

BETWEEN: R.C.B. as litigation guardian of E.K.V., C.E.V., C.I.V., and L.R.V.
Plaintiff

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

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First Defendant

**DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITIES
(CHILD SAFETY SERVICES)**

Second Defendant

L.K.G.

Third Defendant

T.V.

Fourth Defendant

PLAINTIFFS' SUBMISSIONS IN REPLY

20 **Part 1: Suitability for Publication**

[1] The Plaintiffs certify that this submission is in a form suitable for publication on the internet.

Part 2: Reply

CONTENT OF PROCEDURAL FAIRNESS REQUIREMENT

[2] All of the submissions in opposition to the Plaintiffs, both of defendants and of interveners, embrace (either expressly or implicitly) the suggestion that that something short of representation by an independent legal practitioner acting for the Plaintiffs may satisfy any entitlement of the Plaintiffs to procedural fairness. That suggestion must be rejected.

PLAINTIFFS' SUBMISSIONS IN REPLY

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- [3] It is acknowledged that the scope and content of a requirement for procedural fairness is flexible, and may vary according to factors including the nature of the proceedings and the seriousness of the potential outcome. But proceedings in an Australian court – whether it be a state court, or a court created under Chapter III of the Constitution – will generally attract an entitlement on the part of a person who may be affected by a determination to have the proceedings heard and determined according to the most exacting standards of procedural fairness, as described by French CJ in *International Finance Trust Company Ltd v New South Wales Crime Commission*¹.
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- [4] Generally speaking, that is the case regardless of the nature of the proceedings: whether they arise under statute, regulation or otherwise; and whether they are criminal or civil in character. Whilst recognising that effect must be given to the particular statutory framework within which the proceedings take place², the fact that jurisdiction had been conferred on a court (rather than, say, an administrative tribunal) necessarily limits the legislature’s power to mitigate the requirements of procedural fairness. That is especially so where, as in the present case, the nature of the jurisdiction which has been conferred is such that it could not validly have been
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- conferred on any decision-maker or tribunal other than a state court or a Chapter III court.
- [5] In addition, the seriousness of the potential outcome militates strongly in favour of the highest standards of procedural fairness. To order that a person abjure their country of citizenship or present domicile is no light thing. In Blackstone’s time, exile or banishment (including transportation to the colonies) was regarded as second only to capital punishment in the calendar of criminal sanctions³. In modern times, the extradition of fugitive offenders, and the deportation of illegal immigrants, are likewise properly

¹ [2009] HCA 49 at [54]; referred to in the Plaintiffs’ primary outline in this Court at [38].

² *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*, (1963) 113 CLR 475 at 503, 504.

³ William Blackstone, *Commentaries on the Laws of England* (1st ed., 1765-69), Book IV, Ch. 29, p.370.

regarded as matters of the gravest importance. There is no rational basis for treating the expatriation of innocent children as somehow less serious than expatriation on grounds of actual (proved or alleged) wrongdoing.

INDEPENDENT CHILDREN'S LAWYER

- [6] Hence, the appointment of an Independent Children's Lawyer ("ICL") is no answer to the Plaintiffs' arguments. The child is afforded no "opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it"⁴; an ICL is not obliged to act on a child's instructions⁵; and an ICL may not even meet with the child.⁶
- 10 [7] In any event, as is plain from the structure of section 68L(3) of the Act, it is not every proceeding under the Regulations in which a child is granted an ICL. It is the exception rather than the norm; and in those cases which do not satisfy the abstract notion of "exceptional circumstances", a child is necessarily denied procedural fairness.

OTHER "NEUTRAL" THIRD PARTIES

- [8] Likewise, the notion that procedural fairness is achieved by the Court's obtaining a report under Regulation 26 is fatuous. The report writer is not, in any relevant sense, an advocate for the child; is under no obligation (and, indeed, is not expected) to act on the particular child's instructions, or to
- 20 pursue the outcome which the particular child desires; and, most certainly, is in no position either to challenge evidence and submissions advanced against the child's preferred outcome, or to advance evidence and submissions in favour of the child's preferred outcome.

⁴ *International Finance Trust Company Ltd v. New South Wales Crime Commission* (supra) per French CJ at [54].

⁵ See section 68LA(4) of the *Family Law Act 1975 (Cth)* ("the Act").

⁶ The unsatisfactory consequences of such an appointment are exemplified by the submissions of the Commonwealth Attorney-General at [23].

[9] The submissions made by each of the Second Defendant⁷ and the South Australian Attorney-General⁸, to the effect that a child's right to procedural fairness may be satisfied by the appointment of a person in a neutral role, should therefore be rejected. In neither case can the child be comforted with knowledge, or the legitimate expectation, that their instructions will be acted upon, or even advanced.

ATTEMPTS TO JUSTIFY THE TRUNCATION OF PROCEDURAL FAIRNESS

[10] The South Australian Attorney-General concedes that section 68L(3) modifies the rules of procedural fairness, but argues that the section can be justified as an attempt to "serve the protective purpose" as explained in that submission⁹.

[11] Significantly, no such statutory restriction on the legal representation of affected children is imposed in the determination of proceedings under the Act generally, where the paramount or relevant consideration is the child's best interests or the child's welfare.¹⁰ As the Commonwealth Attorney-General makes plain, section 68L(2) "cannot sensibly be read as empowering the Court to refuse to make the Order" once the judgment is reached that the interests of a child "ought" to be independently represented.

[12] The issue remains whether, in the determination of proceedings arising under the Regulations – to which the rebuttable presumption created by Regulation 16(3) applies – the statutory restriction on a child's being legally represented, as imposed by section 68L(3), circumvents rules of procedural fairness by the need for a threshold finding that "exceptional circumstances" exist.

⁷ Paragraphs 40-52, 60-62.

⁸ Paragraphs 6, 17, 18.

⁹ At paragraph 21.

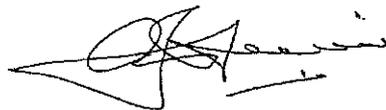
¹⁰ Section 68L(2) of the Act.

[13] There is no good or legitimate reason to truncate rights of procedural fairness merely because: (a) the proceedings arise under the Regulations, and (b) the case is unexceptional. By reason of the rebuttable presumption, the considerations in such proceedings are the same as in all other proceedings under the *Family Law Act*. The construction agitated by the Commonwealth Attorney-General should be rejected.

10 [14] It remains that the operative effect of section 68L(3) is to abrogate rights of procedural fairness. They are rights which must, in any civilised society, be extended to a person who is the subject of (but not a party to) proceedings which may have the gravest consequences for that person. In a society operating, as ours does, under a constitution pursuant to which judicial powers must be exercised judicially, the idea that a person may suffer the most extreme adverse consequences under a judicial order, yet have no right to be heard regarding the making of that order, is anathema. And the fact that the person who will suffer those consequences is a child, deserving of society's most indulgent protection, only strengthens that imperative.

[15] The Plaintiffs continue to rely on the propositions set out in paragraphs 39, 40 and 41 of their primary outline filed in this Court.

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