



The guardianship of children adopted overseas on entry to Australia

Intercountry adoption

In some countries, for a range of complex cultural and economic reasons, children are unable to be cared for by their families in their country of origin. Intercountry adoption provides permanent family care by Australian families for such children. Australia is party to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Convention) which establishes international principles to ensure that intercountry adoptions occur only where it is in the best interests of the child and with respect for his or her fundamental rights.

The recognition of overseas adoptions and guardianship of children adopted from overseas

Overseas adoptions are not automatically recognised under Australian law in all circumstances, even those that are facilitated by a State or Territory Central Authority (that is, the government department responsible for child welfare and protection). There are a number of different processes, depending on the country from which the child is adopted and the state or territory in which the adoptive family lives, for the adoption to be finalised and recognised under Australian law.

Generally speaking, children whose adoptions are yet to be finalised in Australia or are not recognised automatically under Australian law, are officially under the guardianship of the Minister for Immigration and Citizenship when they enter Australia. The minister can delegate his powers and functions as guardian to certain officers in the relevant Central Authority in the State or Territory where the child resides. However, the minister cannot delegate the office of guardian itself. This arrangement is set out in the *Immigration (Guardianship of Children) Act 1946 (IGOC Act)*.

Children under the guardianship of the minister

In the context of adoption, children who arrive in Australia under the guardianship of the minister are generally:

- those who will need to obtain an Australian adoption order from an Australian court to finalise the adoption
- children adopted by expatriate Australian citizens living overseas, where those children have been adopted:
 - through the domestic processes of the overseas country, or
 - from or through a second country that is not a party to the Hague Convention, and
 - whose adoptions have not been automatically recognised under the state or territory law.

The Department of Immigration and Citizenship (DIAC) will advise adoptive parents whether the child falls within these guardianship provisions of the IGOC Act when a decision is being made to grant the child a visa. DIAC also advises the Central Authority in the state or territory in which the adoptive parents usually reside (or intend to reside) of the child's details and that an adoption visa has been issued.

Children not under the guardianship of the minister

Children arriving in Australia who will not be under the guardianship of the minister are generally:

- children adopted from a country that is a signatory of the Hague Convention where there is an adoption compliance certificate in force and adoption orders made in the country of origin are therefore automatically recognised (for example, Colombia)
- children adopted from prescribed overseas jurisdictions where adoption orders made in the country of origin are automatically recognised—currently the People’s Republic of China only
- children adopted by expatriate Australians resident in a country that is a signatory to the Hague Convention (for example, New Zealand) from another country that is also a signatory of the Hague Convention (for example, Bolivia). There must be an adoption compliance certificate in force and recognised adoption orders made before the child travels to Australia.

Rights and responsibilities of the minister

As noted above, under the IGOC Act, particular officers in the State and Territory Central Authorities are delegated certain powers and functions of guardianship for the child by the minister. These officers have the “... same rights, powers, duties, obligations and liabilities as a natural guardian of a child would have...” (that is, the legally recognised parents of a child).

Practically, this means that those officers in the State and Territory Central Authorities have legal responsibility for the child and can make decisions where a guardian’s approval or consent is needed. For example, this may include (but not be limited to) decisions such as:

- proceeding with major medical treatment involving anaesthetic
- enrolling children in kindergarten or school
- publicly publishing identifying information about the child or any other parties to the adoption
- travelling interstate or overseas for any period of time.

In these cases, the State and Territory Central Authorities will make decisions in close consultation with the child’s custodian, usually the prospective adoptive parents.

