IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B28 of 2012

BETWEEN: **RCB AS LITIGATION GUARDIAN OF EKV, CEV, CIV, AND LRV**
Plaintiffs

AND: **THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA**
First Defendant

DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITIES (CHILD SAFETY AND DISABILITY SERVICES)
Second Defendant

LKG
Third Defendant

TV
Fourth Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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I

INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

II

BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

3. The Commonwealth makes submissions in support of the validity of s 68L(3) of the *Family Law Act 1975* (Cth) (**Act**). The Commonwealth does not make submissions on whether relief should be granted on the facts of the present proceeding.

III

APPLICABLE PROVISIONS

4. The Commonwealth accepts the statements of the applicable constitutional provisions, statutes and regulations in the submissions of the plaintiffs and second defendant.

IV

ARGUMENT

Introduction

5. In the exercise by the Family Court of jurisdiction under s 39(5)(d) of the Act in proceedings instituted under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (**Regulations**), procedural fairness may require that an affected child who has or may have attained an age and degree of maturity which make it appropriate to take account of his or her views be afforded an opportunity to express those views and to have them taken into account by the court.

6. The Act and the Regulations and the *Family Law Rules 2004* (Cth) (**Rules**) made under the Act provide for a range of procedures by which that opportunity is able to be afforded. Only one of those procedures is the making of an order under s 68L(2) that the child's interests in the proceedings are to be independently represented by a lawyer (**ICL**) whose role is as described in s 68LA.

7. In limiting the circumstances in which an order can be made under s 68L(2), s 68L(3) does nothing to require or permit a court to act other than in accordance with judicial process. It does nothing to prevent the views of the child being taken into account other than through the making of an order under s 68L(2). Nor would s 68L(3) prevent the court making an order under s 68L(2) were the court to consider in the circumstances of a particular case that the order would afford procedural fairness when other procedures might for some reason be deficient.

Procedural fairness in the exercise of the judicial power of the Commonwealth

8. Procedural fairness "is a concomitant of the vesting of the judicial power of the Commonwealth"[1] and a defining characteristic of a court exercising federal jurisdiction.[2] Since the legislative power of the Commonwealth does not extend to the making of a law which requires or authorises a court to exercise the judicial power of the Commonwealth "in a manner which is inconsistent with the essential character of a court or with the nature of judicial power",[3] it may be accepted that a Commonwealth law cannot validly require or authorise a court to act otherwise than in accordance with procedural fairness.

9. What is required by procedural fairness, however, is the avoidance of "practical injustice":[4] relevantly no more than the provision to a person whose rights or legally recognised interests may be directly affected by an exercise of judicial power of a *reasonable* opportunity to be heard. The procedures by which a reasonable opportunity to be heard might be provided within the context of a particular jurisdiction admit of a range of legitimate legislative and judicial choices. What amounts to a reasonable opportunity to be heard must be accommodated to the nature of the jurisdiction and to the range of competing interests that may need to be balanced.[5] In determining whether

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1 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [42] per Gaudron and Gummow JJ; see also at 89 [5] per Gleeson CJ.

2 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 (***International Finance***) at 354 [54] per French CJ, 379-80 [141] per Heydon J; *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] per French CJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] per French CJ and Kiefel J; *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45] per French CJ; *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ.

3 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

4 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37] per Gleeson CJ; see also at 34-5 [106] per McHugh and Gummow JJ, 38-9 [122] per Hayne J, 48 [149] per Callinan J.

5 *J v Lieschke* (1987) 162 CLR 447 at 457 per Brennan J.

an opportunity to be heard in a particular case according to a particular procedure is fair, "the whole of the circumstances in the field of enquiry are of importance" and "[t]he nature of the jurisdiction exercised and the statutory provisions governing its exercise are amongst those circumstances".[6]

Jurisdiction in proceedings instituted under the Regulations

Hague Convention Proceedings

10. Australia is a party to the *Convention on the Civil Aspects of International Child Abduction*, done at The Hague on 25 October 1980 (**Convention**).[7] The objects of the Convention are "to secure the prompt return of children wrongfully removed to or retained in" a contracting state and to "ensure that rights of custody and of access" under a contracting state's law "are effectively respected" in other contracting states.[8]

11. Sections 125 and 111B of the Act together empower the Governor-General to make regulations that enable Australia to perform its obligations, or to obtain any advantage or benefit, under the Convention.

12. The Regulations must be construed having regard to the Convention's principles and objects (reg 1A(2)(a)), recognising that it is the child's country of habitual residence that is ordinarily the appropriate forum for "resolving disputes relating to a child's care, welfare and development" (reg 1A(2)(b)).

