, for the provision of services under **Chapter V** (Co-operation)?

- ☐ No  
☒ Yes, for the following types of services (e.g., translation, legal assistance):

Some of our State and Territory Central Authorities have indicated that they would need to impose reasonable charges for some of the services under Chapter V. Most, if not all, of Australia's Central Authorities would consider doing so in an appropriate case. For example, the costs associated with making a suitability assessment in relation to a proposed placement of a child.

27. Have authorities in your State experienced any challenges, or have questions arisen, with regard to charges provided under **Article 38(1)**?

- ☒ No  
☐ Yes, please describe:

Please insert text here

28. With the understanding that services provided by Central Authorities under the 1996 Convention may vary, does your Central Authority provide assistance to **individuals** habitually resident in your State who request it in connection with the following matters? If so, please specify the nature of the assistance provided.

a) A request to organise or secure effective exercise of **rights of access** in another State Party (requested State)<sup>4</sup>

- ☐ 1. None  
☒ 2. Assistance in obtaining information on the operation of the 1996 Convention  
☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State  
☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide  
☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State  
☐ 6. Assistance in initiating judicial or administrative proceedings with a view to making arrangements for organising or securing the effective exercise of rights of access  
☐ 7. Assistance in providing or facilitating the provision of legal aid and advice  
☐ 8. Assistance in obtaining private legal counsel or mediation services, where needed in the requested State  
☒ 9. Referral to other governmental and / or non-governmental organisations for assistance

<sup>4</sup> See in this context, e.g., the [Practical Handbook](#) on the Operation of the 1996 Child Protection Convention, sections 11(E)(d) and 13(B) (2014).

- ☐ 10. Provision of regular updates on the progress of the application
- ☒ 11. Other, please specify:

Requests in relation to rights of access are normally arranged under the 1980 Convention. This is not something that we are usually asked to assist with under the 1996 Convention. Under the 1996 Convention, we are more commonly asked to assist with the registration of measures overseas, which might include measures relating to access. However, in appropriate cases, we would be able to provide the limited assistance above. The assistance would be limited to requesting information under the co-operation provisions, providing information about the overseas Central Authority and providing a list of overseas practitioners for a person to make their own inquiries. We might also refer someone to agencies such as ISS for support.

- b) A request to secure the return to your State of a child subject to **parental abduction** where the 1980 Convention is not applicable

- ☐ 1. None
- ☒ 2. Assistance in obtaining information on the operation of the 1996 Convention
- ☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State
- ☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide
- ☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State
- ☐ 6. Assistance in discovering the whereabouts of a child who has been wrongfully removed or retained
- ☐ 7. Assistance in taking provisional / urgent measures of protection to prevent further harm to the child
- ☐ 8. Assistance in securing the voluntary return of the child or in bringing about an amicable resolution of the issue
- ☐ 9. Assistance in initiating judicial or administrative proceedings with a view to obtaining the return of the child
- ☐ 10. Assistance in providing or facilitating the provision of legal aid and advice
- ☐ 11. Assistance in providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child
- ☐ 12. Assistance in obtaining private legal counsel or mediation services
- ☒ 13. Referral to other governmental and / or non-governmental organisations for assistance
- ☐ 14. Regular updates on the progress of the application
- ☐ 15. Other, please specify:

As above, this is not something that we are usually asked to assist with under the 1996 Convention. Under the 1996 Convention, we are more commonly asked to assist with the registration of measures overseas, which might include measures relating to abduction. However, in appropriate cases, we would be able to provide the limited assistance above. The assistance would be limited to requesting information under the co-operation provisions, providing information about the overseas Central Authority and providing a list of overseas practitioners for a person to make their own inquiries. We might also refer someone to agencies such as ISS for support.

- c) A request to secure the return to your State of a **runaway child** (see **Article 31 c)**)

- ☐ 1. None
- ☒ 2. Assistance in obtaining information on the operation of the 1996 Convention
- ☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State
- ☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide
- ☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State

- ☐ 6. Assistance in discovering the whereabouts of a runaway child
- ☐ 7. Assistance in initiating judicial or administrative proceedings with a view to obtaining the return of the child
- ☐ 8. Assistance in providing or facilitating the provision of legal aid and advice
- ☐ 9. Assistance in providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child
- ☐ 10. Assistance in obtaining private legal counsel
- ☒ 11. Referral to other governmental and / or non-governmental organisations for assistance
- ☐ 12. Regular updates on the progress of the application
- ☐ 13. Other, please specify:

This is not something that we have ever been asked to assist with under the 1996 Convention. However, in appropriate cases, we would be able to provide the limited assistance above. The assistance would be limited to requesting information under the co-operation provisions, providing information about the overseas Central Authority and providing a list of overseas practitioners for a person to make their own inquiries. We might also refer someone to agencies such as ISS for support. Parents might be referred to law enforcement agencies or to the Department of Immigration and Border Protection to obtain information about the child's intended destination at the point of entry or departure.

