

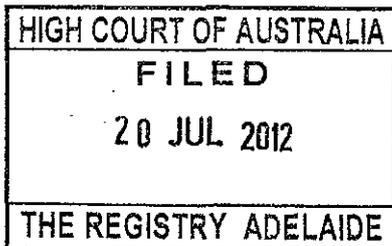
BETWEEN

RCB as litigation guardian of EKV, CEV, CIV AND LRV
Plaintiff

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- and -

THE HONOURABLE JUSTICE COLIN JAMES FORREST,
A JUDGE OF THE FAMILY COURT OF AUSTRALIA
First Defendant



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

LKG
Third Defendant

TV
Fourth Defendant

**WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA
(INTERVENING)**

30 **PART I: CERTIFICATION**

1. This submission is in a form suitable for publication on the Internet.

PART II: INTERVENTION

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

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PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

4. The relevant statutes and regulations are annexed to the written submissions of the Second Defendant. To these South Australia adds and appends hereto:

- *Family Law Act 1975 (Cth) (FLA)*, Part III Div 2, s38N
- *Family Law Rules 2004*, Reg 6.08, 6.09 and 6.10

PART V: ARGUMENT

10 **A: The issue**

5. EKV, CEV, CIV and LRV are the children of LKG and TV. The children were all born within the marriage of LKG and TV in the Republic of Italy. The marriage broke down. Orders were made in the Italian courts governing custody and access. The habitual place of residence of the children was in Italy. On 23 June 2010 the children were, with the consent of TV, brought to this country by LKG for a holiday. Here they were wrongfully retained by LKG. In Australia the State Central Authority commenced proceedings in the Family Court of Australia at the behest of TV for the return of the children to Italy pursuant to the *Family Law (Child Abduction) Regulations 1986 (Regulations)*. On 23 June 2011 a judge of the Family Court of Australia made orders for the return of EKV, CEV, CIV and LRV to the Republic of Italy where issues as to access and custody could be determined by the Italian courts.¹ The judge made the orders knowing that the children objected to returning to Italy if their mother did not intend to accompany them. In this regard the judge had the benefit of:

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- i. the report of a family consultant as to the attitude of EKV, CEV, CIV and LRV to being returned to Italy;²
 - ii. a psychologist's report tendered by LKG that addressed the psychological wellbeing of the children in relation to remaining in Australia or returning to Italy.

¹ *Department of Communities (Child Safety Services) & Garning* [2011] Fam CA 485.

² Exhibit LF3 to the affidavit of Lisa Maree Foley, sworn 5 July 2012.

In these circumstances, were EKV, CEV, CIV and LRV denied procedural fairness in that the Family Court of Australia did not afford them an opportunity for separate and independent representation?

B: South Australia's submissions in summary

6. South Australia contends that:

- i. Regulation 16(3)(c) contemplates that the objecting child will be heard.
- ii. Regulation 26 provides a means whereby this may occur - a report prepared by a family consultant.
- iii. Section 68L(3) FLA should be construed in the light of procedural fairness being afforded to the child as contemplated by regulation 16(3)(c), the availability of the regulation 26 report, the possibility of there being a litigation guardian, the purpose of the Convention, and the protection of the interests of the child.
- iv. So construed, what amounts to exceptional circumstances will arise where the Court cannot otherwise be properly appraised of the objection.
- v. To the extent that s68L(3) FLA modifies the rules of procedural fairness, if at all, construed in the context identified above, the limitation upon its application does not have the consequence that the Family Court of Australia ceases to answer the description of a court for the purposes of Ch III. Section 68L(3) FLA is valid.

C. Judicial power and procedural fairness

7. An oft cited statement as to the content of judicial power is that contained in the judgment of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*.³

His Honour said:

Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has

³ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361; See also *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.⁴

8. In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said:

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The *Constitution* is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute “an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the Provisions of Chap. III”. Thus it is well settled that the grants of legislative power contained in s 51 of the *Constitution*, which are expressly “subject to” the provisions of the *Constitution* as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.⁵ (Footnotes omitted)

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9. In *Thomas v Mowbray* Gummow and Crennan JJ accepted as a working proposition “that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III”.⁶ This proposition was stated in recognition that the *Constitution* contains no express general guarantee of due process of law.⁷ Where a court is required to depart to a significant degree from the methods and standards which have characterised judicial activities in the past, it ceases to exhibit the defining characteristics of a court within the meaning of s71, 75, 76 and 77 of the *Constitution*.

