

HIGH COURT OF AUSTRALIA

GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE JJT & ORS

RESPONDENTS

EX PARTE VICTORIA LEGAL AID

PROSECUTOR

Re JJT; Ex Parte Victoria Legal Aid (M74/1997) [1998] HCA 44
25 June 1998

ORDER

1. *Order nisi for certiorari made absolute.*
2. *Order 3 of the orders made by Faulks J of the Family Court of Australia on 9 September 1997 quashed.*
3. *Order nisi for prohibition discharged.*

Representation:

S M Crennan QC with P J Hanks for the prosecutor (instructed by Victoria Legal Aid)

No appearance for the first and second respondents

B W Walker SC with C E Molyneux QC and C M Caleo for the third and fourth respondents (instructed by Hogg and Reid)

Interveners:

D Graham QC with N D Hopkins intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

B M Selway QC with G L Ebbeck intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

L S Katz SC with A S Bell intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

H C Burmester with J S Stelliios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re JJT & Ors; Ex Parte Victoria Legal Aid

Costs – Power to make order against a non-party – Order of Family Court requiring Victoria Legal Aid to provide for future costs of child's separate representation – Whether order "as to costs" – Whether order as to security for costs.

Family law – Order of Family Court requiring Victoria Legal Aid to provide for future costs of child's separate representation – Whether supported by power to make such other orders as the court considers necessary to secure separate representation – Power to make interim maintenance orders.

Words and phrases – "order as to costs".

Family Law Act 1975 (Cth), ss 68L, 117.

1 GAUDRON J. I agree generally with the judgment of Hayne J. I would, however, add a few observations of my own.

2 The power conferred by s 117(2) of the *Family Law Act* 1975 (Cth) ("the Act") is a power to "make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just." That power is not simply a power to make an order for costs. Were it so, it would only authorise orders to indemnify for "costs actually incurred in the conduct of litigation"¹. However, a power to make an "order as to costs" is a broader power. And when regard is had to the consideration that s 117(2) expressly authorises interlocutory orders, that sub-section must, in my view, be construed as authorising orders requiring a party to proceedings under the Act to provide another party with funds to conduct those proceedings².

3 Doubtless, the power to award maintenance under s 74 of the Act also extends to orders that a party to the marriage provide the other with funds to conduct proceedings under the Act. I mention this matter because, as between parties to a marriage who are also parties to litigation, an order to provide funds for the conduct of litigation as to their mutual rights and obligations is as aptly described as a maintenance order as an "order as to costs". And it may be that, in the absence of statutory power either as to costs or maintenance, a superior court has inherent power in proceedings between de facto couples to make an order that one party provide the other with funds to conduct proceedings, if that is necessary to enable the proper conduct of litigation with respect to their property³. And in that situation, an order might as easily be described as a mandatory injunction or an order for interim provision as an "order as to costs".

4 One other matter should be noted with respect to s 117(2), namely that its terms are, if anything, wider than the bare power "to award costs" considered in *Knight v FP Special Assets Ltd*⁴. Accordingly, it follows that the sub-section authorises orders against persons who are not parties to proceedings in the

1 *Cachia v Hanes* (1994) 179 CLR 403 at 410.

2 See *Breen v Breen* (1990) 65 ALJR 195. Note, however, that in that case, the Court did not decide whether the power to make the order in question derived from s 117(2) or s 74 of the Act.

3 As to the inherent power of a superior court to make orders necessary to effectuate its process, see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 which examines the inherent (or implied) power of the Federal Court to grant Mareva injunctions; in particular, at 617-619 per Wilson and Dawson JJ, 622-624 per Deane J (with whom Mason CJ agreed), 637-640 per Gaudron J.

4 (1992) 174 CLR 178.

exceptional circumstances in which that course is appropriate. At least that is so if the order is one which indemnifies for costs actually incurred, an order of that kind being properly described as an "order as to costs".

5 Notwithstanding the width of the power conferred by s 117(2) of the Act, an order under that sub-section must, as Hayne J points out, be an "order as to costs [or] security for costs". The order in question in this case is plainly not an order for security. And an order against a person, who is not a party to proceedings and who has no interest in them or their outcome and no control over them, to provide funds to another is not, in my view, an order as to costs even though its purpose is to enable that other person to be legally represented in the proceedings. Rather, it is simply a maintenance order, or, where, as here, made against a legal aid body, an order for the provision of legal aid.

6 I agree entirely with the observations of Hayne J with respect to s 68L of the Act.

7 The order nisi for certiorari should be made absolute and order 3 of the orders made by Faulks J in the Family Court on 9 September 1997 should be quashed. Given the developments that have occurred since the order nisi was granted, it is not now necessary for prohibition to issue. Accordingly, the order nisi for prohibition should be discharged.

3.

8 GUMMOW J. The order nisi for certiorari should be made absolute and order 3 of the orders made by Faulks J should be quashed. The order nisi for prohibition should be discharged. I agree generally with the reasons given by Callinan J. For myself, I would add only the following points:

9 The first concerns the legislative history. As it stood on 5 February 1993 when an order for separate representation was first made, s 117 was in a different form to that which it took when the orders were made on 31 July 1996 and 9 September 1997. Sub-sections (3) and (4) were omitted, with effect 16 December 1995, by s 54 of the *Family Law Reform Act* 1995 (Cth) ("the 1995 Act"). These sub-sections had stated:

"(3) A person who has instituted a matrimonial cause or a person who is entitled to participate in proceedings either as a respondent or intervener may apply to the Australian Legal Aid Office for legal assistance under this section in respect of the proceedings.

(4) Where an application is made by a person under subsection (3), the Attorney-General, the Director of the Australian Legal Aid Office or a person employed in the Australian Legal Aid Office authorized by the Director in writing in that behalf may (in the case of a person employed in the Australian Legal Aid Office, subject to any restriction in that authority in writing) authorize legal assistance to the applicant in accordance with the means and needs test of the Australian Legal Aid Office for the giving of legal assistance."

The references in s 117(3) to the provision by the Australian Legal Aid Office of "legal assistance under this section" upon application by a person who had instituted a matrimonial cause (then defined in s 4(1)) or by a person entitled to participate either as a respondent or intervener indicate a legislative scheme whereby it was those persons, not the legal aid authority itself, who were to suffer orders as to costs. No difference in result is required by the changes made by the 1995 Act in substituting a new Pt VII (ss 60A-70Q), headed "CHILDREN" and including s 68L, and by the making of O 23 r 4(2) of the Family Law Rules with its provision for requests to legal aid bodies.

10 Secondly, the basic concept that orders as to costs provide for or towards an indemnity does not deny the competency of an interlocutory order whereby one party is obliged to make available to another funds towards that indemnity. Such an order may be made *quia timet*, in advance of the indemnity being called upon after the making of final orders. However, the order to which the prosecutor objects is not of that description.

- 11 Thirdly, whilst s 117(1) is directed to the carriage by the parties of their own costs, *Penfold v Penfold*⁵ established that s 117(1) must yield to s 117(2) whenever the court forms the opinion "that there are circumstances justifying" it in making an order of the description in s 117(2). That sub-section speaks not of parties but of certain orders. In considering what order (if any) should be made, the court is obliged by s 117(2A) to have regard to certain matters. These are set out in pars (a)-(g). Whilst pars (a)-(f) are focused upon the parties to the proceedings and their circumstances and conduct, par (g) speaks of "such other matters as the court considers relevant". The result is to accommodate within s 117 orders as to the carriage of costs by third persons with an interest in the litigation of the nature identified by Mason CJ and Deane J, and Gaudron J, in *Knight v FP Special Assets Ltd*⁶.
- 12 Fourthly, the prosecutor does not have any interest of this nature. The order made by Faulks J is connected with the costs, in the sense that observance of it has consequences for the carriage of costs, but in form and substance the order is one for the provision of legal aid, such aid to be selected by the prosecutor from the alternatives stipulated in the order.
- 13 Finally, a matter which the court may properly regard as relevant when making costs orders against parties, or those with an interest in the *Knight* sense, may be the need to secure separate representation of a child by order made under s 68L. However, s 68L itself is not an independent source of authority to make such costs orders.

5 (1980) 144 CLR 311 at 315.

6 (1992) 174 CLR 178 at 192-193, 205.

- 14 KIRBY J. In *Aiden Shipping Ltd v Interbulk Ltd*⁷, speaking of the provisions of the *Supreme Court Act* 1981 (UK) affording the power to award costs, Lord Goff of Chieveley remarked⁸: "It is strange that courts should think it right to impose, by way of implication, a limit upon a wide statutory jurisdiction". It is still strange. Limits upon such wide statutory powers may be imposed by constitutional law. Sometimes controls are imposed by the statute itself⁹. But where, by valid legislation, a power to award costs is afforded to a court in general terms, the grant of power should be given an ample interpretation and not narrowly construed.

Orders appointing a child's representative

- 15 In the background of this litigation is a young girl ("the child"). The marriage of her parents has broken down. Both by Australian law¹⁰, and by international law¹¹ decisions affecting her must be determined in accordance with her best interests.
- 16 In February 1993, a judge of the Family Court of Australia (Treyvaud J) ordered that the child "be separately represented in these proceedings, only on the basis that the Legal Aid Commission provide such representation". Pursuant to this order, the Legal Aid Commission of Victoria (since renamed Victoria Legal Aid) ("VLA") (the prosecutor) appointed one of its employed solicitors,

7 [1986] AC 965. See also *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 586; 152 ALR 83 at 94; [1998] HCA 11 at 38.

8 [1986] AC 965 at 979.

9 cf Corporations Law, s 1335(2) which limits an award of costs in proceedings before a court under the Law so that it is "borne by such party to the proceedings as the court, in its discretion, directs."

10 *Family Law Act* 1975 (Cth), ss 65E, 68F.

11 United Nations Convention on the Rights of the Child 1989, Arts 3, 12 (ratified by Australia on 17 December 1990); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288, 291, 298, 301, 304-305, 315; Walsh, "The United Nations Convention on the Rights of the Child: A British View" (1991) 5 *International Journal of Law and the Family* 170; King, "Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention" (1994) 57 *Modern Law Review* 385; Van Bueren, *The International Law on the Rights of the Child* (1995) at 45-47; Cretney and Masson, *Principles of Family Law*, 6th ed (1997) 584-587; cf African Charter on the Rights and Welfare of the Child, Art 4; European Convention on the Exercise of Children's Rights, Ch II.

