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**PART I – THE AUSTRALIAN LEGAL SYSTEM**

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1
THE RESEARCH PROBLEM

Learning objectives
1. Adopt a structured approach to legal problem solving.
2. Analyse a research problem for its key facts and issues.
3. Identify key search terms.
4. Effectively use legal reference tools to gain an overview of a topic.
5. Prepare citations for legal encyclopaedias.

A research problem presents the law student or lawyer with a set of issues, whether they are factual or legal, which require further analysis and information gathering, in order to resolve the problem in the context of the law. The methodology of approach to the research problem is more commonly known as legal problem solving, and is what law students practice as they learn and apply the law to factual scenarios set in an assignment or exam. This is academic engagement in replicating the type of legal problems which confront legal practitioners in their work environment. That is, the analysis of a set of facts which trigger one or more legal issues, and the resolution of the issues, through the analysis and application of the relevant law to the particular facts presented.

Legal problem solving

In its simplest form, legal problem solving essentially involves five basic steps.

1. Identification of the relevant facts
2. Identification of the legal issues
3. Identification and interpretation of the rules that govern the legal issues
4. Application of the rules to the facts
5. Conclusion.
A number of models have been developed to assist with the process of legal problem solving, including the MIRAT,1 ILAC, IRAC and HIRAC models. They all reflect the five step approach listed above, with varying emphasis on the fact finding stage as discreet in itself, or as a component of the legal issue identification process. The “Application” stage is alternately referred to as “application and argument” and is perhaps the most intellectually rigorous and important stage of the entire process. It represents the synthesis of your research on the law and the application of the law to the facts, presented in argument in support of a particular position. It requires a mastering of the art of legal discourse, something which is beyond the scope of this Guide, although we do provide initial guidance on the approach to legal argument. Importantly, the MIRAT approach to legal problem solving is a process that is applied to each issue raised in a legal problem, not the composite legal problem itself. Each issue has its own facts, rules, interpretation and application to be considered.

Table 1.1: Legal problem solving models

<table>
<thead>
<tr>
<th>MIRAT</th>
<th>IRAC</th>
<th>ILAC</th>
<th>HIRAC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Material Facts</td>
<td>Issue</td>
<td>Issues</td>
<td>Heading</td>
</tr>
<tr>
<td>Issues of law and policy</td>
<td>Rule</td>
<td>Law</td>
<td>Issue</td>
</tr>
<tr>
<td>Rule</td>
<td>Application</td>
<td>Argument</td>
<td>Rule</td>
</tr>
<tr>
<td>Arguments/Application</td>
<td>Conclusion</td>
<td>Conclusion</td>
<td>Application</td>
</tr>
<tr>
<td>Tentative conclusion</td>
<td></td>
<td></td>
<td>Conclusion</td>
</tr>
</tbody>
</table>

In this chapter, we introduce a research scenario to illustrate the legal problem solving process. The particular focus of this Guide is upon the third step – the identification of the rules that govern the legal issues. To this end, we instruct you in the information resources and search strategies employed to find the law, predominately in the online legal information environment, but also with reference to relevant print resources. A number of alternative sources and databases are introduced, covering Australian and foreign jurisdictions. This focus upon the location of the rules that govern the legal issues is supplemented by a demonstration of legal argument in the preliminary application of the law to the facts of the research scenario.

EXAMPLE RESEARCH SCENARIO (ADAM V EVE)

You have commenced a Summer Clerkship with a mid-sized family law firm, where you have been asked by the senior partner to research the law with

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respect to the right of a parent to unilaterally relocate a child to another country from their normal country of residence.

Client file:
Adam is a consultant engineer who works in the oil and gas industry. He and Eve have been married 10 years and have two children aged 6 and 8. Both children were born in Australia. For the past two years the family has lived in the United Kingdom (UK) where Adam bases his international consultancy. He earns an excellent income and his work frequently requires travel to Europe.

Since living in the UK Eve has missed her home and family, however Adam was born in the UK and has a wide family network there. The move to the UK was originally to be for a two year period only, however demand for Adam’s services and the attractive income he brings in has meant that they decided to stay on for at least a further two years. Six months ago they purchased a beautiful home in Datchet, Berkshire, where they had been renting, and where the children have been attending a local school.

Eve has been unhappy in the UK, and decided to take the children back to Australia for a one month visit at the end of the English school year. However Eve and the children did not return on the date set for return, 1 September 2009, and it appears they have moved in with Eve’s parents into their comfortable home in the Eastern Suburbs of Adelaide. Adam has just learned that Eve has obtained a position as a HR consultant for a defence company based in South Australia and does not intend to return to the UK. The children have been enrolled into a private school near the home they share with Eve’s parents.

Adam has flown back to Australia for an extended Christmas break with his family and seeks your advice on the return of the children to the UK.

The MIRAT process
1. Identification of the relevant (material) facts
The identification of the relevant facts, that is, facts material to the working of the law, is an important skill. Legal problems presented to the law student or practitioner may contain many superfluous facts which are of no relevance. However it is not always a simple task to recognise a relevant fact. As you become more familiar with the substantive law you will become more adept at recognising the relevant facts in conjunction with the constituent elements of the legal rules which comprise the applicable law. For example, the constituent elements of the law of (or rule about) negligence, comprise a duty of care, breach of that duty, and damage as the result of the breach. An understanding of each element of a legal rule helps to inform you as to the relevancy of particular facts. Further research
into the law alerts you to exceptions to a rule and nuances of degree in relation to each required element, thus leading you to identify further facts which you might previously have not thought material to the problem. Legal problem solving is therefore not a strictly linear process.²

The differentiation of material facts from the legal issues which surround the facts may not be a straightforward process. Facts and legal issues are often intertwined, in that there are direct or indirect legal implications implicitly attached to a fact.