13. The Regulations designate the Secretary of the Commonwealth Attorney-General's Department as the "Commonwealth Central Authority" (reg 2), and authorise the Attorney-General to appoint a person as a State Central Authority (reg 8). The Commonwealth Central Authority is obliged, upon receiving a request to take action to secure the return of a child claimed to have been removed from a Convention country to Australia in breach of rights of custody, to take action to secure the return of the child under the Convention (reg 13) by means which include himself or herself applying for an order under Pt 3 of the Regulations for the return of the child (reg 13(4)(d)) or transferring the request to a State Central Authority (reg 13(4)(a)) who then has the power and duty to make the same application (reg 9).

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6 *Coulter v The Queen* (1988) 164 CLR 350 at 356 per Mason CJ, Wilson and Brennan JJ.

7 [1987] ATS 2.

8 Convention Art 1.

14. An application by a Central Authority for a return order under Pt 3 of the Regulations is made under reg 14(1)(a) to a court in which federal jurisdiction is conferred or invested under s 39(5)(d), (5A)(a) or (6)(d)(i). Regulation 14(1)(b) enables the making of a similar application by "a person, institution or other body that has rights of custody in relation to the child". Reg 15(1)(a) empowers the court to which the application is made to make a return order if "satisfied that it is desirable to do so" and reg 16 obliges the court to do so in the circumstances specified in reg 16(1) or (2) unless "a person opposing return" establishes one of four exemptions based, broadly, on the consent or acquiescence of the person seeking the child's return (reg 16(3)(a)), grave risk of exposing the child to physical or psychological harm (reg 16(3)(b)), an objection of sufficient strength by a child of sufficient maturity (reg 16(3)(c)), or the fundamental principles of Australia relating to human rights and freedoms (reg 16(3)(d)). If a court makes a return order, reg 19A(1) allows the applicant or "a respondent to the proceeding" to apply to the court for an order discharging the return order if satisfied of a ground specified in reg 19A.

15. The specific identification of who can make an application under reg 14(1) manifests a "contrary intention" within the meaning of s 69C(2) of the Act, which would otherwise have permitted institution of proceedings in relation to a child by the child's parent, the child, the child's grandparent, or any other person "concerned" with the care, welfare or development of the child.[9] An application under reg 14(1) is required by reg 27(1)(a) to be served on the person who the applicant claims has wrongfully removed or retained the child who is the subject of the application. Together, regs 14(1) and 27(1)(a) identify necessary parties to proceedings.

16. The child the subject of the application is not a necessary party. There are, however, several mechanisms under the Act and Regulations which afford an affected child who has or may have attained an age and degree of maturity which make it appropriate to take account of his or her views an opportunity to express those views and to have them taken into account by the court.

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9 *A v GS* (2004) 187 FLR 240. At the time of this decision, reg 14 was in a different form, providing only for applications by a central authority. The court held that a parent could not make an application. The regulation was subsequently amended to allow applications by persons with rights of custody. The principle still holds, however, that the regulations specify who may institute proceedings and a child may not do so under reg 14.

17. *First*, the parties to a proceeding can adduce evidence of the child's views.[10]

18. *Second*, the court may direct a family consultant to report on relevant matters (reg 26(1)) and the family consultant is also able to report on any other matter that relates to the care, welfare or development of the child (reg 26(2)). The court is specifically empowered to order the attendance upon a family consultant of a party or of the child (reg 26(3)).

19. *Third*, the child may apply to intervene in a proceeding. Section 92 of the Act allows the court, on application, to make an order entitling "any person" to intervene as a consequence of which the person will be "deemed to be a party with all the rights, duties and liabilities of a party". Part 6.3 of the Rules facilitates a child's intervention in, and subsequent conduct of, a proceeding by a case guardian save where "the court is satisfied that [the] child understands the nature and possible consequences of the case and is capable of conducting the case".

20. *Fourth*, the court may, in exceptional circumstances, order under s 68L that the child's interests be independently represented by an ICL.

21. These mechanisms operate alongside other mechanisms designed to protect a child from participation that could be harmful to his or her welfare. In particular, s 100B of the Act prohibits a child from swearing an affidavit, being called as a witness, or being present in court unless the court orders otherwise and s 60CE clarifies that nothing in Part VII (including the sections prescribing the role of the ICL) permits the court or any person, to require a child to express views.