Mr Edelson, to represent the child as her separate representative¹². When, two years later, Mr Edelson left the employ of the Commission another solicitor employed by VLA, Mr Cohen, assumed the role of separate representative of the child.

17 In mid-1996, the dispute between the child's parents involved (amongst other things) contact with the child. A registrar of the Family Court, on 31 July 1996, extended the order earlier made by Treyvaud J. The former provision of the *Family Law Act 1975* (Cth) ("the Act") under which a separate representative of a child might be ordered¹³ was replaced by the present provision (s 68L)¹⁴. The title of the office was changed to the "child's representative"¹⁵. However, the administrative arrangements whereby VLA designated one of its employees to act as such representative continued. This was reflected in the registrar's order that the child "continue to be separately represented by Mr Charles Cohen of Legal Aid Victoria (sic)". The order contained a request¹⁶ that "Victoria Legal Aid arrange such separate representation". So it did.

18 As a result of reductions in funding for legal aid, VLA in October 1996 wrote to various legal practitioners advising them that requests for the appointment of a child's representative would in future be subject to a means test, based on whether the parties were legally aided. A ceiling of \$15,000 was also imposed on the legal aid funds available for such representation. In February 1997, VLA wrote to its officer, Mr Cohen, advising him that under new legal aid guidelines, the means of the parents of the child in the present proceedings precluded the child from qualifying for legal aid. The letter was signed by a Grants Officer in the Grants Division of VLA. It was addressed to Mr Cohen in the Family Law Division of VLA. VLA "instructed" the child's representative to seek an order from the Family Court requiring the parties to the proceedings (the parents, and paternal grandparents) to pay the representative's costs to that date and thereafter until the matter was finalised.

12 The office was originally known as a separate representative. See s 65 of the Act as originally enacted.

13 Act, s 65 (now repealed).

14 By *Family Law Reform Act 1995* (Cth), s 31.

15 This occurred when Pt VII was repealed and substituted with a new Part (by *Family Law Reform Act 1995* (Cth), s 31).

16 By O 23, r 4(2) of the Family Law Rules it is provided: "If the court orders that a child is to be separately represented, it may request that the representation be arranged by a legal aid body that is a relevant authority within the meaning of section 116C of the Act."

19 In or shortly before August 1997 Mr Cohen was replaced by Ms Glaister as the child's representative. She too was an employee of VLA. She notified the solicitors for the parties that she was seeking the provision of legal aid to commence proceedings for an order that the parties pay the costs of the separate representation. VLA duly granted legal aid for this purpose. After further correspondence between Ms Glaister and the solicitors (all of it written by Ms Glaister on the letterhead of VLA), the application by the child's representative was filed in the Melbourne registry of the Family Court on 4 September 1997. The application form named VLA as the applicant. Ms Glaister was named as the "solicitor for the applicant" (ie the solicitor for VLA). The parents and paternal grandparents of the child were named as the respondents to the application. It sought an order "[t]hat the Court determine the proportion of the Separate Representative's (sic) costs payable by each party" and that the parties pay the sum of \$9,037.60 "being estimated future costs to [VLA] within seven days of the date hereof, such moneys to be held by [VLA] on trust for payment of the Child Representative's future legal costs".

20 In support of the application, an affidavit was filed by a Grants Officer employed by VLA. This stated that he was responsible for the grant of legal assistance to Ms Glaister who was described as "solicitor ('the child's representative') of [VLA] acting on behalf of [the child]". The affidavit went on:

"Acting upon a determination of the Board of [VLA] I have instructed the Child Representative to seek an Order from the Court that the parties ... pay the Child Representative's future costs in a proportion to be determined by the Court."

The affidavit concluded:

"In the event that such costs are not paid I will terminate the grant of assistance to the Child Representative in these proceedings."

21 The last-mentioned statement presented immediate difficulties. As was well known to VLA and Ms Glaister, the principal proceedings between the parties were listed for a five day trial to commence on 15 September 1997. When the application of VLA came before the Family Court on 8 September 1997, it was heard by Faulks J. His Honour is a respondent to these proceedings. He has submitted to the orders of this Court save as to costs. Unsurprisingly in the circumstances, Faulks J enquired of counsel for the applicant whether he appeared for the child's representative or for VLA. Until that point, the position of the two had been treated as identical; but they were incomparable. The child's interest was to continue the representation which VLA was threatening to terminate. Counsel took instructions from Ms Glaister. He then indicated that he appeared for the child's representative and not VLA. Thereupon, the application in the name of VLA was withdrawn. Leave was given to make the application previously notified on behalf of the child's representative. Yet the position remained that the child's

representative (Ms Glaister) was an officer of VLA. The order she was seeking was, in effect, that the child's parents and paternal grandparents be ordered to pay moneys for her future costs.

22 The costs in question were calculated by reference to estimated counsel's fees and to Ms Glaister's own costs of the approaching proceedings. The former were estimated to be \$816.00 per day for five days (\$4080.00). The latter were estimated to be twelve hours of preparation at \$93.60 per hour (\$1,123.20), instructing fees of \$748.80 per day for the estimated five days of the coming trial (\$3,740), together with conference fees (\$94.40). I pause to observe that more than half of the sum demanded in the application before his Honour related to the professional fees of the child's representative. She was at all times an officer of VLA employed and authorised by VLA to act in that capacity. Although VLA, with the leave of Faulks J, withdrew from the application for costs, the record clearly shows that it left behind its officer, Ms Glaister. By inference, as she was not in private practice, the order for costs which she was making was not for her personal benefit but for the financial benefit of VLA.

23 Tedious though it is to mention all these facts, it is impossible to understand the orders challenged in these proceedings without a full appreciation of the direct and continuing involvement which VLA, from the outset, had in the litigation between the parties. It was no stranger. Even when VLA, as such, withdrew from the role of a party to the application, the substituted application was that of its officer. Its funds were the intended beneficiary of the orders which that officer continued to advocate. The court record of the hearing before Faulks J shows that counsel appearing for the child's representative was "instructed by Family and Civil Law Division, Victoria Legal Aid".

24 After the amended application before Faulks J had continued for a time, VLA reappeared. Presumably it had been notified that some of the parties were urging that the proper order for costs of the child's representative was one not against them but against VLA itself. VLA was granted leave to intervene to resist such an order. By virtue of the Act, no different order being made, VLA was thereby deemed to be a party to the proceedings "with all the rights, duties and liabilities of a party"¹⁷. Admittedly, in the judgment of Faulks J and during the course of the present proceedings, VLA was sometimes described as a "non-party". That was its position at common law. But its status was unquestionably altered by the statutory deeming provision. Once it returned and intervened, it was deemed a party.

25 At no stage did VLA or Ms Glaister acknowledge any conflict in their respective positions. Ms Glaister continued to act as the child's representative. So

17 Act, s 92(3).

far as this Court is aware, she still holds that office whilst remaining an employee of VLA.

Costs order and challenge

- 26 VLA submitted before Faulks J that he had no power to make an order which would require it to continue "funding of" the child's representative nor any power to make an anticipatory order for costs against it or to order it to provide security for costs. Nevertheless, Faulks J proceeded to make the order which has provoked these proceedings:

"That pursuant to the provisions of section 117 of the *Family Law Act* 1975, [VLA] will provide either the sum of \$9,037.60 for the future costs of the child's representative in these proceedings or shall facilitate the making available of the child's representative (sic) services and provide for the payment of counsel's fees in advance of such proceedings."

- 27 Upon the making of this order, pursuant to the Constitution, s 75(v) and the *Judiciary Act* 1903 (Cth), VLA applied to this Court for orders of certiorari¹⁸ and prohibition. Two points were raised to support its challenge. The first was that, under the Act, Faulks J lacked jurisdiction to make the order which he did. The second was that the order was constitutionally impermissible. In this way two points were tendered for decision. The first raised a question of statutory construction. The second involved the interpretation of the Constitution. The latter occasioned notices pursuant to the *Judiciary Act*¹⁹. These resulted in the interventions of the States of New South Wales, Victoria, South Australia and Western Australia, and of the Commonwealth.

- 28 Two events occurred before the return of the proceedings which should be mentioned. First, on 15 September 1997, another judge of the Family Court (Kay J) ordered that the parents of the child "each pay the sum of \$4,518.80 to [VLA]" by a specified date "towards the costs of the child of the marriage being separately represented". That order was designed to ensure that the approaching hearing dates for the trial would not be vacated. The order recorded the agreement of the parties that it was not intended to affect "in any way" any orders of this Court²⁰. Secondly, by procedural orders made in this Court, it was determined that

18 As to the grant of certiorari, see *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482 at 484; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 348-349; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604, 617-618, 630, 645.

19 s 78B.

20 The order recited: "... it being intended that any monies paid under these orders shall be refunded if the orders of Justice Faulks are upheld by the High Court."

the point of statutory construction would be heard first and separately from the constitutional challenge. The latter would be heard later, and presumably by the entire Court, in the event that the challenge on statutory grounds failed, wholly or in part.

29 There are obvious disadvantages in the foregoing procedures. It would have been open to VLA, as an intervening party made subject to the orders of Faulks J, to appeal against those orders before the Full Court of the Family Court. Such a challenge could have been advanced upon grounds wider than those which could be raised before this Court, notably in respect of discretionary and factual considerations. It is ordinarily appropriate that parties questioning the validity of orders of a federal court should exhaust the remedies available within that court before seeking relief under the constitutional writs. Doing so conserves the time of this Court, provides it with the advantage of the opinion of the federal court concerned, and affords proper respect to that court.

30 There are also disadvantages in excising from argument addressed to the meaning of statutory provisions, challenges about the constitutional validity of such provisions. Whilst it is true that, to judge the constitutionality of a law, it is necessary to construe it, the function of elucidating the meaning of a law may itself be affected by any constitutional constraints in relation to which the law is to be understood²¹. The Constitution is part of the law. It permeates and affects all other parts. Earlier judicial remarks about leaving constitutional challenges to a last resort²² may need reconsideration. They derive from a time when different procedures governed the separate hearing and the determination of most constitutional questions in Australia²³.