For example, John was driving a car and was found to have a blood alcohol reading below that of the prescribed concentration of alcohol.

This is a simple statement of fact, or is it? Is it really complete in that we have all the facts relevant to the question of John’s legal right to drive a car? What form, if any, of driver’s licence is held by John? If John holds a provisional driver’s licence, this may require that while driving, he has no concentration of alcohol in his blood. There are legal implications aligned to many so-called simple facts, therefore the factual analysis required at this stage is very much preliminary to the identification of the legal issues.

As the example above illustrates, the facts might not be clear or facts might be missing. Missing facts should be acknowledged, and as far as they change the legal consequences, you must address the facts and consequences for each alternate scenario when you reach the stage of applying the law to the facts.

For example, It is not known if John holds a provisional drivers licence, however if he does then he has committed an offence under the Road Traffic Act.³ But if John holds a full driver’s licence and his blood alcohol reading is below the prescribed concentration of alcohol, he is not in breach of the law.

Facts might be implied from the circumstances, but take care not to assume facts. The facts might even be difficult facts in that they resonate with moral or ethical issues. Although there may be no specific legal consequences attendant on what makes the fact difficult, it poses a dilemma of a sort for the legal adviser.

General points to note in respect of the facts are summarised as follows:

- list the facts
- facts should be ordered into a logical or chronological order
- each fact should sit discretely on its own
- the facts should be complete

² For further guidance on legal analysis and problem solving, see: J H Farrar, Legal Reasoning (Lawbook Co., Pyrmont, 2010), Pt II; B Wolski, Skills, Ethics and Values for Legal Practice (2nd ed, Lawbook Co., Pyrmont, 2009), Ch 4; M C Brogan and D Spencer, Surviving Law School (Oxford University Press, South Melbourne, 2004), Ch 5.

³ Road Traffic Act 1961 (SA), or other similar State Act.
• missing facts should be acknowledged insofar as they change the legal consequences.

A useful way to determine the facts is through asking questions starting with "What, Who, When, Where, Why, and How". There are variations to these questions depending on the research problem, and not all questions will be applicable to all problems, however, examples are:

• What happened, and what is the desired outcome?
• Who was responsible for the event, and to whom did it happen?
• When did the event happen?
• Where did the event happen?
• Why did the event happen?
• How did the event happen?

THE FACTS OF OUR RESEARCH SCENARIO PRESENTED IN CHRONOLOGICAL ORDER

• Adam and Eve have been married 10 years and have 2 children
• The family has been residing in the UK for the past 2 years where Adam's consultancy is based
• The children are Australian born and have been attending school in the UK
• Eve returned to Australia with the children for a short holiday and has decided not to return to the UK
• Eve has obtained a job in Australia and the children have been enrolled into school
• Adam would like the family to return to the UK

2. Identify the legal issues

The extraction of possible legal issues from a given set of facts is an art to be mastered. It requires a combination of legal knowledge and analytical and lateral thinking skills, and lies at the heart of legal research.

Legal research requires a combination of factual knowledge and higher-level intelligence. Factual knowledge involves recognition of objects, activities, and locations. A higher level of intelligence enables the researcher to create, manipulate, and apply abstract concepts to the given facts. High-level perception involves recognition of relationships and abstract ideas and concepts. It draws meaning out of objects, activities, and locations. This type of insight allows the researcher to think in the abstract, recognizing patterns

in the facts, issues, and primary sources and regrouping them to recognize new patterns. The researcher may recognize similarities, distinctions, and relationships. Out of these patterns, insight may allow the researcher to notice analogies and build abstract conceptual legal frameworks.\(^5\)

In some areas of law this might involve, in part, early recognition of the harm done or the remedy sought. For example, in torts, if you establish that the harm done amounts to the total restraint of a person’s liberty, you are directed to the tort of false imprisonment and the rules which make out this tort. Similarly, you might recognise a contract to be void if a party enters into a contract with another to sell an interest in a company, under the threat of murder if they refuse to sell.\(^6\)

At this stage, issue identification need not be overly specific. As you research further into the legal rules that govern the issues, you will have the opportunity to refine the questions initially raised. Early recognition of possible issues raised by the facts also requires a contextual analysis of the issues. For example, a cause of action such as false imprisonment might arise in both the civil law of tort and as a criminal law action. You need to decide early on in your research the relevant context of the action, often determined by the remedy that you seek. You will also need to begin to address the question of whether the issue concerns State or federal law, or both.

A legal problem will frequently comprise more than one issue. As outlined earlier, each issue has its own facts, rules, interpretation and application to be considered. However, as you research further into the law the resolution of some of the issues initially raised might be a simple matter not requiring detailed research. This occurs when the issue relative to the facts and the law is reasonably certain; therefore little analysis and argument is required. The major issues of your research problem become the difficult or grey areas of the law, relative to the facts. This may be because of problems attendant on the facts as provided, or because the law is uncertain or arguable, or a combination of these factors. The more difficult issues become the issues upon which you need to focus most of your research effort.