Operation of s 68L and validity of s 68L(3)

Operation of s 68L

22. Section 68L(1) applies s 68L to a proceeding where the best interests or welfare of the child are required to be taken into account as the paramount consideration or a relevant consideration. While the best interests or welfare of the child are not required to be taken into account in proceedings under the Regulations as the paramount

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10 Although the hearsay exception in s 69ZV of the Act may not apply in proceedings under the Regulations (see s 69ZM), the *Evidence Act 1995* (Cth) s 66A would operate so that the hearsay rule would not apply to evidence of a child's previous representation that was a contemporaneous representation about the child's feelings; and the exceptions for first-hand hearsay in ss 63 and 64 could apply in relation to a child who is not incompetent by reason of lack of capacity (*Evidence Act 1995* (Cth) ss 13, 61).

consideration,[11] they may be a relevant consideration when, for example, the exception in reg 16(3)(b) "requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child".[12]

23. Section 68LA governs the role of an ICL appointed to represent the interests of a child. An ICL is not the child's legal representative, nor obliged to act on the child's instructions (s 68LA(4)) but is rather to form, and act upon, an independent view of what is in the child's best interests (s 68LA(2)), although he or she is obliged to put before the court "any views expressed by the child" (s 68LA(5)(b)). Underscoring the independence of the role, an ICL must act impartially in dealings with the parties (s 68LA(5)(a)), and must ensure that certain matters are properly drawn to the court's attention (s 68LA(5)(c)). The obligation to put before the court "any views expressed by the child" does not entail a positive obligation on the ICL, himself or herself, to ascertain the views of the child. The ICL may become aware of views expressed by the child through reports of family consultants, doctors, teachers or others, or if the ICL meets with the child. But there is no statutory obligation on the ICL to meet with a child to investigate his or her views. The ICL might, in a particular case, form the view that meeting the child to ascertain the child's views would be inconsistent with his or her statutory obligations, by reason that the meeting would: compromise the ICL's ability to form an independent view of the child's best interests (s 68LA(2)(a)); or be detrimental to the child's interests (s 68LA(2)(b)); or not minimise trauma to the child (s 68LA(5)(d)); or not facilitate an agreed resolution of matters at issue (s 68LA(5)(e)). This position is reflected in Guidelines for ICLs dated 6 December 2007 and endorsed by the Chief Justice of the Family Court and by the Federal Magistrates Court, which provide that "assessment about whether, where and how to meet the child is a matter for the ICL", though "it is expected that the ICL will meet the child" unless there is reason not to do so.[13] Thus, the power to appoint an ICL cannot be seen as necessarily a manifestation of affording a child the opportunity to be heard: it depends upon the circumstances.

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11 Cf s 60CA. See also *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 (***De L***) at 658 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

12 *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 418 [41] per Gaudron, Gummow and Hayne JJ. See also *De L* (1996) 187 CLR 640 at 661 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, at 683 per Kirby J.

13 Family Law Courts, *Guidelines for Independent Children's Lawyers*, 6 December 2007 available at <www.familylawcourts.gov.au> at [6.2].

24. Section 68L(4) provides that a court can make an order for the appointment of an ICL of its own initiative or on the application of the child, an organisation concerned with the welfare of children, or any other person.

25. Section 68L(2)(a) provides that a court "may" make such an order "if it appears to the court" that the interests of the child "ought to be" independently represented. Despite the word "may", once a court has reached the judgment referred to in s 68L(2)(a) that the interests of a child "ought" to be independently represented by a lawyer, the section cannot sensibly be read as empowering the court to refuse to make the order.[14] While s 68L(2)(b) allows the court to make "such other orders as it considers necessary to secure that independent representation of the child's interests", neither s 68L(2)(b) nor any other provision of the Act extends to ordering a person not party to the proceeding to incur expenditure in providing that representation.[15]

26. The operation of s 68L(3) is to limit the circumstances in which a court may form the judgment in s 68L(2)(a): it indicates to a court that it should not form the view that independent representation "ought" to be ordered, unless the court "considers there are exceptional circumstances that justify doing so".

27. The words "exceptional circumstances" in s 68L(3) are to be given their ordinary meaning in a curial context:

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[16]

28. Construed in that manner, s 68L(3) operates to prevent an order under s 68L(2) being made as a matter of routine: if and to the extent that the interests of the child are raised for consideration in a proceeding under the Regulations, those interests are ordinarily to be ascertained by other processes at the court's disposal. What s 68L(3) requires is something unusual or uncommon in the circumstances of the particular case to warrant ordering that a lawyer having the independent role defined by s 68LA represent the

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14 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [33] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

15 *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184.