⁴ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-5.

⁵ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ); see also *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [50] (French CJ).

⁶ *Thomas v Mowbray* (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ); see also *Nicholas v The Queen* (1998) 193 CLR 173 at 208-9 (Gaudron J).

⁷ *Thomas v Mowbray* (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43 (Brennan J). The framers preferred to place their faith in the democratic process and leave matters of individual rights in the hands of Parliament. The 1898 Constitutional Convention rejected a proposal to include an express guarantee of individual rights based largely upon the 14th Amendment to the United States Constitution and including a right to due process of law and the equal protection of laws; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 8 February 1898, vol IV at 664-691; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd Ed (1910) at 614-5; Sir Owen Dixon, *Two Constitutions Compared*, reprinted in *Jesting Pilate* (1965) at 102.

10. In considering what is or is not a departure from the defining characteristics of a court it must be borne in mind that courts may be organised or structured in a variety of ways for the purpose of exercising jurisdiction without offending Ch III.⁸ Further, not all functions committed to a court that comprise the exercise of federal judicial power must be undertaken by a judge and may be undertaken by other officers of the court provided that the judges of the court effectively control and supervise the exercise of the court's jurisdiction.⁹ It should also be noted that the judicial process or the capacity to administer the common law form of adversarial trial is a means to an end, the end being the exercise of power manifest in an order quelling a controversy.¹⁰ The point is that once variation in the judicial process is acknowledged and accepted there is no norm with the result that the question of whether a significant departure from what is acceptable has occurred "inevitably attracts consideration of predominant characteristics together with comparison of historic functions and processes of courts of law".¹¹
11. It has been said that procedural fairness lies at the heart of the judicial function¹² and that, amongst other things, "it requires that a court ... provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it".¹³ These requirements operate in the context of a process that is adversarial in nature. Hence it has been said that the defining

⁸ *Harris v Caladine* (1991) 172 CLR 84 at 91 (Mason CJ and Deane J).

⁹ *Harris v Caladine* (1991) 172 CLR 84 at 95 (Mason CJ and Dawson J), 151 (Gaudron J), 160 (McHugh J); This Court, for example, may order the examination of a person on oath before an officer of the Court; *Judiciary Act 1903* (Cth) s 77G.

¹⁰ *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 186 (Brennan CJ).

¹¹ *South Australia v Totani* (2010) 242 CLR 1 at [69] (French CJ), [134] (Gummow J).

¹² *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ); See also, *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Re Refugee Tribunal*; *Ex parte AALA* (2000) 204 CLR 82 at [42] (Gaudron and Gummow JJ); *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

¹³ *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ), [141] (Heydon J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Harris v Caladine* (1991) 172 CLR 84 at 150 (Gaudron J); *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395 (Dixon CJ and Webb J).

characteristics of a court include the “capacity to administer the common law system of adversarial trial”.¹⁴

12. Importantly, “[a]ccording to the circumstances, the content of the requirements of procedural fairness may vary”.¹⁵ Hence in *Leeth v The Commonwealth* Mason CJ, Dawson and McHugh JJ noted:

10 ... but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers’ Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.¹⁶ (footnote omitted)

20 Thus the method and the process in which a party or interested person may be heard, advance its own case, and answer the case put against it may vary or be modified without resulting in a court ceasing to exhibit the defining characteristics of a court for the purposes of Ch III.¹⁷ The constitutional validity of any statutory modification to the rules of procedural fairness to be applied in the exercise federal judicial power will be determined in the manner discussed above, namely, by considering whether the practical effect of the modification poses such a departure from the methods and standards which have characterised the judicial process in the past that the court ceases to answer the constitutional description of a court within the meaning of s71, 75, 76 and 77 of the *Constitution*. It follows that the statutory framework within which the modification to the rules of procedural fairness operates must be considered. Thus the following statement, made in the context of executive decision making, is equally applicable to judicial decision making:

[26] It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord

¹⁴ *Forge v Australian Securities and Investments Commission* (2006) 226 CLR 45 at 76 (Gummow, Hayne and Crennan JJ).