The legal issues should be stated in the form of a question, so focusing your attention on providing an answer.\(^7\) This simple method directs you to answering the issues which arise in the problem to arrive at a conclusion. As the law is frequently concerned with the rights and liabilities of parties, it is often useful to approach the framing of the issues in terms of possible rights and liabilities.


\(^6\) Void for duress: Barton v Armstrong [1973] 2 NSWLR 598.

\(^7\) Simpson, above n 4.
For example, is John liable for any offence under the Road Traffic Act\textsuperscript{8} if he holds a provisional driver's licence and his blood alcohol reading is below the prescribed concentration?

THE ISSUES RAISED BY OUR RESEARCH SCENARIO

- Does Eve have a legal right to unilaterally relocate the children?
- Do Eve's actions constitute abduction of the children?
- Have Adam's parental rights been infringed by Eve's actions?
- What are the rights of the children?
- In what country does the law recognise that the children regularly resided?
- Does the law of the United Kingdom or Australia apply?

Fact and issue identification are skills to be learnt and refined through continual practice. From this process the key concepts and associated terms relevant to the problem can be distilled. These terms can then be used in your initial search queries of key secondary sources, such as legal dictionaries, encyclopaedias, commentary services\textsuperscript{9} and texts. Early identification of relevant key terms is particularly important given the prominence of online sources of legal information, which frequently require a keyword search approach to retrieving information.

The relevant facts might be briefly distilled to the following terms:

- Country of residence; Parent and child; Removal of children;
- International relocation

From your knowledge of the law, you may be able to identify the broad legal topics which relate to the issues on a general level in the terms set out below. If you cannot identify any broad legal topics at this stage, return to your research problem and revise the facts and issues once more, or conduct a preliminary search of a legal reference information source\textsuperscript{10} using some of the facts or issues you have identified as your search terms.

- Family law; Child abduction; Relocation; Custody of children;
- Parental control; Rights of the child

\textsuperscript{8} Road Traffic Act 1961 (SA), or other similar State Act.
\textsuperscript{9} "Commentary services" includes what were previously known as loose-leaf services. See Chapter 5.
\textsuperscript{10} A discussion on clarifying legal issues using legal reference sources is set out later in this chapter under the heading "Clarifying the legal issues".
3. Identification and interpretation of the rules that govern the legal issues

The rules make up the law on the matter and may comprise precedent, (including statute or case law), legal principle or policy. For legal rules manifest in a number of guises, and are to be found not only in statute or case law, but might require the extraction of principles found within the common law.\textsuperscript{11} Recourse to policy is a further level of abstraction of legal authority, where “legal precept, precedent, authority and past principles offer an insufficient guide to solve a new problem in a just way”, and requires the evaluation of choices.\textsuperscript{12} Yet it may also be argued that the application of case or statute precedent also requires the evaluation of choice in applying a theory, principle or value.\textsuperscript{13}

These rules both scope the law and provide authority for the law. The authoritative law is then recognised as arising from precedent, principle or policy, and the scope of the law determines the particular elements which make up a legal rule. Enright classifies these rules into elements and consequences.\textsuperscript{14} For example, the elements of the law on what constitutes a legal marriage are:

- The union of a man and a woman
- To the exclusion of all others
- Voluntarily entered into
- For life.\textsuperscript{15}

If all the elements are made out then a legal marriage exists. If not all the elements are made out, then the marriage is not legally recognised in Australian law. The consequences attendant on this lack of recognition are wide reaching. This is a simple example of an aspect of the law which is relatively straightforward, although questions still arise – for example, what of the issue of transgender in respect of recognition of sex? Is a man who has undergone sexual realignment as a woman, recognised under the law of marriage as being a woman?\textsuperscript{16}

Therefore, just as facts resonate with issues which develop as we ask more questions of the facts, so too, the legal rules become less straightforward as we seek to define the parameters of each rule.


\textsuperscript{12} See n 11. A clear illustration of the distinction between the application of authority, principle and policy is provided in the reasoning of the High Court in Catlanach v Melchior (2003) 215 CLR 1.


\textsuperscript{14} See especially, C Enright, Legal Skills (Branxton Press, Sydney, 2006).

\textsuperscript{15} Marriage Act 1961 (Cth) s 5(1). The common law definition of marriage was enacted into statute by the Marriage Amendment Act 2004 (Cth).

\textsuperscript{16} Re Kevin: Validity of Marriage of Transsexual (2001) 165 FLR 404.
Both identifying the rules and obtaining guidance on the meaning of the rules, are important aims of legal research and form the main focus of this Guide. That is, the identification of the law and the attendant interpretation of that law, using the legal research resources with which you need to become familiar. We provide an introduction to the nature of legal information and the process of legal research with the aim to instruct you in the skills and techniques required for you to efficiently locate the relevant law. The following chapters use the research scenario introduced earlier to illustrate this process.

Proficiency at identifying the relevant legal rules requires the efficient use of legal research tools and the critical analysis of the information you retrieve. The skills involved can be identified as follows:

- a focus upon the issues and context of the research problem
- the early identification of relevant search terms
- an understanding of search syntax (how to employ your search terms)\(^{17}\)
- an understanding of the nature of primary and secondary sources of legal information\(^{18}\)
- the ability to evaluate legal information for relevance and authority
- the identification of the best authority for a legal rule
- the ability to synthesise the results of your research.