16 *R v Kelly (Edward)* [2000] QB 198 at 208 per Lord Bingham of Cornhill CJ. See also *Baker v The Queen* (2004) 223 CLR 513 at 573 [173] per Callinan J.

child's interests in the proceeding. Section 68L(3) would not prevent an order being made under s 68L(2) were it to appear to the court that the appointment of an ICL would afford procedural fairness in the circumstances of a particular case, when other processes for some reason would not.

Evolution of independent children's lawyer

29. The curial appointment of a lawyer independently to represent the interests of children in proceedings concerning the welfare of the child has limited historical antecedents and must be seen to be a modern statutory innovation. Moreover, it must be understood within its wider context, encompassing the relatively recent emergence of an appreciation of, and commitment to, the capacities and rights of children to participate in decisions that affect them.[17]

30. The emergence of that appreciation is evident in the 1983 amendment to the Act enabling, in custodial proceedings, the wishes of a child of any age, and not only a child over 14 years old, to be taken into account (and given weight appropriate to the circumstances).[18] It is also evident in the 1986 decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[19] (subsequently adopted by the High Court in *Marion's Case*[20]) holding, by reference to changing social customs[21] and "the conditions of today",[22] that the parental right to control a minor child does not extend in time until the child reaches a fixed age, but depends upon whether the particular child possesses "sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision".[23] It came to be reflected in the *Convention on the Rights of the Child*, done at New York on 20 November 1989 (**CRC**), which Australia ratified in 1990,[24] and to which Pt VII of the Act is intended to give effect.[25] The CRC recognises

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17 Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) at [1.3].

18 *Family Law Amendment Act 1983* (Cth) s 29 (amending s 64(1)(b) of the 1975 Act).

19 [1986] 1 AC 112 (***Gillick***).

20 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

21 *Gillick* [1986] 1 AC 112 at 171E per Lord Fraser of Tullybelton.

22 *Gillick* [1986] 1 AC 112 at 187B per Lord Scarman.

23 *Gillick* [1986] 1 AC 112 at 186D per Lord *Scarman*. See also at 171E per Lord Fraser of Tullybelton, 195A per Lord Bridge of Harwich.

24 [1991] ATS 4.

the right of a child who is capable of forming his or her own views to "be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law" (Art 12(2)). The CRC does not prescribe the mechanisms that may be used to afford that opportunity and, in particular, does not require the provision of an independent lawyer to represent the child's interests.[26]

31. The ICL has no clear analogue at common law or in equity. Although the Court of Chancery long exercised *parens patriae* jurisdiction over infants in their best interests,[27] there does not appear to have been any practice of appointing lawyers to represent those interests. Indeed, the traditional position, as stated in *In re Agar-Ellis*, was that "a father has the control over the person, education and conduct of his children until they are twenty-one years of age".[28] The closest analogy appears to be the role of the Official Solicitor in England and Wales. The Official Solicitor to the Supreme Court of Judicature was established by order of the Lord Chancellor in 1875, but was preceded by the Official Solicitor to the High Court of Chancery, established in 1871, and the solicitor to the suitors' fund before that.[29] Although the Official Solicitor no longer represents children the subject of family proceedings,[30] he could, historically, be appointed as guardian *ad litem* of a child in High Court proceedings, including in the guardianship, wardship and matrimonial jurisdictions. The Official Solicitor's powers and functions in this role have been described as "almost barren of authority",[31] though it appears that he was to act in accordance with the child's best interests, rather than his or her wishes, and could conduct investigations by interviewing the child, the parents, and other relevant persons including expert professionals, and then place before the court a report of the

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25 s 60B(4).

26 See Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 1999) at 223-5.

27 See *In re Fynn* (1848) 2 De G & Sm 457; 64 ER 205. *Hope v Hope* (1854) 4 De G M & G 328; 43 ER 534. *In re McGrath (Infants)* [1893] 1 Ch 143. For a discussion of the historical development of the jurisdiction, see *J v C* [1970] AC 668 at 692-8 per Lord Guest, 702-8 per Lord MacDermott.

28 (1883) 24 Ch D 317 at 326 per Brett MR.

29 Records of the Official Solicitor, Record Summary, Online Catalogue of the United Kingdom National Archives available at <www.nationalarchives.gov.uk>.

30 See Official Solicitor Practice Note, *Appointment in Family Proceedings*, 2 April 2001 available at <www.justice.gov.uk>, citing the responsibilities of the Children and Family Court Advisory and Support Service (CAFCASS) under s 12 *Criminal Justice and Court Services Act 2000* (UK).