¹⁵ *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [54] (French CJ)

¹⁶ *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ); see also, *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [55] (French CJ); *Re Minister for Immigration and Multicultural And Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]-[38] (Gleeson CJ).

¹⁷ Applications heard *ex parte* for orders with immediate effect upon person or property where there exists the opportunity subsequently to contest the order provide a well established example; *Thomas v Mowbray* (2007) 233 CLR 307 at [112] (Gummow and Crennan JJ).

procedural fairness will depend upon the facts and circumstances of the particular case. As Kitto J said in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*:

"[T]he books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity ['to correct or contradict any relevant statement prejudicial to their view'] in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place." (emphasis added)

10 In the present case, attention in argument, both in this Court and in the courts below, was directed more to the particular circumstances of the case than to the relevant statutory framework, but it is necessary to notice some aspects of that framework. Unless that is done, the argument proceeds at too high a level of abstraction and may proceed upon assumptions that are ill founded.¹⁸ (footnotes omitted)

13. Generally speaking, the authorities suggest that significant modification of the rules of procedural fairness will not impermissibly detract from the judicial process where they serve, for example, a protective purpose.¹⁹ Similarly, modifications are also justifiable where the decision making process is necessarily expedited.²⁰

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14. Again, generally speaking, modifications to the traditional rules of procedural fairness are less likely to be repugnant to the judicial process where:

- o they are unlikely to deprive the court of access to material that is centrally relevant to the jurisdiction that it is exercising;²¹
- o the modification applies to a preliminary step in a larger decision making process which viewed in its entirety does entail procedural fairness (particularly, where

¹⁸ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 228 CLR 152 at [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ);

¹⁹ For example, criminal intelligence; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; Mareva injunctions, *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 ALL ER 213; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 617 (Wilson & Dawson JJ); legal professional privilege, *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; public interest immunity *Sankey v Whitlam* (1978) 42 CLR 1; national security *Thomas v Mowbray* (2007) 233 CLR 307 at [122]-[125] (Gummow and Crennan JJ); *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61 (Mason J); and trade secrets litigation *Gypsyjokers Inc v Commissioner of Police* (2008) 234 CLR 532 at [185] (Crennan J).

²⁰ *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 (Dixon CJ & Webb J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 99-100 (McHugh J)

²¹ By analogy *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1 at 23 (McHugh JA); *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 4 at 56 [25] (Gleeson CJ)

any decision taken on that preliminary step is unlikely to affect the reputational interests of a person deprived of the traditional procedural rights);²²

- o the court exercises a high degree of control in determining when and how the departure from the traditional rules is to apply.²³

D. This case

15. Any consideration of the validity of s68L(3) FLA must start from the position of
 10 acknowledging that the *Convention on Civil Aspects of International Child Abduction (Convention)*, which, by virtue of the Regulations forms part of the municipal law of Australia and must be read with the Regulations,²⁴ is:

... concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and access. This entails a preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to "its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case".²⁵

- And that "the objective is to secure the prompt return of children who have been
 20 removed wrongfully, or are being retained wrongfully, so that issues of custody and access may be dealt with according to the laws of their habitual place of residence".²⁶

16. The objective is not unqualified. Regulation 16(3) identifies four circumstances in which a court may refuse to make an order for the return of a child. They include 16(3)(c) where the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of the child's views. Here it must also be borne in mind that:

[33] The content of those exceptions must be understood against the other provisions of the Regulations which, as has earlier been pointed out, make plain that there may be an order for

²² *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578 (Mason CJ, Dawson, Toohey & Gaudron JJ); *South Australia v O'Shea* (1987) 163 CLR 378 at 389 (Mason CJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 99-100 (McHugh J)

²³ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 555 [19] (Gummow, Hayne, Heydon & Kiefel JJ); *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554, 560 (the Court)

²⁴ *De L v Director-General, Department of Community Services* (1996) 187 CLR 640 at 647 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

²⁵ *De L v Director-General, Department of Community Services* (1996) 187 CLR 640 at 648-9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [32] (Gaudron, Gummow and Hayne JJ).