The ability to evaluate legal information for relevance and authority is a skill which develops as you build both your understanding of the substantive law and your legal analytical skills. This evaluation also requires a sound understanding of our legal system, the judicial hierarchy and the doctrine of precedent which all bear on the question of the authority for the legal rules you use. Such discussions are beyond the scope of this book however there are many excellent texts on these foundation aspects of our legal system.\(^{19}\)

Some additional handy hints when searching for the relevant law:

1. How do you research the law effectively?
   - Work quickly but not at the expense of being thorough
   - Generally progress from broad concepts to the specific
   - Read the relevant primary material (case and statute law), and do not rely solely upon digests and commentary
   - Record your research methodology and take notes as you go
   - Think laterally

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\(^{17}\) See Chapter 2, The Law Online, for discussion of search syntax.
\(^{18}\) See Introduction for discussion on the classification of primary and secondary sources of law.
2. What if you cannot find any specific law on the issue?
   • Rethink your approach to the problem by reviewing the facts
   • Change your search terms
   • Broaden your search parameters
   • Even consider the possibility that there may be very little by way of primary law or analysis on the matter in Australia
   • Try finding similar law in a comparative jurisdiction such as the UK.
3. When to stop?
   • Time constraints
   • When you are learning nothing new
   • When you keep returning to the same case and statute law authorities
   • When you are directed to the same commentaries.

4. Application of the rules to the facts

This stage principally concerns the development of your skills in legal reasoning and argument. These skills come into play when you seek to apply the law to the facts of the matter, examine the issues, canvass the arguments and counter-arguments and provide a conclusion. It is an extremely important step in mastering the legal research process and is one upon which you should concentrate early in your student life.

The law is not always simple or clear. Where it is so, for example the straightforward application of a reasonably unambiguous statutory provision, or a similar fact and issue case law precedent, the application of this authority to the facts in determination of the legal outcome is relatively straightforward and predictable. Where the statute or precedent does not offer direct authority, or is ambiguous, recourse must be made, respectively, to statutory construction and the logic of legal reasoning. Reasoning by analogy is the most common form of legal reasoning, where we treat like cases alike, in that we look to facts, issues, precedent, principles and policy adopted in a case to see if we can predict the outcome of the issue confronting us, relative to earlier precedent. Thus, using reasoning by analogy we might compare differences and distinguish a case. Other forms of reasoning commonly adopted include inductive and deductive reasoning. Inductive reasoning involves arguing from the specific principle or precedent to a general conclusion;

20 See, for example, B Wolski, Skills, Ethics and Values for Legal Practice (2nd ed, Lawbook Co., Pymont, 2009), Ch 6; J Farrar, Legal Reasoning (Lawbook Co., 2010); T Hutchinson, Research and Writing in Law (3rd ed, Lawbook Co., Pymont, 2010); C Enright, Legal Technique (Federation Press, Annandale, 2002); R Krever, Mastering Law Studies and Law Exam Techniques (6th ed, LexisNexis Butterworths, Chatswood, 2006).
21 If it were so, then the legal system we know might be replaced, in part, with expert systems in law.
22 See Chapter 4, Case Law.
deductive reasoning involves arguing from the general principle or precedent to a specific conclusion.\textsuperscript{23}

To ensure your legal reasoning is both logical and transparent, so that your reader can follow the arguments presented, it is important to first be clear about the nature of the legal rule applied. The identification of not only the applicable legal rule, but the form and authority for that rule, is crucial. For example, with reference to our John and blood alcohol reading scenario, the form of the rule is statute law, more specifically, the *Road Traffic Act*.

The application of the law to the facts therefore comprises a number of processes, including:

- the specific identification of authority (statute or case precedent), principle or policy as embodying a legal rule
- the identification of the best authority for a legal rule
- the construction or interpretation of a legal rule
- the identification of ambiguity in the construction of a legal rule
- the identification of conflicting rules, or conflict in the past reasoning and application of a legal rule
- the logical and systematic application of fact to the legal rule
- the analysis of remedies.

This, in essence, becomes the structure of your argument. The reader is made aware of the facts, the issues, the applicable law and the reasoning adopted to argue the facts relative to the law. The legal world is full of examples of the direct application of the law to the facts. Judges do it when they write their reasons for decision; lawyers do it when they provide a legal opinion or advice; law students do it when they address a legal problem in an assignment or exam.

Using the research scenario through this and the following chapters, we provide illustrations of the application of the law to the facts and identify the authorities which comprise the legal rules on the matter.

5. *Conclusion*

Effective legal writing requires you to argue the law and come to a conclusion no matter how difficult the problem is to resolve. This is done by focussing on the strengths and weaknesses of the facts relevant to all the elements of the law. It also requires clear acknowledgment of the difficulties that the law may present, for example, through uncertain rules, so that your conclusion is coherent and can be followed. The conclusion is where you also address the remedy once again so that the applicable outcome sought is clearly defined.