31 *In re L (an Infant)* [1968] P 119 at 133 per Ormrod J.

facts, and submissions on the course which seemed to him to be in the child's best interests.[32]

32. In the first half of the twentieth century in Australia, in custody proceedings in which the wishes of the child were regarded as a relevant but not determinative consideration, judges from time to time interviewed the child in chambers.[33] The *Family Law Rules 1984* (Cth), and subsequently the *Family Law Rules 2004* (Cth), contained a rule which provided for a judge to interview a child,[34] but the power was "little used" and "enjoyed little favour".[35] The rule was omitted in 2010,[36] and the Family Court explained that for a judge to interview a child "does not generally occur and where it does can be the subject of case specific orders."[37]

33. The *Matrimonial Causes Rules* made under the *Matrimonial Causes Act 1959* (Cth) provided for intervention in proceedings by an infant: r 115 enabled a guardian *ad litem* to apply for leave to intervene. In 1967, there was inserted a new r 115A, which empowered the court to adjourn proceedings to allow the appointment of a guardian *ad litem*. The jurisdictional condition upon that power was that "it appears to the court that a child ... ought to be separately represented". The power could be exercised whether or not the child wished to intervene.[38] This power appears to have been "rarely, if ever, used" prior to the commencement of the current Act.[39]

34. As enacted in 1975, the Act provided in s 65 for the court, in custody, guardianship, maintenance or access proceedings, to order, of its own motion or on application, that a child be separately represented "where ... it appears to the court that the child ought to

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32 See Justice Geoffrey Cross, 'Wards of Court' (1967) 83 *Law Quarterly Review* 200 at 210; United Kingdom, *Report of the Committee on the Age of Majority*, Cmnd 3342 (1967) at [206]-[214].

33 See *Storie v Storie* (1945) 80 CLR 597 at 601-2; *Rogers v Rogers* (1947) 64 WN (NSW) 207; *Mackenzie's Practice in Divorce (NSW)* (6th ed, Law Book Co, 1952) at 238.

34 *Family Law Rules 1984* (Cth) O 23 r 4; *Family Law Rules 2004* (Cth) r 15.02 (renumbered as r 15.03 by *Family Law Amendment Rules 2009 (No 1)* (Cth) sch 4 item 2).

35 *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 202-3 [43] per Kirby J.

36 *Family Law Amendment Rules 2010 (No 1)* (Cth) sch 1 item 16.

37 Explanatory Statement to *Family Law Amendment Rules 2010 (No 1)* (Cth) sch 1 item 16.

38 *Matrimonial Causes Rules*, SR 1967 No. 120, r 18.

39 See *In the Marriage of Demetriou* (1976) 27 FLR 93 at 96 per Asche SJ.

be separately represented". By amendments in 1983 and 1987, the provision came to apply in any proceeding under the Act in which the welfare of a child is relevant.[40]

35. There does not appear to have been any common understanding or consensus about the function of the separate representative under s 65. Some judges of the Family Court saw the role of the separate representative as requiring the formation of an "independent judgment" of the child's "best interests";[41] others thought that it "misunderstands the role of an advocate" to suggest that the representative "has a duty to express his personal opinion as to the child's interest or welfare".[42]

36. In effect from 1980 to 1990 was a Practice Direction of the Family Court comprising guidelines for children's representatives.[43] Those guidelines described the separate representative as "like any other legal representative, an advocate of his or her client's interest".[44] It acknowledged, however, that "the manner in which he or she conducts the child's case will depend on the child's age and maturity", the relationship with a younger or more immature child being "more dependent on assessments of the child's needs and preferences made by experts".[45]

37. The Family Law Council, in its 1989 report on *Representation of Children in Family Proceedings*, expressed the view that the Family Court's guidelines had "failed to sufficiently clarify the function or role of separate representatives",[46] in respect of the competing conceptions of the representative as "advocate or fact finder".[47] The report set out several distinct ways in which the role might be fulfilled: acting on the child's instructions, acting on an independent judgment of the child's welfare, a dual role depending upon the maturity of the child, and a role akin to amicus curiae whose function is to ensure that relevant information is put before the court, without making decisions about the child's best interests.

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40 *Family Law Amendment Act 1983* (Cth) s 30; *Family Law Amendment Act 1987* (Cth) s 27.

41 See, eg, *In the Marriage of Harris* (1977) 29 FLR 285 at 292 per Fogarty J.

42 *Waghorne and Dempster* (1979) 5 Fam LR 503 at 505 per Treyvaud J.

43 Reproduced in Family Court of Australia, *Representing the Child's Interests in the Family Court of Australia: Report to the Chief Justice of the Family Court of Australia* (September 1996).