- d) A request for a **report on the situation of a child** habitually resident in another State Party (e.g., a child returned as a result of child abduction proceedings or a child who has moved as a result of a relocation) (see **Article 32 a**))

- ☐ 1. None
- ☒ 2. Assistance in obtaining information on the operation of the 1996 Convention
- ☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State
- ☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide
- ☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State
- ☒ 6. Other, please specify:

We might also refer a parent to ISS for support.

- e) A request that the competent authorities of another State Party decide on the **recognition or non-recognition** of a measure taken in your State (see **Article 24**)

- ☐ 1. None
- ☒ 2. Assistance in obtaining information on the operation of the 1996 Convention
- ☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State
- ☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide
- ☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State
- ☐ 6. Assistance in obtaining private legal counsel
- ☐ 7. Regular updates on the progress of the request
- ☐ 8. Other, please specify:

Please insert text here

- f) A request that the competent authorities of another State Party **declare enforceable or register for the purpose of enforcement** measures taken in your State (see **Article 26**)

- ☐ 1. None
- ☒ 2. Assistance in obtaining information on the operation of the 1996 Convention

- ☒ 3. Assistance in obtaining information on the relevant laws and procedures in the requested State
- ☒ 4. Establishment of contact with the Central Authority and / or the competent authorities in the requested State to find out the kind of assistance such authorities could provide
- ☒ 5. Transmission of the request to the Central Authority or to the competent authorities in the requested State
- ☐ 6. Assistance in obtaining private legal counsel
- ☐ 7. Regular updates on the progress of the request
- ☐ 8. Other, please specify:

Transmitting Australian orders overseas for the purposes of enforcement is one of the most common functions we perform under the 1996 Convention.

29. With the understanding that services provided by Central Authorities under the 1996 Convention may vary, if your Central Authority were to receive a request of assistance from **another Central Authority** on behalf of an individual residing abroad, in connection with the following matters, please specify the nature of the assistance that your Central Authority provides or would provide if the situation was to arise.

a) A request to organise or secure effective **exercise of rights of access**

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or the relevant laws and procedures in your State
- ☐ 3. Assistance in initiating judicial or administrative proceedings with a view to making arrangements for organising or securing the effective exercise of rights of access
- ☐ 4. Assistance in providing or facilitating the provision of legal aid and advice
- ☐ 5. Assistance in obtaining private legal counsel or mediation services available in your State
- ☒ 6. Referral to other governmental and / or non-governmental organisations for assistance
- ☐ 7. Regular updates on the progress of the application
- ☒ 8. Other, please specify:

Transmitting an overseas protection measure to the relevant court for registration is one of the most common functions that we perform under the 1996 Convention. Enforcement of the orders once registered is a matter for the parent. The ACA does not initiate proceedings to secure access rights. We might refer someone to agencies such as ISS for emotional support.

b) A request to secure the return to the State of habitual residence of a child subject to parental abduction where the 1980 Convention is not applicable

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or the relevant laws and procedures in your State
- ☐ 3. Assistance in discovering the whereabouts of a child who has been wrongfully removed or retained
- ☐ 4. Assistance in taking provisional measures of protection to prevent further harm to the child
- ☐ 5. Assistance in securing the voluntary return of the child or in bringing about an amicable resolution of the issue
- ☐ 6. Assistance in initiating judicial or administrative proceedings with a view to obtaining the return of the child
- ☐ 7. Assistance in providing or facilitating the provision of legal aid and advice
- ☐ 8. Assistance in providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child
- ☐ 9. Assistance in obtaining private legal counsel or mediation services
- ☒ Referral to other governmental and / or non-governmental organisations for assistance
- ☐ 10. Regular updates on the progress of the application
- ☒ 11. Other, please specify:

Transmitting an overseas protection measure to the relevant court for

registration is one of the most common functions that we perform under the 1996 Convention. Enforcement of the orders once registered is a matter for the parent. The ACA does not initiate proceedings to secure a return in these circumstances. We might refer someone to agencies such as ISS for support.

c) A request to secure the return of a runaway child (see **Article 31 c**))