\textsuperscript{23} See, for example, Lord Atkin’s discussion of the neighbour principle in *Donoghue v Stevenson* (1932) AC 562, 580-581.
Clarifying the legal issues

Initial list of search terms

From your identification of the legal issues in Step 2, an initial list of search terms was compiled. These, along with any identified synonyms, will be a useful start for your early research. There are a number of techniques for brainstorming search terms, one of which is the “Cartwheel of terms”.24 This involves placing your topic in the centre of the diagram (wheel) and placing alternative terms around it under headings such as broader terms, narrower terms, synonyms, antonyms, closely-related terms, agencies and courts, and procedural terms.

Some of the key terms for our example research scenario that we have identified so far are:

- Family law
- International relocation
- Rights of the child; Children’s rights
- Parental rights; Parental control; Custody
- Child abduction; Removal of children
- Country of residence.

Gaining a proper understanding of the legal terms encountered in the initial stages of research is vital. So too is understanding the contexts within which these legal concepts operate and acknowledgment of any related legal issues that arise. For this reason, as well as to identify leading cases and applicable legislation, it is useful to begin your research with secondary sources of information,25 such as:

- Legal dictionaries
- Legal encyclopaedias.

Legal dictionaries

A legal dictionary helps to clarify a term, place it in its legal context, and provides related concepts and keywords. There may also be references to key cases or legislation. A keyword search of a library catalogue using the terms law dictionaries will lead you to the dictionaries held at your library. These might include:

- Butterworths Concise Australian Legal Dictionary26
- Oxford Companion to Law27
- Osborn’s Concise Law Dictionary28
- Mozley and Whiteley’s Law Dictionary.29

24 Hutchinson, above n 20, p 88.
25 Although this is very much dependent upon the legal knowledge you already hold.
One useful online dictionary is the *Encyclopaedic Australian Legal Dictionary* (EALD) available on the Australian LexisNexis (LNAU) platform. This is a searchable database of legal definitions supported by Australian legislative and judicial authority which includes jurisprudential and criminological terms, explanations of well-known rules and principles of law, international law terms, treaties and conventions, translations of legal Latin language, descriptions of landmark decisions of the High Court of Australia, and biographical entries.

- At LexisNexis AU, the dictionary can be found by clicking Dictionaries on the top toolbar.
- At the search form, under Sources, select the Encyclopaedic Australian Legal Dictionary.
- Start with one of the identified issues (above); “child abduction”.
- Type *child abduction* into the Defined Terms box.
- The results include a definition of the phrase as input, as well as for “international child abduction”, and the Child Abduction Convention (international treaty).
- Click on the definition of “child abduction” and you will find the definition is associated with two aspects of the law, the first concerning family law matters, the second, alluding to abduction as an offence where the victim is a child. Note that the broad area of law is identified as *Family law*.

**Child abduction**

Definition = “In family law matters, the taking or retention of a child in breach of the custody rights of another person”: *Family Law Act 1975* (Cth) ss 64 and 111B.

Points to note:
- The issues arise in the context of family law, so this definition is immediately on point.
- The terminology used is important, note “taking or retention of a child” and “breach of custody rights”. These phrases are important in two respects. They lead us to the specific elements of the offence of child abduction and introduce two further key legal terms.
- Authority (primary source authority) for the definition is provided in the references to ss 64 and 111B of the *Family Law Act 1975* (Cth).

In addition to the definition of child abduction, the EALD cites further authority in the *Hague Convention on the Civil Aspects of International Child Abduction 1980*

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30 See Chapter 2 for an introduction to LexisNexis AU.
31 Taken from the LexisNexis source information.
(the Convention) which is described as an international agreement "relating to the return of children wrongly removed or retained across international borders". The issue therefore concerns authority from both domestic and international law.\footnote{See Chapters 10 and 11 for researching private (known as "Conflict of laws") and public international law.

\textbf{Figure 1.1:} Definition from the \textit{Encyclopaedic Australian Legal Dictionary}

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\textbf{Convention on the Civil Aspects of International Child Abduction 1980} \\
An international agreement relating to the return of children wrongly removed or retained across international borders, signed in the Hague on 25 October 1980, and sponsored by the Hague Conference on Private International Law. The Convention entered into force for Australia on 1 January 1987 and is implemented by the (CTH) Family Law (Child Abduction Convention) Regulations 1986: (CTH) Family Law Act 1975 s 111B. Its purpose is to discourage the unilateral removal or retention of children internationally, and to secure the prompt return of children wrongly removed from or retained in any state: Director-General of Family and Community Services (NSW) v Davis (1990) 14 Fam LR 381; PLC 162-162. A person who has a right to custody of a child, who has been removed from one Convention country to another or is wrongly retained, can apply for an order for the return of the child. The court must order the return of the child forthwith unless it is satisfied that: the person complaining has consented to the removal or retention; there is a grave risk that the child's return would expose the child to physical or psychological harm; the child being of sufficient maturity, objects to being returned; or return would be contrary to Australian principles of human rights: (CTH) Family Law (Child Abduction Convention) Regulations 1986 reg 16(2). Approximately 60 countries are signatories: reg 10, Sch 2. Also known as "Hague Convention on the Civil Aspects of International Child Abduction 1980". See also Abduction; Access; Child; Convention on the Rights of the Child 1989; Custody; International child abduction; Kidnap; Municipal law; Private international law. \\
\hline
\end{tabular}
\end{center}

The EALD then proceeds to describe the elements of the legal concept or offence of child abduction under the Convention.