44 Ibid at [1].

45 Ibid at [7].

46 Family Law Council, *Representation of Children in Family Law Proceedings* (1989) at 10.

47 Ibid at 11.

38. In 1990, the Full Court of the Family Court described the role of the separate representative as "broadly analogous to that of counsel assisting a Royal Commission" and noted that the representative is not "bound to make submissions on the instructions of a child as to its wishes or otherwise".[48] In 1995, in *P v P*, the Full Court accepted a submission of the separate representative in that case about the general nature of the role, setting out eight aspects of it, including, significantly, that the separate representative ought to act independently in the child's best interests, and was not bound to act on the child's instructions.[49]

39. The *Family Law Reform Act 1995* (Cth) repealed s 65 and replaced it with s 68L, which originally provided for a child to be "separately represented" where it appeared to the court that the child ought to be, in proceedings in which the child's best interests or welfare was the paramount or a relevant consideration. Section 68M labelled the separate representative the "child's representative".

40. A 1997 report of the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, entitled *Seen and heard: priority for children in the legal process*, dealt in substantial detail with different models of child representation, including in family law proceedings. It documented the "different perceptions"[50] of the role of a best interests representative and the fact that "no detailed standards have been developed ... for representation of children in Australian jurisdictions".[51] It made several recommendations, including that a representative should allow a child who "is able and willing to express views or provide instructions ... to direct the litigation as an adult client would".[52]

41. A 2004 report of the Family Law Council, entitled *Pathways for Children: A review of children's representation in family law*, also noted the "lack of clear guidance as to the content of the role" and "confusion and criticism surrounding the child representative role".[53] It identified as the source of the confusion a tension between two "distinct features" of the

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48 *In the Marriage of Bennett* (1990) 102 FLR 370 at 380 per Nicholson CJ, Simpson and Finn JJ.

49 *P v P* (1995) 126 FLR 245 at 279 per Nicholson CJ, Fogarty and Finn JJ.

50 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process* (1997) at [13.59].

51 Ibid at [13.83].

52 Ibid at [13.95] (Recommendation 70).

53 Family Law Council, *Pathways for Children: A review of children's representation in family law* (2004) at [2.4] and [2.13].

representative's role, being to assist the court to make a decision in the best interests of the child, and also to provide a voice for the child in proceedings affecting them.[54] In seeking to reconcile both roles, the Family Law Council embraced the formulation of the role in *P v P* and recommended that it be enacted.

42. The amendments to s 68L, and insertion of s 68LA, by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) are, as the Explanatory Memorandum makes clear, an explicit response to that recommendation, and others, in the Family Law Council's report. The language of "independent children's lawyer" was preferred to "child's representative" to emphasise "the neutrality and independence of the role" and to overcome "confusion, particularly for children who may expect that the child's representative will act on the child's instructions".[55] The provision in s 68L(2) that an ICL should represent a child's "interests" was intended to define a role with "the feature of assisting the court while simultaneously allowing the child's voice to be heard" and was considered to be "appropriate given the legislative requirement for the court to make decisions that are in the best interests of the child".[56] Section 68LA was enacted in response to "concerns about the minimal direction and guidance concerning the role of the child representative" and broadly adopted the formulation in *P v P*.[57]

Significance of evolution

43. The evolution towards the ICL demonstrates that the institution is a statutory innovation giving effect to a policy choice made in the context of broader social concerns about how best to involve children in decision-making processes that affect them, while also protecting their welfare. As a statutory innovation, the power to order independent legal representation for a child's interests must be amenable to legislative limitation in accordance with legitimate policy choices.

44. Indeed, the capacity to appoint an ICL could be removed entirely without thereby requiring or authorising a court to proceed otherwise than in accordance with judicial process. To remove the statutory power would be quite unlike removing an ordinary general law discretion, such as the discretion to decide whether or not to hear an

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54 Ibid at [2.4].

55 Explanatory Memorandum to Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) at 139.

56 Ibid at 141.

57 Ibid at 142-145.

application made *ex parte*, which was considered in *International Finance*.[58] In any event, the constitutional infirmity identified in *International Finance* was not simply the curtailment of the relevant discretion, but the exclusion of ordinary facilities to contest an order made at the mandatory *ex parte* hearing.[59] Removing the capacity to appoint an ICL would be in no way analogous, since the child retains the opportunity to be heard via a range of other mechanisms, including by being able to apply to intervene as a party.

45. That is a sufficient answer to the claim that the appointment of an ICL is a necessary incident of the judicial power of the Commonwealth in proceedings under the Regulations. However, aspects of the statutory regime further demonstrate the rationality of the policy choices that underpin s 68L(3).