²⁶ *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [3] (Gleeson CJ), [32] (Gaudron, Gummow and Hayne JJ).

return with no expectation that there will be any judicial process in the country to which the child will be returned in which any question about what is in the best interests of the child will be raised or addressed. Often enough, of course, there will be proceedings pending or anticipated in the country to which an order for return is sought. Many cases have been decided under the Regulations, and under equivalent provisions applying in other Convention countries, in which that has been so. If, on return of the child, there will be a court hearing that will decide what arrangements for custody of and access to the child will be in that child's best interests, an Australian court, exercising a discretion under the Regulations, will no doubt take that into account. But the construction of the Regulations cannot proceed from a premise that they are designed to achieve return of children to the place of their habitual residence for the purpose of the courts of that jurisdiction conducting some hearing into what will be in that child's best interests. As the Regulations recognise, questions of rights of custody in the country to which return is sought are regulated in some cases by operation of law, by administrative decisions, or by agreement. There may be neither occasion nor opportunity for any engagement of the judicial processes of that country.²⁷ (footnote omitted)

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17. *De L v Director-General, Department of Community Services* is authority for the proposition that where there is evidence of objection by children subject of a Convention application, procedural fairness requires that there be a hearing to determine whether or not the children do, in fact, object.²⁸ In that case it was envisaged by this Court that upon the rehearing the Family Court would exercise the power under the then new regulation 26 for the preparation of a report "by a family and child counsellor or welfare officer, and that the Court ... [would] ... give serious consideration to the exercise of its powers" contained in s68L.²⁹ Implicit in this is an acceptance that the report itself may satisfy procedural fairness requirements.

²⁷ *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [33] (Gaudron, Gummow and Hayne JJ).

²⁸ *De L v Director-General, Department of Community Services* (1996) 187 CLR 640 at 659 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

²⁹ *De L v Director-General, Department of Community Services* (1996) 187 CLR 640 at 663 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ). Incidentally, proceeding in such manner satisfies Article 12 of the United Nations Convention on the Rights of the Child. That Article provides:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular 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 the nation.

Australia signed the *United Nations Convention on the Rights of the Child* on 22 August 1990 and ratified it on 17 December 1990.

18. Accepting, as this Court observed in *De L v Director-General, Department of Community Services*³⁰, that if children are not separately represented the only practical means of ascertaining whether or not they object is by the obtaining of a Regulation 26 report³¹, it can be expected that usually whenever on a Convention application there is *prima facie* evidence of objection by a child or children to being returned and, *prima facie*, the child or children have obtained an age and degree of maturity at which it is appropriate to take account of their views, the Court will order a report.³² The benefits of such a report are obvious; it is prepared by an impartial professional in a relaxed location away from the intimidating atmosphere of the court. Further, and importantly, it avoids the undesirability of a child becoming the adversary of their parent.³³ In the United Kingdom it has been held that separate representation should be permitted a child only if it is inappropriate for the child's views to be represented by the parties or a court welfare officer.³⁴
19. In this case a report was ordered pursuant to Regulation 26.³⁵ No argument is raised as to the adequacy or otherwise of that report in providing the information necessary to the Family Court considering the objection and the weight to be given to it and thereby discharging procedural fairness obligations to EKV, CEV, CIV and LRV. Arguably it was also possible in this case for EKV, CEV, CIV and LRV to present their objection through a litigation guardian.³⁶
20. Regulation 16(3)(c) contemplates that the objecting child be heard. Regulation 26 provides a ready method whereby the Court, through one of its officers over whom it exercises control, may afford the child a hearing. That method is consistent with the policy of the Convention and the protection of the interests of the child. What amounts to exceptional circumstances for the purposes of s68L(3) FLA should be understood in the light of the

³⁰ *De L v Director-General, Department of Community Services* (1996) 187 CLR 640 at 659 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

³¹ A regulation 26 report is prepared by a family consultant. Family consultants are officers of the Family court; s38N FLA. Their functions are set out in Div 1 Part III FLA.