Role of prospective adoptive parents

In exercising their powers of guardianship, State and Territory Central Authorities are permitted by the IGOC Act to place the child into the custody of a suitable person, ie a custodian. The prospective adoptive parents are usually the child’s custodians. This means that the State and Territory Central Authorities entrust decisions about the day to day care of the child to his or her prospective adoptive parents. However, the IGOC Act and associated regulations require the child’s custodians to obtain the consent of the State or Territory Central Authority for their child in relation to the major decisions affecting the child (that is, the decisions outlined above). Additionally, in order to assist the State and Territory Central Authorities in making guardianship decisions, prospective adoptive parents have a responsibility to advise the State or Territory Central Authority about critical matters in the child’s health or welfare. Examples include (but are not limited to) where:

- the child becomes seriously ill or is hospitalised
- the child is involved in a serious accident
- the child is diagnosed with a medical condition not previously identified
- the child suffers from serious emotional or psychological issues
- the child is the subject of violence or abuse or allegations of violence or abuse, or
- the capacity of the prospective adoptive parents to care for the child is compromised by illness or other circumstances.

Expatriate adoptive parents should contact the State or Territory Central Authority where they reside regarding the custodianship of their child.

What happens if something goes wrong whilst the child is still under the guardianship of the minister?

The State and Territory Central Authorities are permitted under the IGOC Act to place a child with a different custodian if they consider it to be necessary and in the interests of the child. Practically, this means that it is possible for the State and Territory Central Authorities to place the child in the custody of persons other than the prospective adoptive parents if they perceive it to be in the best interests of that child. Generally speaking, this is only likely to happen where requested by the prospective adoptive parents, in cases of suspected neglect or abuse or where there is an adoption disruption.

When does the guardianship by the minister cease?

The guardianship arrangements cease to apply once the child obtains Australian citizenship, the child turns 18, departs Australia permanently, or in most cases, when the minister (or delegate) makes an order under section 11 of the IGOC Act. Section 11 orders cease the application of the IGOC Act and usually occur when an Australian adoption order is made for the child at the end of the post-placement supervision period. The prospective adoptive parents become the legal parents of the child when an adoption order is made under relevant State or Territory legislation. However, the minister still remains the legal guardian until a section 11 order under the IGOC Act is made.

For expatriate adoptions¹, where the child has not yet been granted Australian citizenship and travels to Australia on an Australian visa, some States and Territories have legislation that automatically facilitates recognition of the overseas adoption. However, a section 11 order under the IGOC Act is still required to cease the guardianship of the Minister (or delegate) unless the guardianship ceases to apply for another reason, such as conferral of citizenship.