31 Nevertheless, the matter having proceeded as it has, it is appropriate to deal with VLA's summons. For the moment I will therefore isolate, and first consider, the arguments which suggested that Faulks J had no power under the Act to make the order which he did.

21 cf *NLRB v Catholic Bishop of Chicago* 440 US 490 at 500 (1979); *United States v Clark* 445 US 23 at 27 (1980); *St Martin Lutheran Church v South Dakota* 451 US 772 at 780 (1981); *United States v Security Industrial Bank* 459 US 70 at 78 (1982).

22 For example, *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 773-774.

23 *Judiciary Act* 1903 (Cth), s 38A (inserted by *Judiciary Act* 1907 (Cth), s 2 and subsequently repealed by *Judiciary Amendment Act* 1976 (Cth), s 7).

Section 68L

32 Under the predecessor to the present Act, the *Matrimonial Causes Act* 1959 (Cth), it was contemplated that several persons other than the husband and wife might become involved in the proceedings. Thus a person alleged to have committed adultery might be joined²⁴. Interventions by the Attorney-General²⁵ and by other persons²⁶ were envisaged. Special provisions were made in respect of proceedings involving children²⁷, although not specifically for their separate representation before a court.

33 The first provision for the separate representation of a child appeared in the Act. As originally enacted, s 65 provided that the court could order that a child be separately represented:

"and the court may make such other orders as it considers necessary for the purpose of securing such separate representation."

34 The inclusion of a new division in the Act in 1995²⁸ provided the occasion to alter somewhat, and to elaborate, the powers of the Family Court to provide for the separate representation of children²⁹. The present provision is in the following terms³⁰:

"68L(2) If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, *and may also make such other orders as it considers necessary to secure that separate representation.*"

24 *Matrimonial Causes Act* 1959 (Cth), s 45(1).

25 *Matrimonial Causes Act* 1959 (Cth), ss 76, 77.

26 *Matrimonial Causes Act* 1959 (Cth), s 79.

27 *Matrimonial Causes Act* 1959 (Cth), ss 84, 85.

28 Pt VII, Div 10, "The best interests of children and the representation of children". This Division was inserted by the *Family Law Reform Act* 1995 (Cth), s 31.

29 The United Nations Convention on the Rights of the Child 1989 had a "significant" influence on the development of the present form of separate representation of a child: Australia, Family Law Council, *Involving and Representing Children in Family Law* (1996) at par 1.02.

30 Emphasis added.

Section 117

- 35 The *Matrimonial Causes Act* provided, in s 125, the progenitor of the present provision. Like the present section, s 125 was expressed in the widest language:

"In proceedings under this Act, the court may, subject to the rules, make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court thinks just."

- 36 To reflect the different policy which was to govern orders for costs in the new Family Court, the section dealing with costs (s 117) was more elaborate than its predecessor in the former Act had been. The first sub-section was expressed to be subject to sub-s (2) and s 118³¹. It stated the general rule that each party to proceedings under the Act should "bear his or her own costs". The succeeding sub-section provides³²:

"117(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsection (2A) and the Rules of Court, make *such order as to costs and security for costs*, whether by way of interlocutory order or otherwise, as the court considers just."

Although the opening words of the sub-section have been reframed, the closing words, which confer an ample power on the judges of the Family Court, remain unchanged to this day.

- 37 In its original form, s 117(3) empowered any person, instituting proceedings, or entitled to participate in them as a respondent or intervener, to "apply to the Australian Legal Aid Office for legal assistance under this section". By s 117(4) it was provided that, where an application was made for legal assistance, various specified officers could "authorise legal assistance to the applicant in accordance with the means and needs test of the Australian Legal Aid Office for the giving of legal assistance". Sub-sections (3) and (4) were

31 Dealing with frivolous or vexatious proceedings.

32 Emphasis added.

omitted in 1995³³. Meanwhile, s 117(2A) had been inserted in 1983³⁴ to express criteria to which the Court must have regard in considering what order (if any) it should make under s 117(2). All but one of the paragraphs of sub-s (2A) relate to the circumstances of a party. However, the closing paragraph, par (g), is expressed in the most ample terms. It permits the Court to have regard to "such other matters as the court considers relevant".

The legislative basis of the orders under challenge

- 38 In terms of his order, Faulks J purported to rely solely on s 117 of the Act. The Commonwealth directed its submissions only to s 117 and argued that that provision was a proper basis for the order under challenge. The father and the paternal grandparents ("the contesting respondents") accepted that it was not possible to support the second part of Faulks J's order by reference to s 117. Accordingly, they argued that the second part, and alternatively the entire order, could be supported by reference to s 68L. VLA and the intervening States disputed that the order was supported by either section of the Act. There was no representation before this Court for the child or the child's representative. However, having regard to the arguments put for the child's mother and the contesting respondents, it was accepted that the child's separate interests had been adequately protected.

Common ground

- 39 In this much litigated dispute, the parties agreed about some things. Thus, there was no contest concerning the facts stated by Faulks J in his reasons. There was no dispute that the orders appointing and extending the appointment of a child's representative were properly made in this case, having regard to the complexities of the litigation and the desirability of protecting the child's interests separate from those of her parents and grandparents. VLA agreed that it had no complaint concerning the opportunities which had been afforded to it to be heard before the order was made affecting it. No issue was raised by any party concerning the terms of the order of Kay J. None suggested that such order had removed the subject matter of the contest or had left no exercise of power to which the orders of this Court could be addressed. VLA did not dispute the power of the Family Court to make anticipatory orders for costs directed to a husband requiring that he provide for the future costs of a wife. Whether such orders depended upon

33 *Family Law Reform Act 1995* (Cth), s 54.

34 *Family Law Amendment Act 1983* (Cth), s 69. Further amended by *Family Law Amendment Act 1983* (Cth), s 76 and Sched and *Family Law Amendment Act 1987* (Cth), s 63 and Sched.

s 117(2) of the Act or (as has sometimes been suggested³⁵) on s 74 of the Act dealing with maintenance was agreed to be an open question³⁶. For the contesting respondents, it was acknowledged that the order made by Faulks J was unusual. It was conceded by their counsel that it might appear to be outside the orthodox approach to the ordering of costs in inter partes litigation. But those respondents defended the order on the basis of the wide powers conferred upon the Family Court and the ample construction which should be given to those powers. Relevant to such construction were the considerations that s 117 conferred a jurisdiction on a court³⁷, that it was designed to encompass vastly different factual circumstances and necessary to achieve the effectiveness of the separate representation of children in appropriate cases, as envisaged by the Act.

General approach

40 Where a challenge is made to a purported exercise of statutory power, it is not fatal to such exercise that the nominated foundation for it is erroneous. If the power exists, its exercise will be sustained and the nominated basis disregarded³⁸. The fact that Faulks J considered that s 117 of the Act was the legal foundation of his order would not deprive that order of validity if, on examination, it was supported by another provision, such as s 68L. At various times, three sources were propounded to support the order:

- (a) That it was an order "as to" costs within s 117(2).
- (b) That it was an order "as to ... security for costs" within that sub-section.
- (c) That it was an order which the court considered necessary to secure separate representation of a child within s 68L(2).

41 Before considering each of these suggested sources of the power, a few general propositions may be accepted:

1. There was no power to order costs at common law. The source of the power must therefore be found in legislation. Accordingly, the primary task before the Court in this part of the case, is to examine the provisions of the Act relied

35 *In the Marriage of Wilson* (1989) 13 Fam LR 205 at 219 per Kay J (diss); contrast Strauss J at 208, Nygh J at 210.

36 As it was left in *Breen v Breen* (1990) 65 ALJR 195; *In the Marriage of Zschokke* (1996) 20 Fam LR 766 at 779.

37 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

38 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487; *Brown v West* (1990) 169 CLR 195 at 203.

upon and to consider whether those provisions, or any of them, sustain the order³⁹.

2. Statutory powers providing for costs appear in a multitude of forms⁴⁰. Although the word "costs" may import notions of a general kind from the forms of orders which have been made in courts of law for centuries, such preconceptions must not distract the Court from the task of construction which each statutory provision for costs invokes. As with any other legislative measure, the law in question must be construed to achieve its identified purposes⁴¹. A section empowering orders for costs will be construed in the context of any peculiarities of the legislation in which it appears. Relevantly to the Act in question here, this includes those provisions which necessarily involve in the proceedings, perhaps unwillingly, persons other than the principal parties. It inherently involves any minor child of the parties' relationship, guardians of such child, grandparents and other persons concerned with the care, welfare or development of the child⁴². Litigation in the Family Court is not ordinary litigation⁴³. Of its nature, it often involves a wider circle of affected persons who are recognised by the Act, may intervene and become parties to the proceedings. It also recognises, uniquely, the special needs of children sometimes to have a representative appointed to protect their separate interests. To the fullest extent compatible with the language of s 117, the power to make orders as to costs under the Act must be read so as to cover the costs of the variety of persons who participate in proceedings in the Family Court, whether as parties or otherwise⁴⁴.
3. A grant of power to a court to make orders as to costs will not, in the absence of a legislative indication to the contrary, be construed narrowly. This is because it is implied from the character of the donee of the power that the power will be exercised judicially and in accordance with established legal principles. Because the recipient of the power here is the Family Court of

39 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 182-183.

40 *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 600; 152 ALR 83 at 113-114; [1998] HCA 11 at 110-111 and statutes there referred to.

41 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

42 Act, s 65C.

43 cf *M v M* (1988) 166 CLR 69 at 76.

44 *Cassidy v Murray* (1995) 19 Fam LR 492 at 501-503; *In the Marriage of S* (1997) 22 Fam LR 112 at 122-124.

Australia, a superior federal court of record⁴⁵, it would be contrary to principle for the power to be given anything other than the most liberal and ample construction⁴⁶.