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or on the relevant laws and procedures in your State
- ☒ 3. Assistance in discovering the whereabouts of a runaway child
- ☐ Assistance in initiating judicial or administrative proceedings with a view to obtaining the return of the child
- ☐ 4. Assistance in providing or facilitating the provision of legal aid and advice
- ☐ Assistance in providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child
- ☐ 5. Assistance in obtaining private legal counsel
- ☒ 6. Referral to other governmental and / or non-governmental organisations for assistance
- ☐ 7. Regular updates on the progress of the application
- ☐ 8. Other, please specify:

Parents might be referred to law enforcement agencies or to the Department of Immigration and Border Protection to obtain information about the child's intended residential address notified at the point of entry into Australia. We might refer someone to agencies such as ISS for emotional support.

d) A request for a report on the situation of a child habitually resident in your State (e.g., a child returned as a result of child abduction proceedings or a child who has moved as a result of a relocation) (see **Article 32 a**))

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or on the relevant laws in your State
- ☐ 3. Preparing and transmitting the requested report
- ☒ 4. Transmission of the request to the competent authorities in your State
- ☐ 5. Other, please specify:

e) A request that the competent authorities of your State decide on the recognition or non-recognition of a measure taken in another State Party (see **Article 24**)

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or relevant laws in your State
- ☒ 3. Transmission of the request to the competent authorities in your State
- ☐ 4. Assistance in obtaining private legal counsel
- ☐ 5. Other, please specify:

[Please insert text here](#)

f) A request that the competent authorities of your State declare enforceable or register for the purpose of enforcement measures taken in another State Party (see **Article 26**)

- ☐ 1. None
- ☒ 2. Providing information on the operation of the 1996 Convention and / or relevant laws in your State
- ☒ 3. Transmission of the request to the competent authorities in your State
- ☐ 4. Assistance in obtaining private legal counsel
- ☐ 5. Other, please specify:

[Please insert text here](#)

30. Where the habitual residence of a child present in your State cannot be established, have authorities in your State used any of the provisions of **Chapter V** in determining the child's place of habitual residence?

- ☒ No  
☐ Yes, please specify:  
[Please insert text here](#)

31. Are you aware of any challenges, or have questions arisen, in applying any other provisions under **Chapter V** in your State?

- ☒ No  
☐ Yes, please describe:  
[Please insert text here](#)

32. Have judges in your State used direct judicial communications in cases falling under the 1996 Convention?

- ☐ No  
☒ Yes, please specify in relation to which specific matters (e.g., transfer of jurisdiction, placement of a child):  
[Transfer of jurisdiction; access](#)

### General provisions

33. Has your State experienced any challenges, or have questions arisen, in relation to requests under **Article 40** for the delivery of a certificate indicating the capacity in which a person having parental responsibility or entrusted with protection of the child's person or property is entitled to act and the powers conferred upon him or her?

- ☒ No  
☐ Yes, please describe:

34. Which authorities in your State are competent to issue such certificates? Please specify:  
[Various Commonwealth, State and Territory courts are competent to issue such certificates. In Tasmania, it is the Tasmanian Central Authority that is competent to do so.](#)

### Special categories of children

#### Children subject to international parental abduction

35. Have authorities in your State experienced any challenges, or have questions arisen, in relation to the application of the 1996 Convention in cases of child abduction where the 1980 Convention was not applicable (see Question Nos 28 b) and 29 b) above)?

- ☒ No  
☐ Yes, please describe:

36. In cases of child abduction where both the 1980 Convention and the 1996 Convention were applicable, have authorities in your State made use of provisions under the 1996 Convention in addition to or instead of provisions of the 1980 Convention?

- ☐ No  
☒ Yes, please specify the provisions and explain:

[To ascertain what services are available in the state of habitual residence in the context of the grave risk of harm exception \(see details provided in response at Question 19 above\).](#)

[It is possible that an Australian court might consider that orders could be made under Article 11 on the basis that they are urgent in nature if they are necessary to ensure the safe return of a child under the 1980 Convention. See further information about this at the answer to Q.38 below.](#)

37. In cases of parental child abduction, whether or not the 1980 Convention is applicable, have authorities in your State used the co-operation provisions in **Chapter V** of the 1996 Convention to determine whether adequate measures of protection are available in the State of the habitual residence of the child (e.g., to facilitate the safe return of the child)?



- ☐ No  
☒ Yes, please explain:

Such inquiries are usually handled by direct discussion between the relevant Central Authorities for the Abduction Convention involved in the matter. It is common for information about protection measures to be provided by the overseas Central Authority and put before the Australian court. We provide similar information in outgoing matters.

38. In cases of parental child abduction, have competent authorities in your State taken measures of protection under **Article 11**, as an alternative to measures of protection in the form of mirror orders or undertakings, to facilitate the safe return of the child? (See also Question No 5.)