³² A regulation 26 report may be received in evidence by the Court; Regulation 26(6).

³³ *Re HB* [1998] 1 FLR 422 at 427 (Thorpe LJ) 429 (Butler-Sloss LJ).

³⁴ *Re M (A Minor) (Abduction: Child Objections)* [1994] 2 FLR 126 ; *Re S (Abduction : Children : Separate Representation)* [1997] 1 FLR 486.

³⁵ Exhibit LF3 to the affidavit of Lisa Maree Foley, sworn 5 July 2012.

³⁶ *Family Law Rules 2004* (Cth) Reg 6.08, 6.09 and 6.10

benefits and limitations of the Regulation 26 report as a means of affording the child a hearing for the purposes of Regulation 16(3)(c) FLA. Such approach ensures that the child has the opportunity to advance its own case and answer anything to the contrary.

21. Turning to s68L(3) FLA more particularly, although the impugned provision does modify the rules of procedural fairness, that modification is warranted for the following reasons:

- 10 ○ Section 68L(3) FLA serves the protective purpose of deterring parents from abducting children in order to bolster their claims to custody by providing for an expedited process to determine whether the abduction was wrongful, and if so returning the children to the country of habitual residence, so that the merits of any claims as to custody can be dealt with in the country of habitual residence.³⁷
- Section 68L(3) FLA serves the additional protective purpose of avoiding children being drawn into legal battles between parents in dispute.³⁸
- 20 ○ The process envisaged by s 68L(3) FLA is unlikely to deprive the Court of access to important information because the focus of the inquiry undertaken pursuant to regulation 16, in the ordinary course, is on whether the conduct of the absconding parent has abridged the rights of the parent who remains in the country of habitual residence. Where an issue arises which is likely to turn on the evidence or views of a child, for example where a claim of “grave risk” or where the child is sufficiently mature and objects to return to a sufficient degree under reg 16(3)(b) or (c) FLA, then this circumstance alone could enliven the “exceptional circumstances” discretion contained in s 68L(3) FLA. Even where the views of a child are relevant to the issues before the Court, there are other procedures expressly provided for by s 68M FLA of the Act, which enable the Court to obtain those views without undermining the protective purpose of the Convention.³⁹
- 30 ○ In this context, the modification of procedural fairness can be considered to be analogous to that which is accepted in relation to preliminary steps in larger decision making processes which viewed in their entirety do provide for procedural fairness. Although, the relevant Australian authorities cannot control the fairness of the procedures that will be followed in the country of habitual residence, Australia may accept or decline to recognize a signatory to the Convention. Further, any inadequacies in the law of the country of habitual

³⁷ *De L v Department of Community Services (NSW)* (1996) 187 CLR 640, 648-649 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Commissioner, Western Australia Police v Dormann* (1997) FLC 92-767, 84,434; E Perez-Vera, *Explanatory Report on the Convention*, [16]-[34], [40].

³⁸ *Re HB (Abduction: Children’s objections)* [1998] 1 FLR 422, 427 (Thorpe LJ), 428-429 (Butler-Sloss LJ); *Re S (Abduction: custody rights)* [1993] 2 ALL ER 683, (Balcombe LJ); “The Right of a Child to Object to a Return: Article 13(2)”, *Hague Convention on Child Abduction*, 178ff.

³⁹ *Re J (Abduction: Child’s objections to return)* [2004] 2 FLR 64, [66] (Wall LJ & Gage J)

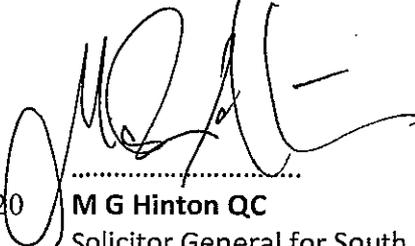
residence may be relevant to the question of exceptional circumstances. The modification to procedural fairness at this 'preliminary step' is very unlikely to adversely affect a child's reputational interests in light of the nature of the inquiry.