4. It is legitimate, in construing a power appearing in legislation, to have regard to the course of any amendments which help to explain the legislative purpose that lies behind the present provision. The amendments to s 117, both in the opening words of sub-s (2) and following the insertion of sub-s(2A), reflect recommendations designed to avoid disadvantages to certain vulnerable spouses (mostly women) which the original language of the section was found to have caused⁴⁷. The disadvantageous position of women in family law litigation⁴⁸ produces a special need, in many cases, to provide for future costs, ie in advance of the conduct of the litigation. The word "costs" in s 117 extends to such cases, as properly it must in the context of this particular Act. The suggestion that such orders represent a form of "spousal maintenance", supported by s 74 of the Act, although expressly reserved by this Court in *Breen v Breen*⁴⁹, is unconvincing. Just as the future costs of vulnerable spouses⁵⁰ can be, and are, provided under s 117, so the analogous future costs of the representatives of vulnerable children would seem, on the face of things, to attract the same provision.
5. Ordinarily, costs are not ordered against non-parties to proceedings before a court. But that is because it is generally inappropriate to do so⁵¹.

45 Act, s 21(2).

46 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J. Her Honour so held on the basis that the power will not be exercised "arbitrarily or capriciously or to work oppression or abuse"; see also *Parker v Parker* (1992) 16 Fam LR 458 at 462; *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203; *Caboolture Park Shopping Centre Pty Ltd (In Liq) v White Industries (Qld) Pty Ltd* (1993) 117 ALR 253; cf *Bent v Gough* (1992) 108 ALR 131.

47 See Australian Parliament, *Family Law in Australia. Joint Select Committee on the Family Law Act*, July 1980, vol 1 at pars 11.35-11.49.

48 See Graycar, "Gendered Assumptions in Family Law Decision-Making" (1994) 22 *Federal Law Review* 278.

49 (1990) 65 ALJR 195.

50 Anticipatory costs for vulnerable spouses were ordered long before the Act was enacted. See *Williams v Williams* [1929] P 114 at 118; *Wilson v Wilson* (1966) 9 FLR 1 at 11.

51 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 203 per Dawson J.

Nevertheless, for a long time and in many different circumstances, courts have exercised their jurisdiction to order costs against non-parties⁵². The issue presented in challenges to such orders is normally now addressed not to the *power* to make them but to whether proper *procedures* have been followed and whether the *discretion* has been exercised in a lawful manner, "judicially and in accordance with general legal principles pertaining to the law of costs"⁵³. In these proceedings no complaint was made about the procedures. No complaint could be made about the exercise of discretion having regard to the nature of the proceedings.

Special consideration: the child's representative

42 The importance of reading s 117 in the context of the provisions of the Act for the peculiar office of child's representative is apparent on the face of the Act itself. It arises out of the elaborate provisions which the Act makes for safeguarding the welfare of children. Whereas in the *Matrimonial Causes Act*, and even in the original version of the *Family Law Act*, the provision in relation to children was limited and ancillary to the resolution of the interests of the parents in dispute, amendments to the *Family Law Act* in 1995 introduced substantial changes⁵⁴. As amended, the Act affords a wide range of protections for children which reflect a parliamentary recognition of their separate identity and rights. It is in this context that s 68L must be read. But so also s 117(2).

43 The "old system" for ascertaining the interests of children of a marriage being dissolved sometimes included a private judicial interview of the child to ascertain its wishes. This procedure had many defects⁵⁵. It was little used once

52 The cases are collected in *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 187-188 per Mason CJ and Deane J.

53 *Oasis Hotel Ltd v Zurich Insurance* (1981) 124 DLR (3d) 455 at 462.

54 Pt VII ("Children") as amended by the *Family Law Reform Act* 1995 (Cth), s 31, introducing ss 60A to 70Q.

55 *Sargeant v Watkins* (1965) 6 FLR 302; see also *Demetriou and Demetriou* (1976) FLC ¶90-102 at 75,469.

the *Family Law Act* commenced⁵⁶. It enjoyed little favour⁵⁷. Its virtual disappearance means that, in a contested case, the Family Court, without separate assistance, may be at a disadvantage in judging what the best interests of a child objectively require, as distinct from what the competing parents (and their supporting families) urge, often coloured by their own interests and perspectives. In New Zealand⁵⁸, Canada⁵⁹, the United Kingdom⁶⁰ and the United States of America⁶¹, provision exists for orders to be made that children be separately represented in family law proceedings. In some countries it seems that the power is rarely exercised⁶². Doubtless, in most cases in Australia, separate representation (which is inescapably expensive) is also unnecessary. But well documented reports show that there are particular instances where special representation may not only be helpful but essential. Such cases include some

56 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process. Report No 84* (1997) at par 16.61.

57 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process. Report No 84* (1997) at par 16.61. The Commission points to the fact that the reality of adversarial litigation carries particular dangers for children (at par 16.31) and that children in some situations should not have to align themselves with the conflicting parties or their legal representatives (at par 16.59).

58 The position in New Zealand appears to be similar to that in Australia. See *Family Proceedings Act* 1990 (NZ), ss 158, 162; *Guardianship Act* 1968 (NZ), s 30; Cochrane, "The team approach to separate representation - the New Zealand perspective" in Family Court of Australia, *Enhancing Access to Justice: Second National Conference Papers* (1995) 345.

59 In Canada the position appears to be governed by judicial discretion and to vary among the Provinces. See *Wakaluk v Wakaluk* (1976) 25 RFL 292 at 304; *Bonenfant v Bonenfant* (1981) 21 RFL (2d) 173 at 178; Davies, *Family Law in Canada* (1984) at 539-541.

60 In the United Kingdom, provision is made for the appointment of separate legal representatives and social science trained guardians *ad litem*: *Children Act* 1989 (UK), Pt IV, Family Proceedings Rules 1991 (UK), r 9.2A.

61 In the United States the Federal Rules of Civil Procedure, r 17 (c) provides generally for the appointment of a guardian *ad litem* for an infant not otherwise represented.

62 Such as the United Kingdom: Cretney and Masson, *Principles of Family Law*, 6th ed (1997) at 597.

involving indigenous children⁶³, children from non-English speaking backgrounds⁶⁴, children with intellectual disabilities⁶⁵ and children in respect of whom physical or sexual abuse is suspected or alleged⁶⁶. In mentioning these cases I do not suggest that any of them was applicable in this instance. But the principle is the same. They might have been relevant.

- 44 It is in this context, which would be well known to the Parliament, that a section has been enacted⁶⁷, and then re-enacted and reinforced⁶⁸, allowing the appointment of a child's representative. Clearly, it was intended that this power, for such an important human and social purpose, should be effective. It was intended to go beyond pious aspirations. Ordinarily, it might be contemplated, as a matter of discretion, that the Family Court would order the parents or other members of the child's family to pay the costs of the child's representative. But, clearly, cases will exist where that is not appropriate or possible. It was inherent in VLA's submission that, in any such case, there was nothing effective that the Family Court could do except (as it faintly and unpersuasively suggested) provide funds from that court's resources for such separate representation. The question is whether this construction, which could in particular cases completely defeat the high legislative purpose of ensuring the separate representation of children before the Family Court, is what the Act requires. It would be a curious result. Whether it is necessary depends upon the construction of the Act.

The order is not "as to security for costs"

- 45 Some of the written submissions examine whether the order of Faulks J could be justified as being one "as to ... security for costs" within s 117(2). This would be consistent with his Honour's nomination of s 117 in the terms of the order for that section contains a reference to such security. It would also be consistent with the character of "security" for costs as relating to the future costs of a litigant

63 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*. Report No 84 (1997) at pars 16.62-16.63. See also Act, s 68F(2)(f).

64 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*. Report No 84 (1997) at par 16.67.

65 Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*. Report No 84 (1997) at par 16.73. See also Act, 68F(2)(e).

66 See Act, s 68F(2)(g), (i) and (j); cf *Re P (a child); Separate Representative* (1993) FLC ¶92-376.

67 Act, s 65 (since repealed).

68 Act, s 68L.

seeking protection against a risk that, ultimately, that party's costs might not be met unless an advance payment were ordered.

46 Initially, the submissions for VLA before this Court accepted that the order made by Faulks J was "very close, in effect, to making an order for security for costs". The concession was hastily withdrawn when it appeared that "security for costs" might be construed in the context to mean (as the phrase commonly does) security for the costs of the opposite *party* to the litigation. Counsel for the contesting respondents ultimately made it plain that he did not seek to sustain the order on the basis that it was one "as to ... security for costs"⁶⁹. Certainly, the expression is usually one which relates to the costs which that party seeks to have secured by its opponent. The only question, posed by the words "as to", and by the context of s 117(2) in an Act making special provision for a child's representative, is whether these considerations are sufficient to import into this Act a wider meaning for the expression "security for costs". Clearly, a wider meaning would be necessary for the phrase to apply to the provision of security for the costs of a child's representative who was not a party at all.

47 Given the peculiar position of such representative under the Act, I would not myself have so readily accepted that the provision for "security for costs" had no application to such a case. Words take their meaning from any peculiarities of their context. In that regard the Act has many novel features. I was inclined to consider that the original concession made by VLA might have been correct. However, because I can reach my conclusion in these proceedings without reliance upon this point, I will accept for the purposes of these reasons that Faulks J's order was not one "as to ... security for costs". On this basis, if it is to be sustained, it must find support elsewhere in the Act.

The order is not supported by s 68L

48 It is convenient next to consider whether the order, or any part of it, may be sustained as an order which the Family Court considered "necessary to secure ... separate representation" within s 68L(2). Certainly, the provision of funds to a child's representative, the making available of the "child's representative's services" (which the evidence showed VLA had long provided to this child) and the allowance for the payment of counsel's fees in advance of the proceedings would all be practical steps conducive to actually securing the separate representation of the child pursuant to the decision of the Court that the child should be separately represented. But is this the kind of order which s 68L(2) contemplates?