- ☒ No  
☐ Yes, please explain:

We are not aware of any specific experience in an Australian Court with urgent measures under Article 11.

Article 11 measures could be used to regulate and implement conditions for the return of a child to the state of habitual residence following a wrongful removal or retention of a child to, or in, Australia or to make provision for a child who is habitually resident in Australia to have access with a person in another country. In those circumstances, we would be relying on recognition of the protective measure as a matter of law pursuant to Article 23(1). However, if a matter has been contentious enough to require intervention by a family court in Australia, the relationship between the parents is usually such that the court and/or one of the parents requires that the protective measure taken in Australia will be enforceable, as opposed to merely recognised, in the other contracting state. Likewise, if our court intends to impose conditions on the return of a child to another contracting state under the 1980 Convention, it would want to avoid the implementation of the condition being defeated by a subsequent challenge and refusal of recognition under Article 23(2).

#### Children subject to international relocation

39. Are you aware of any use being made of provisions of the 1996 Convention in cases where a parent wishes to relocate with his or her child to another State?

- ☐ No  
☒ Yes, please explain:

The use of the recognition and enforcement provisions is the most common type of request and such requests are often made in anticipation of a relocation to another jurisdiction. We receive such requests in both incoming and outgoing cases.

Please see response to Question 14.

Furthermore, the Family Court has indicated that recognition and a declaration of enforceability or registration has at least twice been used in the context of appeals against decisions at first instance allowing a parent to relocate a child overseas. That is, the advance recognition procedure has been employed to permit or entitle a parent to take the child to live overseas pending the hearing of the appeal on the basis that, if declared or registered as enforceable, our court was satisfied that the return of the parent and child to Australia could be compelled.

The first was an appeal in the matter of *Cape & Cape* [2013] FamCAFC 114 where orders were made by the trial judge permitting the mother to relocate a child to Germany pending determination of an appeal against orders permitting the relocation subject to the mother executing an undertaking as a measure of protection pursuant to the 1996 Convention that she would return the child to Australia in the event the father's appeal was successful. The Full Court allowed the appeal against the decision and made its own order which permitted the mother to remove the child from Australia upon providing proof that she had obtained from a court of competent jurisdiction in Germany either recognition of orders pursuant to Article 24 or a declaration of enforceability or registration pursuant to Article 26 of the 1996 Convention.

The second case was a matter before our then Deputy Chief Justice, Lasman & Lasman [2013] FamCA 593 where he had ordered that a mother could relocate a child to Sweden. The father appealed the DCJ's decision and sought a stay of the relocation order. His Honour was satisfied that there were necessitous circumstances around the mother's health which justified her being able to leave with the child before the appeal was heard providing that she could first obtain advance recognition of enforceability of an order that she would return if required to do so. The request was made in September 2013 and the Svea Court of Appeal in Sweden made the declaration in February 2014.

### International access / contact cases involving children

40. Are you aware of any use being made of provisions of the 1996 Convention, including those under **Chapter V**, in lieu of or in connection with an application under **Article 21** of the 1980 Convention?<sup>5</sup>

☐

No

☒

Yes, please explain:

Requests for the registration of orders under the Family Law (Child Protection Convention) Regulations 2003 (available at <http://www.comlaw.gov.au>) and similar requests in outgoing matters, are our most common requests under the Convention. Many orders are registered in Australia under that regime, thereby avoiding the need for applications seeking contact with a child to be instituted under Australia's domestic law by the parents. In addition, the Australian Central Authority only offers mediation in relation to applications for access under the 1980 Convention.

### Unaccompanied, separated, and internationally displaced children

41. Are you aware whether authorities in your State have used the provisions of the 1996 Convention in relation to the protection of internationally displaced children (such as refugee children, trafficked children, sexually exploited children, or unaccompanied children) and / or children whose habitual residence cannot be established?

☒

No

☐

Yes, please specify:

[Please insert text here](#)

### **Miscellaneous**

42. Is there any other comment that your State wishes to make relating to the practical operation of the 1996 Convention? If so, please specify:

[For our State and Territory child protection agencies, the main type of requests received under the Convention are requests for information about prospective placements for children and, in some cases, requests for ongoing follow up of placements.](#)

[One State Central Authority has suggested that 1996 Hague Convention is being under utilised. It is their experience that very few overseas child protection agencies are aware of the Convention and they frequently send agencies details of their own country's central authority in order to formalise requests. This suggests that there is significant scope for providing information about the Convention on a more comprehensive basis than the current case by case approach.](#)

[Another State Central Authority has identified the consistency and timing of the requests as a particular issue for them. Requests from some Convention countries have been difficult to manage because they come in with a lack of consistency \(or clarity about what the request is for\) and often with extremely short time frames.](#)