46. *First*: A proper appreciation of the evolution of separate representation, into the current form of representation by an ICL, having the role prescribed by s 68LA, illustrates the lack of any precise fit between the purpose of appointing an ICL and the nature of proceedings under the Regulations. The duty on an ICL to form a view about, and then pursue, the best interests of the child aligns with the jurisdiction exercised in the typical proceeding under Pt VII, which requires a determination of the best interests of a child. The duty does not align as clearly with the jurisdiction exercised in the typical proceeding under the Regulations, which requires not an ultimate determination of the best interests of a child, but the determination of the forum in which that ultimate determination is to occur. The Regulations accord with the Convention in recognising that it is ordinarily in a child's best interests that disputes about their welfare be resolved in the country of their habitual residence.[60] They also accord with the Convention in requiring a court to determine any application for a return order expeditiously.[61]

47. *Second*: Proceedings under the Regulations differ from proceedings under Pt VII in respect of the role fulfilled by a central authority, which is the usual applicant for a return order, but which plays no role in Pt VII proceedings. The role of a central authority has been "likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but

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58 (2009) 240 CLR 319.

59 *International Finance* (2009) 240 CLR 319 at 364-7 [89]-[98] per Gummow and Bell JJ, 386 [157]-[159] per Heydon J; *contra* at 355 [56] per French CJ.

60 Convention, Preamble, Art 1; Regulations, reg 1A(2)(b).

61 Convention, Preamble, Art 1; Regulations, regs 5(3), 15(2).

to implement the requirements of the Convention."[62] Thus, in proceedings under the Regulations, unlike proceedings under Pt VII, there is, in the typical case, already a party who is obliged to assist the court and ensure that all relevant material is put before it.

48. *Third*: The qualification in s 68L(3) is also consistent with practice in foreign jurisdictions in cases arising under the Convention. While it is widely accepted that children of sufficient age and maturity should have an opportunity to be heard, the methods of achieving that end vary, as they do in Australia: only rarely would such a child be heard via the appointment of an independent legal representative.[63]

49. *Fourth*: Limitations upon the circumstances in which an ICL may be appointed can legitimately be informed by financial considerations. An August 1996 report of the Family Law Council noted the "considerable burden"[64] placed upon Legal Aid Commissions by the increased number of orders for separate representation for children, following the guidelines for appointing separate representatives established in *Re K.*[65] It presented as one of three "basic options" that the Parliament "prescrib[e] in legislation the circumstances in which separate representation is to be provided".[66] It did not recommend this option because it was seen to "involve a political decision which is a matter for the Government".[67] But the option is one properly open to Parliament, and consistent with the orthodox proposition that it is not a function of a court to order that

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62 *Laing v Central Authority* (1999) 151 FLR 416 at 481 [300] per Kay J; see also at 429 [62] per Nicholson CJ. See also *Re F (Hague Convention: Child's Objections)* (2006) 36 Fam LR 183 at 203-5 [74]-[81] per Bryant CJ, Kay and Boland JJ; *Harris v Harris* (2010) 245 FLR 172 at 181-2 [28]-[31] per Bryant CJ, Finn and Boland JJ.

63 See *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at 642 [59]-[60] per Baroness Hale of Richmond; *In re M (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288 at 1311 [57] per Baroness Hale of Richmond; *Andrews v Secretary for Justice* [2007] NZFLR 891 at 895-7 [16]-[24]. In Canada, practices for ensuring that the child is heard vary across the provinces, but rarely is an independent lawyer appointed for a child in convention matters: see Hague Conference on Private International Law, *Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* at 26-9, available at: <http://www.hcch.net/upload/abduct2011ca1e.doc>.

64 Family Law Council, *Involving and Representing Children in Family Law* (1996) at [7.32].

65 (1994) 117 FLR 63.

66 Family Law Council, *Involving and Representing Children in Family Law* (1996) at [7.34].

67 Ibid at [7.41].

representation be provided to a party in a proceeding,[68] nor to order that a legal aid body pay the costs of a party's representation.[69] Outside of the context of a trial for a serious criminal offence, fairness does not require that a person be legally represented. *Dietrich* does not benefit a witness at an administrative inquiry,[70] nor apply "in civil proceedings or in committal proceedings ... [or] in favour of an indigent person charged with a criminal offence which is other than serious".[71] Procedural fairness has been held not to require the provision of legal representation in deportation proceedings,[72] extradition proceedings,[73] civil penalty proceedings,[74] or at an interview with a family consultant under the Act.[75]