A person who has a right of custody of a child, who has been removed from one convention country to another or is wrongly retained, can apply for an order for the return of the child.

\begin{itemize}
  \item \textbf{Element 1} \hspace{1cm} person with a right of custody of the child
  \item \textbf{Element 2} \hspace{1cm} child is removed from one convention country to another, or is wrongly retained in a convention country
  \item \textbf{Consequence} \hspace{1cm} application for an order for return of the child
\end{itemize}

You also need to address any legal exceptions or defences to the offence of child abduction. These exceptions and defences are also set out in the EALD.

The court must order the return of the child forthwith unless it is satisfied that: the person complaining has consented to the removal or retention; there is a grave risk that the child's return would expose the child to physical or psychological harm; the child being of sufficient maturity, objects to being returned; or return would be contrary to Australian principles of human rights.

\begin{itemize}
  \item \textbf{Defence 1} \hspace{1cm} Person applying for return of the child originally consented to the removal or retention
  \item \textbf{Defence 2} \hspace{1cm} grave risk of physical or psychological harm to the child if returned
  \item \textbf{Defence 3} \hspace{1cm} child objects to being returned and is of sufficient maturity for objection
  \item \textbf{Defence 4} \hspace{1cm} return of child contrary to Australian principles of human rights
\end{itemize}
Each element and defence making up the rules of child abduction raises further questions:

- What does a right of custody amount to?
- What is a convention country?
- What is wrongful retention or wrongful removal?
- To what authority is an application for return of the child made and what are the specific requirements of the application?
- What constitutes consent to removal or retention of the child?
- What amounts to grave risk of physical or psychological harm?
- When is a child’s objection to return taken into consideration?
- What are or where would we find the Australian principles of human rights?

Many of these questions should be answered with reference to primary sources of authority and the EALD cites some of this authority, namely the Family Law Act 1975 (Cth), the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the Family Law (Child Abduction Convention) Regulations 1986 (Cth). Reference should also be made to any case law which interprets and applies provisions and articles of the legislation and Convention.

The dictionary reference source is, however, only a preliminary step in understanding the legal rules relating to child abduction. It is a synopsis and guide only and cannot replace the primary source authority in setting out all the specifics of the offence, exceptions and defences, particularly as it does so outside the context of other requirements of the legislation and Convention.33

**Legal encyclopaedias**

Legal encyclopaedias provide commentary on the current state of the law. They are arranged systematically by topic, and contain case and statute law authorities in support of the propositions of law. For the law student they are particularly useful as they succinctly summarise leading issues. However, remember that they are secondary sources and that the law cited may not be completely up-to-date, making it essential to verify and update the primary sources cited. There are two Australian legal encyclopaedias, both of which are available in print and online:

1. *Halsbury’s Laws of Australia* (LexisNexis)

**Halsbury’s Laws of Australia**

*Halsbury’s Laws of Australia* provides statements of principle on the law of Australia through 89 subject titles. It is available in print and online via LexisNexis AU. Most LexisNexis AU publications provide both browse and search options.

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33 For example, a specific procedural requirement of the application for return of a child wrongfully removed, requires that the application be made within one year of the child’s removal: Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 16(1)(b).
SEARCH OPTION

When searching or browsing legal encyclopaedias it is especially important that you are aware of the relevant context of law being researched. For example, in Halsbury’s Laws of Australia, a search for the phrase “child abduction” provides a range of results pulled from the subject areas (Titles) of Family Law, Contempt, Foreign Relations, Citizenship and Migration and Conflict of Laws. Search results specify the source and location of the paragraph within the topic arrangement of the encyclopaedia therefore providing important contextual information. We can see below that an area of law relevant to our research problem is Title 85 “Conflict of Laws”.

Figure 1.2: Search results from Halsbury’s Laws of Australia on LexisNexis AU with Table of Contents (left menu) showing Title location

The results of a search on “child abduction” in Halsbury’s reflects the results of the encyclopaedic dictionary search; that the topic concerns both domestic (Family Law Act 1975 (Cth)) and international law (Hague Convention on the Civil Aspects of International Child Abduction 1980), with commentary focussing primarily upon the Hague Convention.
BROWSE OPTION

Another option is to view the table of contents in the Browse tab, although this requires an understanding of where relevant information is filed in the Topic arrangement. Halsbury's Laws of Australia has a "Quick Find" option on the Browse screen which searches the entire database, not just the Topic titles. The Search option used in the example above, does however allow you to limit your database search to a specific Title/s, for example, Conflict of Laws.

For the browse view, click the Browse link and follow this path, opening the + signs as you go to find more specific subtitles, chapters etc.

85 Conflict of Laws > II Choice of Law > (1) Family Law > (E) Proceedings in Relation to the Welfare of Children

Within each Title, the text is organised by numbered paragraphs [indicated by square brackets] for ease of cross-referencing and updating. Each paragraph number has two components; the first number represents the Title (Subject category) within which the paragraph is located (for example, 85 is the number allocated to the Conflict of Laws Title), the second number indicates the numerical position of that paragraph within the Title.

Click on [85-1040] Abduction of children: Hague Convention, to go to the text of the paragraph.