49 Within the Family Court itself, there have been differences of opinion as to whether s 68L of the Act (or its predecessor s 65) supports an order of the kind

⁶⁹ Act, s 117(2).

made here. In *Heard v De Laine*⁷⁰, a Full Court rejected the submission that s 65, not relevantly different from s 68L, went so far as to afford the power to order the Legal Services Commission of South Australia to continue to fund the separate representation of a child. Whilst s 65 and its successor, s 68L, permit the making of ancillary orders necessary to facilitate such representation, such orders did not, in the Full Court's view, go so far⁷¹. Doubts about this holding were later expressed by Nicholson CJ, sitting alone, in *In the Marriage of S*⁷². His Honour accepted that *Heard* stood for the proposition that s 68L(2) does not provide to a judge of the Family Court a source of power to require a legal aid authority to fund a child's representative⁷³. The contesting respondents disputed this interpretation of the power. They argued that "securing" meant making secure or certain. Nothing would conduce to that end so much as ensuring either the provision of funds or the provision of Ms Glaister's services as child's representative, without cost to the child or the reluctant parties.

50 Clearly, s 68L contemplates that the Family Court may make orders to give effect to the important objective of securing separate representation of a child. But in my view, those powers fall short of the making of orders as to costs or having implications for costs. In part, this conclusion derives from the structure of the legislation. The Act deals separately and in broad terms, with the ordering of costs. There is no mention of costs in s 68L. Had it been the purpose of the Parliament that the power expressed in s 68L would extend to the ordering of future costs against a non-party which was a State legal aid body, it might have been contemplated that it would have been more fulsome in the expression of such purpose.

51 In a context in which bodies such as VLA had earlier established schemes by which their employees acted as the representative of designated children, it would have been within the power of the Family Court, under s 68L(2), to make orders providing for the notification to such bodies of the case so that they could consider provision to the child in question of the facilities which they offered. Upon one view, the opening words of the second part of Faulks J's order (if that part be an order), amounted to little more than this. Certainly, requirements of the "order" can only be understood with knowledge of the practice adopted by VLA, doubtless for reasons of economy, of offering a service in the person of an employee such as Ms Glaister. However, the alternative "order" then proceeds to oblige VLA to "provide for the payment of counsel's fees in advance of such proceedings". Clearly, this is an order, if for anything, as to costs. It must therefore find its

70 (1996) 130 FLR 244.

71 (1996) 130 FLR 244 at 249.

72 (1997) 22 Fam LR 112 at 128-129.

73 (1997) 22 Fam LR 112 at 129.

authority in s 117(2). The ancillary powers afforded by s 68L(2) "to secure ... separate representation" of the child contemplate, it is true, a variety of necessary arrangements. But not an order as to costs.

- 52 As the contesting respondents did not seek to support the second part of Faulks J's order upon any footing other than s 68L(2) and as that approach is not justified by the view which I take of the scope of that section, it follows that the challenge of the prosecutor to the second part of the order must be upheld. However, that leaves the first part in which VLA was ordered to provide the sum of \$9,037.60 for future costs of the child's representative in the proceedings. Is that part of the order within the powers conferred on the Family Court by s 117(2)?

An order of future costs is valid

- 53 When the principles governing the approach proper to ascertaining the meaning of a statutory provision for the ordering of costs are applied to s 117(2), there is, in my view, no doubt that the words are broad enough to sustain the first part of Faulks J's order. The purpose of the provision, its context in the Act and the wide variety of circumstances to which it must apply (illustrated by this case), show that Faulks J had the power to act as he did.
- 54 VLA made much of the fact that s 117(2) is expressed to be subject to sub-section (2A). That sub-section refers, in all paragraphs but the last, to the position of a "party" or the "parties" to proceedings in the Court. Whereas an intervener, such as VLA itself, will (in default of a contrary order) become a "party", a child's representative is not, as such, a "party". The representative is in a unique and special position, having unique and special functions to perform.
- 55 If attention is confined to the language of s 117, there is nothing in it to restrict an order to one in favour of, or against, a party. Had it been the purpose of the Parliament to limit the power in such a way it might have said so, as it has in other legislation⁷⁴. Far from restricting the power, it would be hard to imagine a more ample phrase by which to confer it on a court. It is enough that the order should be "as to costs". Neither the recipient of the order is designated nor is the past accrual of the costs required. Approaching the meaning of s 117(2) in the way required by *Knight*, remembering that the power in question is conferred on a court, there is no reason to read the words down. The first part of Faulks J's order is an "order as to costs".
- 56 The fact that VLA was not a party to the proceedings, until it finally intervened to oppose the making of the order, is irrelevant. That fact does not make the order any less an order "as to costs". The suggestion that there is a notion inherent in "costs" that they represent the financial expenses of a *party* is

74 See eg Corporations Law, s 1335(2).

contradicted by the decision of this Court in *Knight*. If anything, this case is stronger than *Knight*. There, the statutory language referred to "the costs of and incident to all proceedings". Here, it is enough that the order made is one "as to costs". There, the challenge was made by receivers of companies engaged in litigation where the receivers themselves were not parties to the proceedings. Here, VLA, by itself and its employee, Ms Glaister, was directly and continuously involved in the proceedings in the various ways I have taken pains to describe. Eventually, VLA, by its intervention, became a party. It was such when the order of Faulks J was formalised.

57 Before *Knight* was decided, the Full Court of the Family Court had held that s 117(2) did not confer power on that Court to make orders against persons other than parties to the proceedings⁷⁵. That decision was overruled after *Knight*⁷⁶. In my opinion the Full Court was correct to perceive that *Knight* required a new approach.

58 In resistance to the conclusion that the first part of the order fell within the power conferred by s 117(2), VLA and the intervening States raised four objections which it is appropriate to consider in turn:

1. That the costs contemplated by s 117(2) refer prima facie to an indemnity for costs already incurred and thus the sub-section does not extend to future costs.
2. That if it had been intended that s 117(2) should apply to non-parties, the Parliament would have said so expressly.
3. That if it had been intended to empower the Family Court to make an order against a State legal aid authority, the Parliament would have said so expressly.
4. That if it had been intended to empower the Family Court to order the provision of legal aid, this too would have been expressly provided and not left to inference.

There is no substance in any of these objections. I will deal with them in turn.

"Costs" are not necessarily an indemnity for past expenses

59 Let it be accepted that historically costs orders have ordinarily been made to provide a partial indemnity to a party with respect to the costs of litigation already

75 See *In the Marriage of Collins* (1985) 75 FLR 84 at 102.

76 *In the Marriage of McAlpin* (1993) 114 FLR 452 at 459.

incurred⁷⁷. This is by no means an absolute rule. The scope of a power to make orders as to costs must in every case be derived from the legislation in which the power exists. The limits of the power must be charted to achieve the purposes of the legislation⁷⁸. The very nature of the office of a "child's representative" involves the assumption that, in some cases at least, the representative will represent the child in adversarial proceedings before the Court. A party, whether husband, wife or other family member, will ordinarily be aware of the prospects of recovering their costs. A spouse in a vulnerable position might seek an order for the provision of future costs so as to ensure that the litigation is equalised⁷⁹. The power to make orders "as to costs" appears in an Act which does not apparently contemplate that the child's representative should act free of charge. Because the child itself would ordinarily be unable to pay the costs of its representative, it is necessarily implicit in the legislation that the court should have the power, by costs orders, to ensure that the representation is effective and that, in appropriate cases, costs are paid in advance of the hearing.

- 60 Once VLA accepted that orders for the payment of future costs of vulnerable spouses were permissible under the Act, the only way this concession could be reconciled with the argument that "costs" in s 117(2) relates only to past costs, is by the flimsy suggestion that orders in favour of a spouse amount to spousal "maintenance" within s 74 of the Act. I do not accept that argument. There is no reason why "costs" in s 117(2) should not be given the most ample meaning that the word permits. That word is broad enough to include future, as well as past, costs. There is nothing inherent in the notion of "costs" that requires a contrary conclusion. There is much in the context and projected operation of the Act which supports the opposing construction.

Costs power extends to non-parties

- 61 As I have indicated, it is my view that VLA, by intervening, was clearly deemed to be a party to the proceedings. Even had this not occurred, it seems plain enough that the role of the child's representative, Ms Glaister, could have been taken as analogous to that of a party to the proceedings⁸⁰. However, as a different approach has been adopted by the majority, it is desirable that I indicate why, even

⁷⁷ *Latoudis v Casey* (1990) 170 CLR 534 at 543; *Cachia v Hanes* (1994) 179 CLR 403 at 410.

⁷⁸ *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 585-586, 601-602; 152 ALR 83 at 93-94, 115-116; [1998] HCA 11 at 36-40, 116-119.

⁷⁹ *Breen v Breen* (1990) 65 ALJR 195.

⁸⁰ See *In the Marriage of McDonald* (1994) 18 Fam LR 265 at 270-271.

if VLA were not deemed to be a party, I would have concluded that a costs order could be made against it.

- 62 In support of its contention that s 117(2) should be confined to costs orders directed to a party, VLA invoked the decision of this Court in *Ascot Investments Pty Ltd v Harper*⁸¹. It was there held that the Family Court had no power, under s 80 of the Act, to require a company or its directors to register a transfer of shares which the Court had ordered to be transferred by one party to a marriage to another. The memorandum and articles of association of the company concerned empowered the directors to decline to register a transfer of shares. The company was not a party to the proceedings in the Family Court. In the course of his reasons, Gibbs J remarked that the general words of the statutory provisions⁸², relied on to sustain the Court's order, should be "understood in the context of the Act, which confers jurisdiction on the Family Court in matrimonial causes and associated matters"⁸³. His Honour went on⁸⁴:

"[I]n that context it would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties, in the absence of clear and unambiguous words ... [I]t does not follow that the Parliament intended that the legitimate interests of third parties should be subordinated to the interests of a party to a marriage, or that the Family Court should be able to make orders that would operate to the detriment of third parties."

- 63 For VLA it was submitted that s 117(2) should be read in the same way so as to avoid the imposition of obligations on persons who were not parties to the substantive proceedings before the Court. Even if s 117(2A) included reference in its closing paragraph to the consideration of matters not specific to a party, the thrust of the section, so it was argued, sufficiently indicated that it was enacted to deal with the costs of parties by orders directed to parties and not to non-parties.

- 64 I do not accept this submission. First, the language of s 117(2) is so broad that the suggested construction would involve an impermissible narrowing of its operation. Especially as it is intended to apply to an Act which expressly contemplates participation in litigation of non-parties, there are good reasons of principle, arising for the efficient operation of the Act, to avoid such a narrow construction. Some significance must attach to the fact that sub-ss (1) and (2A)

81 (1981) 148 CLR 337.