50. These considerations also put into perspective the *obiter dicta* view in the joint reasons of the High Court in *De L*, to the effect that in certain proceedings under the Regulations "there ordinarily should be separate representation".[76] First, the observation was made in a different statutory context, prior to the 2006 amendments creating the institution of the ICL. Thus, the tension previously described between the independent role of an ICL and the nature of the jurisdiction exercised in proceedings under the Regulations, may have been insufficiently appreciated in the statutory context considered in *De L*. Secondly, as the practices of representing children evolved in the manner previously described, there was substantial consideration given to the role of the representative, and the circumstances in which one ought to be appointed. Thus, the *obiter dictum* in *De L*, which was delivered on 10 October 1996, must be seen as one available view among many about representing children. Indeed, in the same case, Kirby J expressed the opposite

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68 *Dietrich v The Queen* (1992) 177 CLR 292.

69 *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184.

70 *New South Wales v Canellis* (1994) 181 CLR 309.

71 *New South Wales v Canellis* (1994) 181 CLR 309 at 328 per Mason CJ, Dawson, Toohey and McHugh JJ.

72 *Nguyen v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 20 at 27 [27], 29 [36] per Sackville, Marshall and Lehane JJ.

73 *Rivera v United States of America* [2004] FCAFC 154 (Heerey, Sundberg and Crennan JJ), affirming *Rivera v United States of America* [2003] NSWSC 1176 (Bell J).

74 *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369 at 410-12 [153]-[164] per Warren CJ, Charles JA and O'Bryan AJA.

75 *Tryon v Clutterbuck* (2010) 246 FLR 193 (special leave to appeal refused: [2011] HCATrans 133).

76 (1996) 187 CLR 640 at 660.

view that separate representation would be provided in "an exceptional case".[77] Parliament's decision to enact its own considered view in the *Family Law Amendment Act 2000* (Cth) was squarely within its legislative competence.

Other allegations of invalidity

51. The plaintiffs' submissions allege two other bases on which s 68L(3) is said to be invalid. It is said that the standard of "exceptional circumstances" is incapable of judicial application, or, as the plaintiffs put it at [29]-[31], "devoid of content", "incapable of refinement" or "impossible ... to satisfy". It is also said, at [37], that Parliament has "purport[ed] to set aside the decision of a Court exercising federal jurisdiction".

52. The nature of "exceptional circumstances" in s 68L(3) has already been addressed. The criterion cannot be said to be "so indefinite as to be insusceptible of strictly judicial application".[78] "Guiding principles will emerge" as it is considered "on a case by case basis".[79] Examples of judicial discretions conditioned upon the existence of "exceptional circumstances" include: the power of a judge under the general law to call a witness to give evidence in a criminal trial;[80] possibly, the same power in a civil trial;[81] and the powers of appellate courts to grant bail in criminal appeal proceedings.[82] Numerous further examples arise in the Act: the power to make a parenting order that cannot be varied by a parenting plan (s 64D); the power to make certain orders for recovery of amounts paid under purported child maintenance orders (s 66X); the power to make a Commonwealth information order in relation to more than one Department or Commonwealth instrumentality (s 67N); and the power to grant leave in certain proceedings for bankrupt and debtor parties to make certain submissions (ss 74(4), 74(7), 79(13), 79(16), 90SE(4), 90SE(7), 90SM(16), 90SM(19)).

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77 *De L* (1996) 187 CLR 640 at 688.

78 *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J (with whom Dixon CJ agreed).

79 *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [92] per Gummow and Crennan JJ.

80 *R v Apostilides* (1984) 154 CLR 563 at 575 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

81 See *Sharp v Rangott* (2008) 167 FCR 225 at 241 [59] per Besanko J; but see at 227 [3] per Gray and North JJ.

82 *United Mexican States v Cabal* (2001) 209 CLR 165 at 181 [40] per Gleeson CJ, McHugh and Gummow JJ and the authorities cited therein at footnote 51. See also *Federal Court of Australia Act 1976* (Cth) s 58DB(3).

53. In adopting the approach of Kirby J in *De L*[83] in preference to that of other members of the High Court in that case, the legislation did not constitute an "impermissible interference with judicial power". The amending legislation did no more than change the law for the future, and, in particular, did nothing to "set aside" any judgment. It is beyond doubt that Parliament can "pass an enactment which changes the law as declared by the court".[84]

V
COSTS

54. The Commonwealth as intervener does not seek any order as to costs and submits that none should be made against it.

Dated: 20 July 2012

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83 (1996) 187 CLR 640 at 688.

84 *Australian Education Union v General Manager of Fair Work Australia* (2012) 86 ALJR 595 at 610 [50] per French CJ, Crennan and Kiefel JJ.