Scroll down to view the Notes referred to. These notes identify cases and legislation. Links are provided where the materials are subscribed to within LexisNexis AU. Coloured signals next to the cases indicate the status of the case.34

Note the date at the top of the paragraph which indicates when the paragraph is current to in terms of the law.35 It is extremely important to update the primary sources.36

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34 Case signals are explained in more detail in Chapter 4, Case Law.
35 The paragraph is current to 17 July 2006 when viewed on 29 April 2010.
36 See Chapters 3, Legislative Material and 4, Case Law.
In Australia, the central authority, or a person, an institution, or another body that has rights of custody in relation to the child for the purposes of the Convention, may apply to a court having jurisdiction under the (CTH) Family Law Act 1975 for orders for the return of the child, for the issue of a warrant to find and recover a child (warrant) authorisation in serious and urgent cases to enter and search premises and to stop, enter and search a vehicle, vessel or aircraft, restraining the removal of the child from a specified place, placing him or her with an appropriate person or institution pending determination, and applicant any other order the central authority considers appropriate to give effect to the Convention. If the court is satisfied that the removal or retention is wrongful, it must order the return of the child without consideration of what the best interests of the child require, unless it is satisfied that the case does not fall within the scope of the Convention or it has a discretion to decline the return of the child under one or more of the specific grounds set out in the Convention. If an application for the return of the child is filed after the expiry of one year from the date of removal or retention, and the person opposing the application cannot establish that the child is settled in his or her new environment, the court must make an order for the return of the child. The principle that the best interests of the child is the paramount consideration does not apply to proceedings under the Convention. There is no constitutional objection to returning a child who is an Australian citizen to the foreign country of the child's habitual residence.

Notes
1 The Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980: Aust 75 1987 No 2; Comnd 8281) was implemented by the (CTH) Family Law (Child Abduction Convention) Regulations 1986 made pursuant to (CTH) Family Law Act 1975 s 111B.
2 The Convention entered into force for Australia on 1 January 1987.
4 See further [85-1045].
5 In Australia the functions of the central authority are exercised by the Commonwealth Central Authority within the Commonwealth Attorney-General's department and State and Territory central authorities: (CTH) Family Law (Child Abduction Convention) Regulations 1986 regs 5, 6. An application for the return of a child may also be made directly to an Australian court: ibid reg 6. See In the Marriage of Farragough (1987) 1 Fam LR 776; In the Marriage of Panayotides (1996) 21 Fam LR 444.
6 ibid reg 15.

Search tip
If you know the area of law that you wish to search, but not the specific legal principle, use the Browse screen to select the relevant title, eg Conflict of Laws, then type more specific words into the Quick Find box. This will eliminate some of the more irrelevant results.

The Laws of Australia

The Laws of Australia is available in print and online via Legal Online. Within this encyclopaedia, subjects are arranged into 36 legal topics, therefore the headings under which to look for legal principles are different to those in Halsbury's. For example, unlike Halsbury's, the topic "Conflict of Laws" is not a Topic Title within

37 See Chapter 2 for an overview of Legal Online.
The Laws of Australia. The topic of “international child abduction” is located within the “Family Law” title. If in doubt about which Topic headings to browse, enter your phrase in the Find box at the top left of the screen.

SEARCH OPTION

The free text search option in The Laws of Australia allows you to search keywords throughout the complete encyclopaedia. Other options include field searches by Case or Legislation, Title (one of the Laws of Australia 36 Titles), Words and Phrases (which might be a useful way to research the phrase “wrongful removal” for example), or “Legal Principle” (which limits your search to the major statements on the law appearing in bold text). As a general keyword search is your simplest option it is often the most effective way to search, provided your search terms are not too general.

The legal dictionary search has given us specific legal terms which accurately describe some of the legal issues in the research problem scenario. A good way to proceed with the legal encyclopaedia is to use some of these identified terms in your search.

- Search for “wrongful retention” in the Free Text Search box, remembering to use “double quotation marks” around your terms so the search is read as a phrase.
- The search results are listed as legal principles (in bold) within which your search terms may appear highlighted. If they are not highlighted the search terms will appear in the commentary text which sits behind the statement of legal principle. Selecting any of these principles will then display the full text summary on the statement together with authorities. Also appearing in the results list is the classification string under which the principle is categorised. This classification provides useful context to the legal principle by noting which Topic and sub-category your results are appearing within.
To perform a more specific search, click New Search at the top of the screen.

- In the Legal Principle search box, type "child abduction".
- Select Family Law from the TLA Title drop down box.
- Click Search.

**Figure 1.5: Search screen from The Laws of Australia online**

**BROWSE OPTION**

You can browse the topic titles of *The Laws of Australia* in a similar manner to *Halsbury's Laws of Australia*. To return to our research scenario, we could check under the Family Law title to see if any relevant material is there, or locate more specific information in the browse option, by searching for any mention of "child abduction" as a topic.
The subject titles can be browsed in the left frame by opening the folders and then clicking on a heading to display a list of legal principles or propositions of law (in bold) in the right frame.

- Browse the following title in The Laws of Australia

**Family Law > International Child Abduction**

*Figure 1.6: Browsing Titles in *The Laws of Australia*, with legal principles displayed in right panel*

Each Legal Principle within the selected topic is listed sequentially by paragraph number and is accompanied by the assigned classification/s. For example, paragraph [17.8.10] has the classification:

- Family Law > International Child Abduction > Introduction > Definition

When each level of the classification is selected, the relevant legal principles are displayed in the right frame.