- o The identification of exceptional circumstances is within the discretion of the Court. That phrase should not be construed unduly narrowly. Rather, it should be construed to enable the Family Court to allow for independent representation where the particular circumstances of the case require it.

10 **Conclusion**

22. South Australia contends that s68L(3) FLA is valid.

Date: 20 July 2012

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ANNEXURE A

APPLICABLE PROVISIONS

Family Law Act 1975

Part III—Family consultants

Division 1—About family consultants

11A Functions of family consultants

10 The functions of family consultants are to provide services in relation to proceedings under this Act, including:

- (a) assisting and advising people involved in the proceedings; and
- (b) assisting and advising courts, and giving evidence, in relation to the proceedings;

and

- (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and
- (d) reporting to the court under sections 55A and 62G; and
- (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

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Note: See subsection 4(1AA) for people who are taken to be involved in proceedings.

11B Definition of *family consultant*

A *family consultant* is a person who is:

- (a) appointed as a family consultant under section 38N; or
- (b) appointed as a family consultant in relation to the Federal Magistrates Court under the *Federal Magistrates Act 1999*; or
- (c) appointed as a family consultant under the regulations; or
- (d) appointed under a law of a State as a family consultant in relation to a Family Court of that State.

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Note: The Chief Executive Officers of the Family Court and the Federal Magistrates Court have all of the functions and powers of family consultants, and may direct consultants in the performance of their functions. See Division 1A of Part IVA of this Act and Division 1A of Part 7 of the *Federal Magistrates Act 1999*.

11C Admissibility of communications with family consultants and referrals from family consultants

(1) Evidence of anything said, or any admission made, by or in the company of:

(a) a family consultant performing the functions of a family consultant; or

10 (b) a person (the *professional*) to whom a family consultant refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is admissible in proceedings under this Act.

Note 1: Communications with family consultants are not confidential (except in the special circumstances set out in subsection 38BD(3) in relation to consultants having several roles).

Note 2: Subsection (1) does not prevent things said or admissions made by or in the company of family consultants from being admissible in proceedings other than proceedings under this Act.

20 (2) Subsection (1) does not apply to a thing said or an admission made by a person who, at the time of saying the thing or making the admission, had not been informed of the effect of subsection (1).

(3) Despite subsection (2), a thing said or admission made is admissible even if the person who said the thing or made the admission had not been informed of the effect of subsection (1), if:

(a) it is an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b) it is a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

30 unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

11D Immunity of family consultants

A family consultant has, in performing his or her functions as a family consultant, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge.

Division 2—Courts' use of family consultants

11E Courts to consider seeking advice from family consultants

- (1) If, under this Act, a court has the power to:
- (a) order a person to attend family counselling or family dispute resolution; or
 - (b) order a person to participate in a course, program or other service (other than arbitration); or
 - (c) order a person to attend appointments with a family consultant; or
 - (d) advise or inform a person about family counselling, family dispute resolution or other courses, programs or services;

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the court:

- (e) may, before exercising the power, seek the advice of:
 - (i) if the court is the Family Court or the Federal Magistrates Court—a family consultant nominated by the Chief Executive Officer of that court; or
 - (ii) if the court is the Family Court of a State—a family consultant of that court; or
 - (iii) if the court is not mentioned in subparagraph (i) or (ii)—an appropriately qualified person (whether or not an officer of the court);

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as to the services appropriate to the needs of the person and the most appropriate provider of those services; and

- (f) must, before exercising the power, consider seeking that advice.
- (2) If the court seeks advice under subsection (1), the court must inform the person in relation to whom the advice is sought:
- (a) whom the court is seeking advice from; and
 - (b) the nature of the advice the court is seeking.