82 Act, ss 80, 114.

83 (1981) 148 CLR 337 at 354.

84 (1981) 148 CLR 337 at 354.

refer to "parties" but sub-s (2) contains no such limiting reference⁸⁵. Moreover, the holding in *Ascot Investments* is clearly distinguishable. That case concerned the making of a substantive order against a complete stranger to the litigation. That order would have a final effect outside the litigation and upon persons not heard. Here, the order was confined to the costs of proceedings in the Family Court. VLA was given ample opportunity to be heard before the order was made. The extent of its involvement in the proceedings, including by the continuing participation of its employee Ms Glaister, makes it absurd to suggest that it was a stranger. The child's representative is required to act in an independent and unfettered way in the best interests of the child⁸⁶. The position of the child's representative here was in no way comparable to that of the company in *Ascot Investments*. If the Parliament had intended to confine the power "as to costs" to the making of orders against a party, it would have said so. In the context of this Act, it is unsurprising that it did not.

Status of a State body affords no statutory immunity

- 65 The complaint by VLA then turned to its status as a statutory authority created by the Parliament of Victoria. It is required by its Act⁸⁷ to perform its functions inter alia by ensuring "that legal aid is provided in the most effective, efficient and economical manner"⁸⁸. Subject to, and in accordance with, agreements and arrangements made between the Commonwealth and the States, it is obliged to "determine or vary priorities in the provision of legal aid as between classes of persons and classes of matters or both"⁸⁹. VLA argued that, had it been intended to empower the Family Court to make orders against a body such as it, the Federal Parliament would have specifically so provided. It would have made arrangements to supplement the legal aid fund⁹⁰ administered by VLA out of which legal aid moneys were payable, relevantly, to the legal profession. In support of its arguments under this head, VLA relied on analogous reasoning in the Full Court of the Family Court. One of the reasons given for rejecting the

85 *In the Marriage of McAlpin* (1993) 114 FLR 452 at 461; *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485 at 508.

86 *In the Marriage of Bennett* (1990) 14 Fam LR 397 at 404-405. A separate representative is empowered to seek orders (*In the Marriage of F and R (No 2)* (1992) 15 Fam LR 662 at 670-671) and has been held entitled to appeal (*Separate Representative v JHE and GAW* (1993) 16 Fam LR 485 at 493-497).

87 *Legal Aid Act* 1978 (Vic).

88 *Legal Aid Act* 1978 (Vic), s 7(a).

89 *Legal Aid Act* 1978 (Vic), s 7(c)(i).

90 *Legal Aid Act* 1978 (Vic), s 41(2)(a).

argument that s 65 (the predecessor to s 68L) should not be interpreted to permit an order to be made against a State legal aid body, was that such an order would amount to empowering the Family Court, in effect, to review the administrative decisions of such a body⁹¹. Had such a power been intended, it was held, it would have been afforded more clearly. VLA urged that a similar approach should be taken in relation to s 117(2).

66 There is no merit in this submission. There is a world of difference between the specific and highly particular provisions of s 68L(2) and the general power in relation to costs conferred on the Family Court by s 117(2). The latter, of necessity, has to address the vast range of cases heard by the Family Court. VLA conceded as much by raising no challenge to the costs order made against it at first instance. Yet if such a costs order could be made in one circumstance, the making of it in another is plainly a matter of *discretion* and not of *power*. It is necessary for a power such as that in s 117(2) to be expressed in broad language. It is unthinkable that VLA, an insurer or any other body, if it were to fund litigation vexatiously and oppressively, could escape an order for costs made against it on the unpersuasive reason that it was not a party to the litigation⁹² or, in the case of VLA, was a State instrumentality that needed to be named or identified by the federal Act before it could be so burdened⁹³.

67 The provisions of s 117(2) appear in words of perfect generality. There is no reason in those words or in the rules of statutory construction, to restrict the operation of the section so that it does not apply to a corporate body such as VLA. Whether this might be done conformably with the Constitution is another question. But it is one that does not arise at this stage of these proceedings.

Character of order: costs not legal aid

68 The final objection of VLA to the order of Faulks J was that, properly characterised, it is an order for the provision of legal aid. It was not an order for costs. The terms of s 117(2) do not permit the making of an order for legal aid. Even in the original form of s 117, the most that was provided was that a person might apply for legal assistance⁹⁴ and identified federal officers might authorise

91 *Heard v De Laine* (1996) 130 FLR 244 at 249.

92 *Chapman Ltd v Christopher* [1998] 1 WLR 12 at 20-21.

93 cf *Minister of Community Welfare v Y* (1988) 12 Fam LR 477 at 485-486; *In the Marriage of S* (1997) 22 Fam LR 112 at 127-135; *In the Marriage of Pagliarella [No 3]* (1994) 122 FLR 443 at 446. See also *O'Neill v De Leo* (1993) 2 Tas R 225 at 230.

94 Act, s 117(3) as originally enacted.

its provision⁹⁵. It may be inferred that this distinction was preserved by the Parliament out of recognition of the need to respect the control of the executive government over the expenditure of legal aid funds raised, for the most part, from taxation levied on the people⁹⁶. Where, exceptionally, power in a court is contemplated to order the provision of legal aid as such, it is usually so stated expressly⁹⁷.

- 69 This attack on the order of Faulks J had more force when the second part of that order, referring to "making available of the child's representative['s] services" is recalled. That, it must be conceded, looks rather like an order for the provision of legal assistance and not an order for costs. However, I have already indicated that that part of the order cannot be sustained. It must be ignored as made without statutory authority. Having excised it, the opening part of the order simply requires the provision of an identified sum as costs. The uncontested evidence shows that that sum related to costs payable to Ms Glaister as the child's representative together with costs for estimated counsel's fees and the time involved in a solicitor of VLA instructing counsel in court. With all respect to those of a different view, I regard it as clear beyond argument that the first part of the order is an "order as to costs". That part is therefore sustained by s 117(2) of the Act.

Defects in the form of the order

- 70 It is impossible to deny that the form of the order made by Faulks J suffers from defects. Most of those defects appear in the structure of the order, expressed as it originally was in the alternative, and in the obligations stated in the second part obliging VLA "to facilitate" the "making available" of the child's representative's "services". The best that can be said for that part of the order, which was virtually unenforceable, is that it was expressed in terms which would probably have been understood by the recipients. VLA would have known that the second limb of the order was giving it an option, in lieu of the provision of the costs fund identified in the first limb, of continuing to make available Ms Glaister's services free of charge, supplemented by "payment of counsel's fees". The latter would presumably have been understood as a reference to that component of the lump sum referred to in the first limb as related to the estimated fees of counsel for the then approaching hearing.

- 71 Whilst the complaints about the terms of the order are understandable, and the need for much greater precision in such matters essential, the excursion from

95 Act, s 117(4) as originally enacted.

96 See *Dietrich v The Queen* (1992) 177 CLR 292 at 297-298, 323, 330, 357, 365.

97 See eg *Crimes Act* 1958 (Vic), s 360A; *Frugtniet v Victoria* (1997) 71 ALJR 1598 at 1600-1601; 148 ALR 320 at 324-325.

the order of the second limb meets most of the complaints. Those which remain should properly be directed to the Family Court. There is no difficulty in doing so. It is clear that the order of Faulks J is an interlocutory one. It would therefore be open to the Family Court to make any amendments necessary to remove ambiguity or uncertainty and to tighten up the terms of its order. This Court would not normally deign to supervise the interlocutory business of another court's orders⁹⁸. There was not much room for ambiguity in the specific sum which the first part of the order required VLA to provide. The failure of the order to deal expressly with the deposit, management and disbursement of the sum might, it is true, require attention. The original application of VLA sought an order that the sum be "held by [VLA] on trust for payment of the Child Representative's future legal costs". Given that the child's representative was herself an officer of VLA, it was presumably intended that a separate account within VLA be established, out of which the proper costs of counsel, solicitors and the special representative herself would be disbursed as they fell due.

- 72 The complaints about its terms do not affect the validity of the first limb of the order which I would therefore uphold.

Discretionary and constitutional considerations

- 73 The Commonwealth, whilst arguing that the order made was within the power afforded by s 117(2), emphasised that such orders should only be made against non-parties, such as VLA was hypothesised to be, in rare and exceptional circumstances. So much appears to have been accepted by the decision of this Court in *Knight*⁹⁹ and in the jurisprudence of the Family Court itself¹⁰⁰. The Commonwealth submitted that courts should develop, and apply, principles which delimit the exceptional circumstances in which a future costs order should be made against a non-party, such as a legal aid body. Similar suggestions have been made in England¹⁰¹. However, in the way in which these proceedings come before this Court, the exercise of *discretion* by Faulks J is irrelevant. The only issue presented is that of *power*.

98 cf *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 873 at 894; 153 ALR 643 at 670; [1998] HCA 30 at 80.

99 (1992) 174 CLR 178 at 192, 203.

100 For example *In the Marriage of S* (1997) 22 Fam LR 112 at 140.

101 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 981; *Symphony Group Plc v Hodgson* [1994] QB 179 at 191-194; *Kelly v South Manchester Health Authority* [1998] 1 WLR 244 at 254-256.

74 This conclusion makes it necessary, in the opinion which I hold, to turn to the constitutional questions which remain for argument¹⁰². One constitutional question, referred to in the order nisi¹⁰³, is whether the making of the order was a purported exercise by Faulks J of powers and decisions vested in VLA by the *Legal Aid Act* 1978 (Vic) and thus an exercise of administrative functions which form no part of the judicial power of the Commonwealth. Other constitutional objections were foreshadowed, including that the order was contrary to the "federal principle" that the legislative powers of the Commonwealth may not be exercised to destroy or curtail the integrity of autonomy of the State¹⁰⁴. These grounds of constitutional challenge are not manifestly meritless. There has been no argument upon them in the way the proceedings were heard. In my view, the Court should therefore hear and determine the constitutional objections.

102 As was not necessary in the conclusion reached in *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337. See at 354 per Gibbs J; cf at 359 per Murphy J who upheld the constitutional validity of the challenged provision.

103 Made by Gaudron J on 12 September 1997.

104 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 498.