- In the right frame click on the legal principle [17.8.10] to read a fuller discussion of the principle, with links to related discussions, supported by Australian case law, legislative and international law authorities.

- The commentary screen links to the full-text case law where subscribed to via Legal Online with any legislative references linking to AustLII.38

This information is also displayed below the commentary text in the "Cases Cited" and "Legislation Cited" boxes.

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38 The automatic linking to legislation on AustLII is a preference setting. See Chapter 3 for finding online legislation.
Search tip

Take note of the “Current as at” date at the top of the commentary screen which advises on the currency of the information. This may alert you to update the case law information provided with a further search in a more current case law database such as FirstPoint. Legislative changes should be updated in a relevant legislation database.

Figure 1.7: Paragraph from The Laws of Australia online

"International child abduction" occurs when a child is taken across the border of one country to another without the consent of a person, usually a parent, in contravention of a right which that person has in relation to custody of, or access to, that child.

Family Law > International Child Abduction > Introduction > Definition

Citation: TL4 [17.8.10]
Title Editor(s): Dr Owen Jessep (1994 - ), Professor Anthony Dickey QC (1995 - )
Current Author(s): Alexandra Harland
Current as at: 22 September 2008

"International child abduction" occurs when a child is taken across the border of one country to another without the consent of a person, usually a parent, in contravention of a right which that person has in relation to custody of, or access to, that child. The means of enforcing a return of the child to the country of its origin will depend on whether the countries involved are contracting parties to the Convention on the Civil Aspects of International Child Abduction (International Child Abduction Convention) (1980) 1980 UNTS 89; 19 ILM 1501; [1987] ATS 2; see [17.8.270] - [17.8.660]. If both countries are contracting parties, a child (under the age of 16 years) who has been removed or retained in contravention of custody rights may be the subject of an order that he or she be returned to the country of origin forthwith. In Australia, the International Child Abduction Convention is implemented by the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

If the child is taken to or from a country which is not a contracting party to the International Child Abduction Convention, the Family Law Act 1975 (Cth) and the common law relating to international child abductions apply.

Footnotes: 1
1. Or in some cases, an institution.
4. The jurisdiction of the Family Court of Australia extends to a child under the age of 18 years: see Family Law Act 1975 (Cth), ss 61C (1), 65H(1) - (2).

Legislation Cited

Commonwealth
- Family Law Act 1975, s 61C(1), ss 65H(1) – (2)
- Family Law (Child Abduction Convention) Regulations 1986, reg 2(1), Sch 1

Treaties and Conventions

See Chapter 4 for information on this case law database.
See Chapter 3, Legislative Material.

A PRACTICAL GUIDE TO LEGAL RESEARCH
Expanded list of keywords

After checking the legal dictionaries and encyclopaedias, an expanded list of keywords and concepts on this topic can be developed to assist with the next stages of your research. You may have come up with some of the following terms and phrases:

- Family law, Private international law, Conflict of laws (broad areas of law)
- Child abduction, International child abduction, Wrongful removal or retention, Breach of custody
- Right of custody, Consent
- Grave risk of harm, Objection of child, Australian principles of human rights, Best interests of the child, Paramount consideration
- Convention country, Return order, Central authority, Country of habitual residence

\textit{Family Law Act 1975 (Cth) ss 64 and 111B}

\textit{Family Law (Child Abduction Convention) Regulations 1986 (Cth)}


\textit{Convention on the Rights of the Child 1989}

You may also have come up with some cases to follow up, such as \textit{MW v Director-General, Department of Community Services}.

Search techniques

You should now start to think about how to group some of these terms together using search techniques common to most databases. Search techniques vary with the database being used, so it is a good idea to check the Help links for each database. Some common connectors (also called Boolean connectors) and search techniques are discussed in Chapter 2 (including a table which summarises connectors used for a number of important legal databases).

There are numerous variations you might begin with when entering your search. A certain amount of trial and error is expected as you become familiar with the requirements of particular databases. If a search fails or retrieves no results, go back and check for spelling, incorrect symbols or the use of "reserved" characters such as parentheses (\textbf{)\textbf{)}}. Some searches for our topic could include:

\footnotesize{41} (2008) 244 ALR 205.
\footnotesize{42} Table 2.1, see p 43.
“child abduction” AND “return order”
“wrongful removal” OR “wrongful retention”
Child w/s custody AND “Hague Convention”

Keep in mind that you will usually need to go back and refine your search strategy depending on the results you get. Too few results may mean that you need to broaden your search or use alternative terms. Too many results may mean that you need to add more specific terms to your search or limit your results in some way, perhaps by date or jurisdiction.

Citation

This section contains citations for some of the references found from searches described in this chapter. Citations are constructed according to the *Australian Guide to Legal Citation*, 3rd ed (AGLC3). Remember that there are various ways to cite legal information, particularly for secondary sources and traditional print sources now available online. Consistency is of prime importance, as is the inclusion of sufficient information to enable the reader to locate the item.

*Legal encyclopaedias*

Where a legal encyclopaedia indicates the date of the last update, this date should be included. Otherwise, the date of retrieval should be included.


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43 *Australian Guide to Legal Citation* (3rd ed, Melbourne University Law Review, Melbourne, 2010).