11F Court may order parties to attend, or arrange for child to attend, appointments with a family consultant

- (1) A court exercising jurisdiction in proceedings under this Act may make either or both of the following kinds of order:
- (a) an order directing one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant;
 - (b) an order directing one or more parties to the proceedings to arrange for a child to attend an appointment (or a series of appointments) with a family consultant.

10 Note: Before exercising this power, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (see section 11E).

- (2) When making an order under subsection (1), the court must inform the parties of the effect of section 11G (consequences of failure to comply with order).
- (3) The court may make orders under this section:
- (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a lawyer independently representing a child's interests under an order made under section 68L.

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11G Consequences of failure to comply with order under section 11F

- (1) If a person who is ordered to attend an appointment with a family consultant under section 11F fails to comply with:
- (a) the order made by the court; or
 - (b) any instruction the consultant gives to the person;
- the consultant must report the failure to the court.

- (1A) If:
- (a) a person fails to comply with an order under section 11F that he or she arrange for a child to attend an appointment with a family consultant; or

- (b) a child fails to attend an appointment with a family consultant as arranged in compliance with an order under section 11F;

the consultant must report the failure to the court.

- (2) On receiving a report under subsection (1) or (1A), the court may make any further orders it considers appropriate.
- (3) The court may make orders under subsection (2):
 - (a) on its own initiative; or
 - (b) on the application of:
 - (i) a party to the proceedings; or
 - (ii) a lawyer independently representing a child's interests under an order made under section 68L.

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Division 3—Other officers and staff of Registries

38N Personnel other than the Chief Executive Officer

(1) In addition to the Chief Executive Officer, there are the following officers of the Court:

- (a) a Principal Registrar of the Court;
- (b) such Registrars and Deputy Registrars of the Court as are necessary;
- (c) such Registry Managers of the Court as are necessary;
- (d) such family consultants as are necessary;
- (e) the Marshal of the Court;
- (f) such Deputy Marshals of the Court as are necessary.

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(2) The officers of the Court, other than the Chief Executive Officer, have such duties, powers and functions as are given to them by this Act, by the standard Rules of Court or by the Chief Judge.

(3) The officers of the Court are appointed by the Chief Executive Officer.

(4) The officers of the Court, other than the Chief Executive Officer and the Deputy Marshals, are to be persons engaged under the *Public Service Act 1999*.

(5) The Deputy Marshals may be persons engaged under the *Public Service Act 1999*.

(6) The Chief Executive Officer may, on behalf of the Chief Judge, arrange with an Agency Head (within the meaning of the *Public Service Act 1999*), or with an authority of the Commonwealth, for the services of officers or employees of the Department or authority to be made available for the purposes of the Court.

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(7) There are to be such staff of the Registries as are necessary.

(8) The staff of the Registries is to consist of persons engaged under the *Public Service Act 1999*.

Family Law Rules 2004:

Part 6.3 Case guardian

6.08 Conducting a case by case guardian

(1) A child or a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian.

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(2) Subrule (1) does not apply if the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case.

Note 1 For service on a person with a disability, see rule 7.09.

Note 2 If a case is started by a child or person with a disability without a case guardian, the court may appoint a case guardian to continue the case.

6.09 Who may be a case guardian

A person may be a case guardian if the person:

(a) is an adult;

(b) has no interest in the case that is adverse to the interest of the person needing the case guardian;

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- (c) can fairly and competently conduct the case for the person needing the case guardian; and
- (d) has consented to act as the case guardian.

6.10 Appointment, replacement or removal of case guardian

- (1) A person may apply for the appointment, replacement or removal of a person as the case guardian of a party.

Note 1 Chapter 5 sets out the procedure for making an Application in a Case.

Note 2 An application in relation to a case guardian may be made by a party or a person seeking to be made the case guardian or by a person authorised to be a case guardian.

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- (2) A person who is a manager of the affairs of a party is taken to be appointed as the case guardian of the party if the person has filed:
 - (a) a notice of address for service; and
 - (b) an affidavit which:
 - (i) provides evidence that the person has been appointed manager of the affairs of the party; and
 - (ii) states that the person consents to being appointed as the case guardian of the party.