Orders

75 I favour the following orders:

1. The order nisi for prohibition and certiorari should be made absolute in respect of the following part of order 3 of the orders made by Faulks J of the Family Court of Australia, dated 9 September 1997:

"or shall facilitate the making available of the child's representative['s] services and provide for the payment of counsel's fees in advance of such proceedings."

2. Direct that the further hearing of the order nisi, on the second ground thereof, proceed in respect of the balance of the said order.

- 76 HAYNE J. On 5 February 1993, in proceedings between a father and mother about their contact with the child of their marriage, a judge of the Family Court ordered that the child be separately represented in the proceedings. The order was made pursuant to s 65 of the *Family Law Act* 1975 (Cth) ("the Act") (as it then stood) and was expressed to be "only on the basis that the Legal Aid Commission provide such representation"¹⁰⁵. The Legal Aid Commission of Victoria was then the body established under the *Legal Aid Act* 1978 (Vic) to provide legal aid in Victoria.
- 77 On 31 July 1996 (that is, after the Act had been amended by the *Family Law Reform Act* 1995 (Cth)), a Registrar of the Family Court made an order, pursuant to s 68L(2) of the Act¹⁰⁶, that the child "continue to be separately represented" by a named officer of Victoria Legal Aid (the successor of the Legal Aid Commission¹⁰⁷). The order went on to say, presumably following the words of O 23 r 4(2) of the Family Law Rules¹⁰⁸, "it is requested that Victoria Legal Aid arrange such separate representation". By this stage of the proceeding the child's paternal grandparents had been joined as applicants. Neither the terms of that joinder nor the nature of the application being made by the grandparents is now significant.

105 Section 65 then provided:

"Where, in any proceedings under this Act in which the welfare of a child is relevant, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organisation concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it considers necessary for the purpose of securing such separate representation."

106 Section 68L(2) provides:

"If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation."

107 *Legal Aid Commission (Amendment) Act* 1995 (Vic), s 9.

108 That rule provides:

"If the court orders that a child is to be separately represented, it may request that the representation be arranged by a legal aid body that is a relevant authority within the meaning of section 116C of the Act."

78 In October 1996, Victoria Legal Aid announced generally to the legal profession in Victoria that its board had made a number of determinations. One was a determination that, irrespective of when an appointment of a child representative had been made in the Family Court, the total grant of legal aid would not exceed \$15,000, that it would not appoint a child representative if neither party to the proceeding was receiving legal aid, and that it would appoint a child representative if one party was receiving aid only if half of the anticipated costs were received in advance from the unaided party or the practitioner appointed to act as representative accepted appointment on the basis that Victoria Legal Aid would be liable for only half the costs which it approved.

79 None of the parties to this proceeding was granted legal aid. The father of the child is an electrical engineer who, in September 1997, was conducting what was said to be a large successful business; the mother is a medical practitioner carrying on practice as an anaesthetist.

80 The proceeding between father, mother and paternal grandparents was fixed for hearing commencing on 15 September 1997. On 6 August 1997, Victoria Legal Aid gave notice that application would be made (presumably by or on behalf of its employee who was acting as the separate representative of the child) for "the discharge of the Order appointing a Separate Representative". That application was not made (as Victoria Legal Aid had suggested it would be made) on 26 August 1997. Rather, on 4 September 1997, Victoria Legal Aid itself made an application in the proceeding that was then pending for orders that the father, mother and paternal grandparents "pay the future legal costs of the Separate Representative" of the child, that the court determine the proportion of the separate representative's costs payable by each party and "[t]hat the parties pay the sum of \$9037.60 being estimated future costs to Victoria Legal Aid within 7 days of the date hereof such monies to be held by Victoria Legal Aid on trust for payment of the Child Representative's future legal costs".

81 This application was supported by an affidavit sworn by the Grants Officer employed by Victoria Legal Aid responsible for the grant of legal assistance to the separate representative. He swore:

"Acting upon a determination of the Board of Victoria Legal Aid I have instructed the Child Representative to seek an Order from the Court that the parties in this matter, namely the Husband, Wife and the Paternal Grandparents, pay the Child Representative's future costs in a proportion to be determined by the Court. I have conducted a search of Victoria Legal Aid's records and it appears that none of the parties in these proceedings are in receipt of legal assistance. In the event that such costs are not paid I will terminate the grant of assistance to the Child Representative in these proceedings.

I am informed by the Child Representative in this matter that neither the Husband, the Wife nor the Paternal Grandparents have paid the Child Representative's costs to date. I am further informed by the Child Representative that the welfare of the Child requires that her interests be separately represented in these proceedings. This matter is presently listed for a 5 day Trial to commence on the 15th September 1997.

The costs that will be incurred by the Child Representative and which are sought to be paid by the Husband, Wife or the Paternal Grandparents are presently estimated to be \$9037.60. These costs comprise:-

- | | |
|--|-----------|
| . Preparation for trial (12 hours at \$93.60 per hour) | \$1123.20 |
| . Counsel's fee (5 days at \$816.00 per day) | \$4080.00 |
| . Conference | \$ 94.40 |
| . Instructing (5 days at \$748.80 per day) | \$3740.00 |

Unless the amount of \$9037.60 is paid to Victoria Legal Aid to be held in trust on account of the Child Representative's costs the grant of assistance from Victoria Legal Aid will terminate in relation to the Child Representative's involvement in these proceedings.

If any further interim hearings are to be listed in this matter the Child Representative's costs would be preparation at \$93.60 per hour, and any appearance at \$93.60 per hour."

82 On 9 September 1997, Faulks J made orders in the following terms:

- "(1) THAT the application filed on the 4 September 1997 by Victoria Legal Aid is withdrawn and accordingly dismissed.
- (2) THAT the child's representative have liberty to make an oral application on behalf of that representative seeking orders identical with those sought in the application just dismissed.
- (3) THAT pursuant to the provisions of Section 117 of the *Family Law Act* 1975 Victoria Legal Aid will provide either the sum of Nine Thousand and Thirty Seven Dollars and Sixty Cents \$9,037.60 for the future costs of the child's representative in these proceedings or shall facilitate the making available of the child's representative services and provide for the payment of counsel's fees in advance of such proceedings.

- (4) THAT Victoria Legal Aid pay the proper costs of the parents and grandparents of and incidental to this matter (including as I previously indicated certification for Senior Counsel and for Counsel)."

83 Victoria Legal Aid seeks writs of certiorari and prohibition: certiorari to bring up and quash par 3 of the order made on 9 September 1997 and prohibition to prohibit any steps to enforce that order (the "impugned order").

84 The order nisi granted¹⁰⁹ was made returnable before a Full Court and gave two grounds:

- that the impugned order was made without jurisdiction; and
- that the making of the impugned order involved the exercise of powers outside and incompatible with Ch III of the Constitution.

Argument has been heard only on the first of these grounds. Because I consider that the order nisi should be made absolute, it is not necessary to hear argument on the constitutional issues which it was sought to agitate.

The impugned order

85 The impugned order is not well drafted. It is by no means clear what it directs Victoria Legal Aid to do. To whom is the specified sum of money to be "provided"? When is it to be provided? Is it to be outlaid by the recipient on *any* future costs of the child's representative in the proceedings or only on certain kinds of costs? Is Victoria Legal Aid free to choose which of the alternative courses mentioned in the order it will follow? What is meant by "facilitat[ing] the making available" of the child's representative services? What counsel's fees are to be provided in advance of the proceedings? To whom are they to be provided? How are they to be provided?

86 These are no mere infelicities of drafting. They are serious deficiencies in the order that would have become readily apparent if any steps had had to be taken to enforce it. Of course, in busy practice lists with other parties and practitioners waiting to bring on their cases, time is short. It is, however, incumbent not only on judges but also on all of the practitioners engaged in matters, however busy may be the court, to give proper attention to the drafting of orders so that parties and others affected by the orders made may know what it is that they are ordered to do or not do. This order fell well short of that.

109 By Gaudron J on 12 September 1997.

Section 117

87 The order was said to be made pursuant to s 117. That section provides:

"(1) Subject to subsection (2) and section 118, each party to proceedings under this Act shall bear his or her own costs.

(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsection (2A) and the Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.

(2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance of that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has, in accordance with section 117C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant."

The primary judge, Faulks J, held that the section empowered what he described as "an anticipatory order for costs as opposed to an order for costs at the end of the

proceedings"¹¹⁰ and that he could, and in this case should, make such an order against a person not a party to the proceedings.

88 (Whether Victoria Legal Aid was properly to be regarded as a party may be obscured by the application which it made on 4 September but withdrew before the impugned order of 9 September was made. Much, if not all, of the argument in this Court proceeded on the basis that Victoria Legal Aid was properly to be regarded as a non-party and I am content to proceed on that basis.)

89 Central to deciding whether s 117 authorised the making of the impugned order is the construction of the expression "order as to costs" as it appears in s 117(2).

90 In *Cachia v Hanes*, Mason CJ, Brennan, Deane, Dawson and McHugh JJ said¹¹¹:

"It has not been doubted since 1278, when the *Statute of Gloucester*¹¹² introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation."

91 On its face, then, the reference in s 117 to "costs" is a reference to "costs" as that word is ordinarily understood in the law: the amount which the person to whom the order is directed must pay to some party to the litigation as partial indemnity for the professional legal fees and expenses incurred by that party in the course of the litigation. Section 117(1) provides, in effect, a prima facie rule that each party is to bear his or her own costs of the proceeding but that prima facie rule is subject to the operation of s 117(2) which, in turn, is dependent upon the court concluding "that there are circumstances that justify" the making of an order.

92 Section 117(2) enables the Family Court to make orders "as to" costs and that may well enable a broad range of orders to be made. The subject-matter of those orders must, however, be "costs": a power to make orders "as to" costs does not enable the court to make orders dealing with something other than costs.

93 The section also makes provision for orders as to "security for costs". This kind of order is, of course, well known. Although it is an order which requires the provision of security against costs which have not yet been incurred (that security being provided, usually, by payment of a sum to be held for application in

110 *TGL v JJT* unreported, Family Court, 9 September 1997 at 19.

111 (1994) 179 CLR 403 at 410.