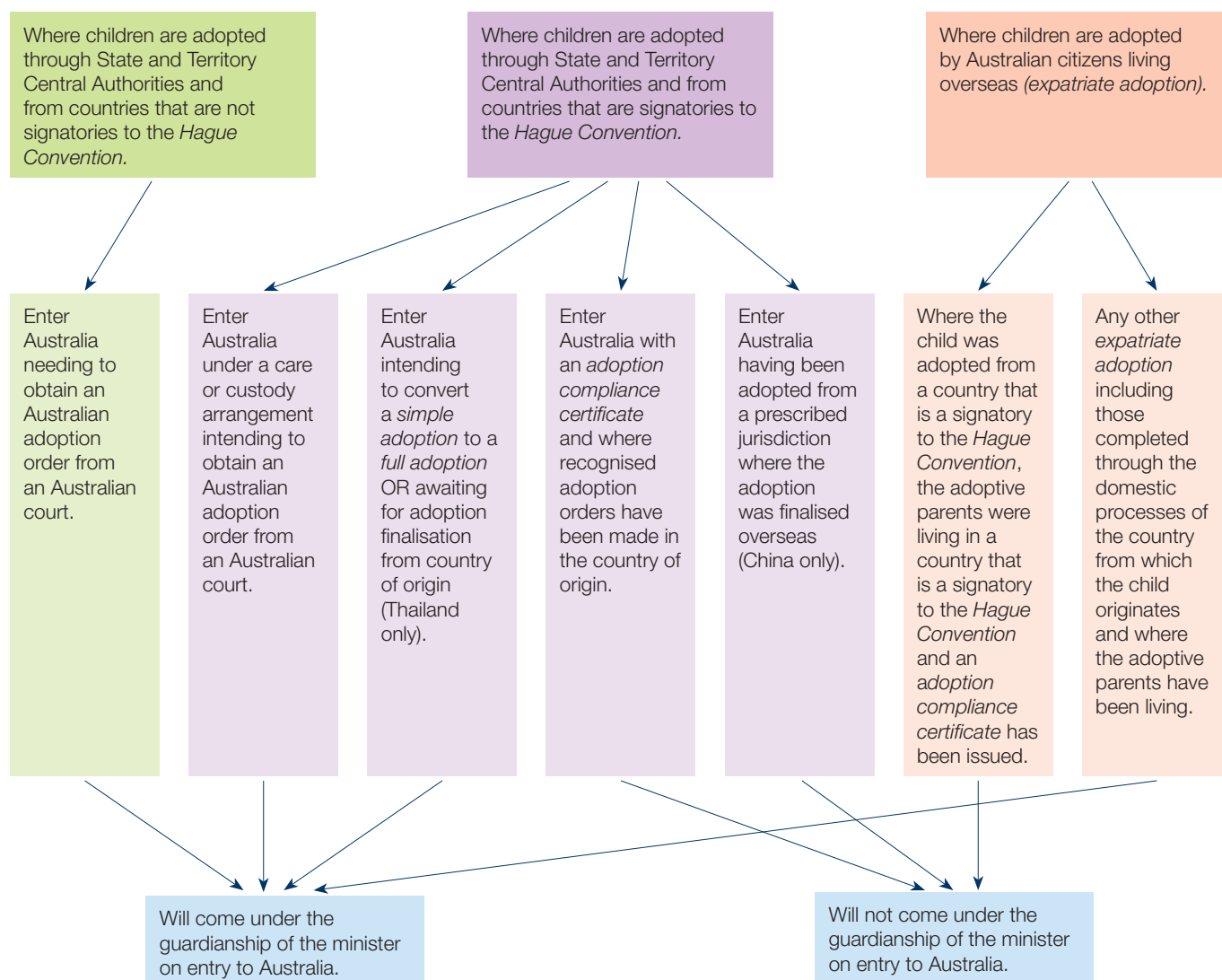
Whether or not the child is adopted through a State or Territory Central Authority or by an expatriate Australian when resident in an overseas country, it is usual for adoptive parents to apply for Australian citizenship for their children once they have entered Australia. The conferral (that is, the grant) of citizenship will cease the guardianship of the minister. For information about applying for Australian citizenship for children adopted overseas, visit www.citizenship.gov.au

Further information

For further information about whether your child will be under the guardianship of the minister when they enter Australia, you can contact the Department of Immigration and Citizenship at <http://www.immi.gov.au> or the State or Territory Central Authority in the state or territory in which you reside or intend to reside.

1. Expatriate adoption is where an Australian living abroad adopts a child from the country in which he or she is resident or another overseas country. The Australian, State and Territory Central Authorities are not responsible for expatriate adoptions, and do not assess or approve applications for such adoptions. For more information about expatriate adoptions you can visit the DIAC website or the Expatriate Adoption page of the Attorney General's website.

IGOC Act and Adoption



Definitions

Expatriate adoption: when an Australian living abroad adopts a child from the country in which he or she is resident or another overseas country.

Full adoption: an adoption where the parent-child relationship which existed before the adoption is terminated.

Simple adoption: an adoption where the parent-child relationship which existed before the adoption is not terminated but a new legal parent-child relationship between the child and his or her adoptive parents is established, and those adoptive parents have parental responsibility for the child.

Hague Convention: *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.*

IGOC Act: *Immigration (Guardianship of Children) Act 1946, administered by the Department of Immigration and Citizenship.*

Adoption compliance certificate: a certificate issued in accordance with Article 23 of the Hague Convention which certifies that the adoption has been made in accordance with the Hague Convention and the necessary agreements have been given by the Central Authorities of both countries.