[The other significant issue that we have encountered relates to visas. In some cases arrangements are being sought for the placement of a child that are simply not feasible because of limitations on the visa classes that are available in a particular situation. This is something that we attempt to address at an early stage, directly with the overseas Central Authorities, to attempt to ensure that immigration issues are considered and resolved before other work is completed to assess the placement.](#)

[From the ACA's perspective, the most useful aspect is the reciprocal recognition of orders relating to parental responsibility. This process enables the Convention to be used by parents who have orders allowing their children to relocate to another Convention country. The orders made in the other Convention country can be pre-emptively registered in Australia prior to arrival so that the parents can be reassured that their orders can be enforced in Australia. This aspect of the Convention can also negate the need for parents to make access applications in some cases \(Australia only offers mediation to attempt to](#)

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<sup>5</sup> The [Explanatory Report](#) (Lagarde) on the 1996 Convention notes that co-operation under Article 35(1) between authorities of States Parties with respect to rights of access "serves in a certain way to complete and reinforce the co-operation, which is not always effective, provided for the same purpose between Central Authorities" under Article 21 of the 1980 Convention. Explanatory Report, paragraph 146 (1997).

resolve disputes about access).

Another particularly useful aspect of the Convention is its use as a means to gather information about the suitability of a parent to have access to a child. This enables a court in Australia hearing either domestic family law proceedings or proceedings for access under the 1980 Convention to find out information from an overseas Convention country about the suitability of a parent as a person for a child to spend time with or communicate with. It allows a court to more easily obtain information that may be of great benefit in making decisions about a child.

The 1996 Convention has the potential to assist in the implementation of the 1980 Convention including, but not limited to, the amelioration of risks associated with alleged family violence and other alleged intolerable situations. The capacity for such orders to be rendered enforceable under the Convention, and the capacity for advanced confirmation of that to be provided, gives an Australian court comfort that the arrangements will be fulfilled upon return without requiring mirror or consent orders to be separately sought.

Feedback from our State Central Authorities is that the information sharing/cooperation provisions are very beneficial. States are relying on these to obtain child protection information on families in that State who are known to have previously resided overseas. The provisions are also being utilised in the reverse situation. These provisions are of particular value because they ensure that child protection concerns are not dealt with in isolation for internationally mobile families.

## **PART II – FOR NON-STATES PARTIES**

43. Is your State currently considering signing and ratifying or acceding to the 1996 Convention?

- ☐ No  
☐ Yes

44. In considering how your State would implement the 1996 Convention, have you encountered any issues of concern?

- ☐ No  
☐ Yes, please explain:  
 Please insert text here

## **PART III – FOR BOTH STATES PARTIES AND NON-STATES PARTIES**

45. Are there any particular issues that your State would like the Special Commission meeting to discuss in relation to the 1996 Convention? Please specify and list in order of priority:

A protocol around the simple and rapid procedure to obtain enforceability in one contracting state of a measure made in another contracting state. In September 2014 one of our Network Judges, Justice Bennett, sent out an email to all Hague Network Judges of countries who are contracting states to the 1996 Convention enquiring about the processes in their country for registration of orders and declarations of enforceability. The responses revealed significant differences between states in relation to the process of seeking registration or a declaration of enforceability, assistance provided to the applicant, the level of involvement of the other parent in the proceedings and the expected length of time between filing an application and obtaining registration of orders or a declaration of enforceability. In one case, the enforceability of the Australian order was delayed by more than 6 months. By comparison, the Network Judge from another country reported that in August 2013 a case in that country was finalised within 17 days.

Discussion about whether other jurisdictions are also experiencing difficulties around right of entry and visa eligibility. As outlined earlier in the Questionnaire, Australian authorities encourage parents, overseas courts and overseas authorities to consider and resolve immigration issues at an early stage when placements are considered in Australia.

The attitude of other Contracting States on the issue of the registration/recognition of orders that allocate parental responsibility in circumstances where it is clear that those orders are being issued in the context of a surrogacy arrangement.

A discussion around whether all requests could give as informative an outline of the circumstances as possible, and at least a clear indication of the nature of the request and the Article that it is being made under.

46. Do you have any observations or comments to share concerning the Practical Handbook on the Operation of the 1996 Child Protection Convention? Please specify:

The Practical Handbook is a good resource for dealing with matters under the Convention.

One of the Australian State Central Authorities indicated that because of the small number of cases under the 1996 Convention, the Practical Handbook is an invaluable guide to them when providing advice or assistance under the Convention. They have indicated their support of the Handbook remaining available and being regularly updated.