112 6 Edw I c 1.

accordance with a future order or the provision of some other security) the subject-matter of the order is still, at its roots, the costs which a court may order one person to pay to another as partial indemnity for the professional fees and expenses incurred in the litigation.

94 But that is not the subject-matter of this order. This order required a person (Victoria Legal Aid) to pay for the representation of a party to the proceeding (the child or, perhaps, the representative of the child). That is, it required Victoria Legal Aid to outlay money (or time and services) for the representation of the child, not to pay or provide for the sum that might later be ordered by the court to be paid by one person to another as indemnity (or more usually partial indemnity) against costs incurred in fighting the suit.

95 The construction of s 117 that was urged in support of the order made by Faulks J would permit the Family Court to order a person not a party to the proceeding and not otherwise having any interest in the proceeding to incur expenditure for the conducting of litigation over which, by hypothesis, that person has no control. That construction should not be adopted. There is nothing, whether in the history of s 117 or the Act more generally, which supports construing s 117(2) in this way.

96 Some attention was given, in the course of argument, to whether s 117(2) would permit the making of an order for costs against a person not a party to the proceeding but who, nevertheless, had had effective control of the proceeding. I am content to assume, without deciding, that s 117(2) does give the Family Court a power to make an order of the kind dealt with in *Knight v FP Special Assets Ltd*¹¹³. But the existence of such a power says nothing of whether an order of the kind made here is authorised by s 117(2). (That is why for present purposes it matters not whether Victoria Legal Aid was properly to be seen as a party to the proceeding in the Family Court.)

97 Appearing, as it does, in the context of a provision enabling a court to make orders for costs, which is a provision remarkable only because it departs from the ordinary rule that costs follow the event in favour of a prima facie rule that each party abide his or her own costs, nothing in the context of s 117 supports the construction of s 117(2) upon which the impugned order must depend if it is authorised by that sub-section.

98 Indeed, the list of matters set out in sub-s (2A) to which the Family Court is directed to have regard in making orders under s 117(2) indicates clearly that the subject-matter of the orders to be made under s 117(2) is the costs which a person may be ordered to pay another as indemnity for that other's liability for

113 (1992) 174 CLR 178.

professional fees and out of pocket expenses reasonably incurred in the litigation, that is, "costs" as that expression is ordinarily understood in the law.

Section 68L

99 In the course of argument it was suggested that the impugned order might be supported by reference to s 68L(2) of the Act, notwithstanding that the trial judge did not purport to rely on this provision. As stated above, s 68L(2) enables the Court to "make such other orders as it considers necessary to secure that separate representation". While s 68L(2) is broadly expressed, it is necessary to read it in the context of the Act as a whole. In particular, s 68L(2) does not provide, by implication, power to do something which is provided for expressly in other provisions of the Act.

100 It was submitted that, unless s 68L or s 117(2) were construed sufficiently widely to authorise the order made by the Family Court on the matter, the system for separate representation of children could not work, or at least, could not work effectively.

101 It was said that because children who are to be separately represented in proceedings in the Family Court will often have no means of paying for that representation, the court must have a power to secure effective representation for the child. The power to do so lies, so the argument went, either in the power under s 117(2) to make such "order as to costs" as the court sees fit or in the power under s 68L(2) to "make such other orders as it considers necessary to secure that separate representation".

102 The premise of this argument (that if there is no power to be found in these provisions, orders for separate representation of children will very often be ineffective because no provision can be made for payment to the lawyers and others engaged for that purpose) is wrong. It is clear that the Family Court's power to make interim orders for the provision of maintenance by one spouse to another, or by one or both parents to a child, can be used for the purpose of meeting the expenses of separate representation of the child. Those powers are to be found in the provisions of Pt VIII of the Act dealing with spousal maintenance¹¹⁴ and Div 7 of Pt VII of the Act dealing with child maintenance¹¹⁵. Indeed, there may be power (both in the Family Court and in State courts dealing with property and like disputes between de facto couples) to make an interim order for division of the property in dispute in such a way as will secure payment for the expenses of separate representation of a child but I need not decide whether that is so. It is enough to note that as between the parents of the child and as between the parents

114 Particularly s 77.

115 Particularly s 66P and s 66Q.

and the child, there is ample power conferred by the Act to ensure that the child can be separately represented properly.

103 That being so I do not consider that it is necessary to find in either s 117 or
s 68L a power of the kind for which the respondents in this Court contended.

104 The order nisi for certiorari should be made absolute and order 3 of the orders
made by Faulks J in the Family Court on 9 September 1997 should be quashed. It
is not necessary for prohibition to issue and the order nisi should be discharged.

- 105 CALLINAN J. On 9 September 1997, Faulks J, a Judge of the Family Court of Australia, made an order in the following terms:

"That pursuant to the provisions of Section 117 of the *Family Law Act* 1975 Victoria Legal Aid will provide either the sum of Nine Thousand and Thirty Seven Dollars and Sixty Cents \$9,037.60 for the future costs of the child's representative in these proceedings or shall facilitate the making available of the child's representative services and provide for the payment of counsel's fees in advance of such proceedings."

- 106 The prosecutor, Victoria Legal Aid, a body corporate established by the *Legal Aid Act* 1978 (Vic) ("the Legal Aid Act"), obtained orders nisi from a Justice of this Court for prohibition and certiorari to quash the order on two grounds:

"1. The First Respondent lacked jurisdiction to hear and determine the matter and to make that order against Victoria Legal Aid in that neither the *Family Law Act* 1975 nor any inherent jurisdiction or powers of the Family Court of Australia authorised a judge of the Court to make orders in those terms.

2. The making of the order constituted an exercise by the First Respondent of the powers and discretions vested in the Prosecutor by the *Legal Aid Act* 1978 (Vict) and:

- a) the exercise of administrative powers and functions which do not form part of the judicial power of the Commonwealth; and
- b) the performance of functions incompatible with the First Respondent's performance of judicial functions and with the proper discharge by the judges of the Family Court of Australia of its responsibility to exercise judicial power;

contrary to the separation of the judicial power of the Commonwealth demanded by Chapter III of the Commonwealth Constitution."

- 107 Upon the return of the order nisi before the Full Court, any argument upon the second ground was deferred to await the outcome of the argument on the first ground. The first ground turns largely upon the construction of the *Family Law Act* 1975 (Cth) ("the Family Law Act") and the Legal Aid Act.
- 108 The form of the order is unusual. In his reasons for judgment, Faulks J characterised it both as an "anticipatory order for costs" and as "security for [the child's representative's] costs in the form of an order against Victoria Legal Aid".

- 109 The order is, in terms, not unlike a mandatory injunction. It purports to award costs to a party against a non-party. There are obvious difficulties associated with the alternative form of the order:

"or shall facilitate the making available of the child's representative services and provide for the payment of counsel's fees in advance of such proceedings".

- 110 The second and third respondents are respectively mother and father of the child referred to in the order. The fourth respondents are the paternal grandparents. The child was born in 1989. The third and fourth respondents appeared in the Full Court to contest the prosecutor's case. There is an agreement between these two sides that neither will seek any costs order against the other.

- 111 The child was not represented in the Full Court. However, after the orders nisi had been granted, the child was represented at a further hearing in the Family Court on 15 September 1997. The Family Court then made orders, without prejudice to the pending litigation in this Court, which provided for the funding of separate representation of the child in further proceedings in the Family Court.

- 112 The parents for some time have been in dispute before the Family Court with respect to access to the child. An order for separate representation of the child was first made on 5 February 1993. Further orders were made on 31 July 1996. These included an order, stated to be made pursuant to s 68L(2) of the Family Law Act, that the child "continue to be separately represented by Mr Charles Cohen of Legal Aid Victoria AND IT IS REQUESTED that Victoria Legal Aid arrange such separate representation". This "request" is to be read with provision made in the Family Law Rules.

- 113 The respondent relies on s 68L as well as s 117 of the Family Law Act.

- 114 Section 68L of the Family Law Act provides as follows:

"(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation.

(3) A court may make an order for separate representation:

(a) on its own initiative; or

43.

(b) on the application of:

- (i) the child; or
- (ii) an organisation concerned with the welfare of children;
or
- (iii) any other person."

115 The relevant rule is O 23 r 4 of the Family Law Rules:

"(1) An application under section 68L of the Act in respect of a child may be heard and determined by the court notwithstanding that a next friend has not been appointed for the child.

(2) If the court orders that a child is to be separately represented, it may request that the representation be arranged by a legal aid body that is a relevant authority with the meaning of section 116C of the Act."

116 The father of the child is a successful businessman. The mother is a medical specialist. By the time of the proceedings before Faulks J in September 1997, the prosecutor had paid money to and on behalf of the child to the ceiling of \$15,000 determined, as a matter of policy, by the prosecutor under the Legal Aid Act.

117 At that point, the parents were invited to fund the child's further representation but no contributions were made by either of them.

118 The prosecutor stresses that the assessment of priorities and the allocation of money from a finite fund such as the one administered by the prosecutor is peculiarly a matter for the administrators of the fund, who are part of the executive apparatus of the State of Victoria, and that a court has no means of assessing the impact of any order upon the fund and others who might have a claim upon it.

119 The Legal Aid Act governs the administration of legal aid in Victoria. It establishes (s 3) the prosecutor as a body corporate by the name "Victoria Legal Aid", which is identified as "VLA", and states (s 5) that "VLA does not represent the Crown."

120 The objects of the prosecutor include the provision of "legal aid in the most effective, economic and efficient manner" and the management by the prosecutor of "its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the State" (s 4).

121 Section 41 establishes the "Legal Aid Fund" into which are to be paid certain moneys, including all moneys made available by the State and the Commonwealth

for the purposes of legal aid, and out of which are to be paid amounts payable "in or in connexion with the provision of legal aid".

- 122 Section 48¹¹⁶ of the Legal Aid Act deals with costs and costs orders. This section would not authorise compliance by the prosecutor with the order of Faulks J which is under challenge.

116 "48 COSTS

(1) Where –

- (a) legal assistance is provided under this Act to a person in relation to a proceeding (including a cross-proceeding) in a court or before a tribunal; and
- (b) the court or tribunal makes an order in the proceeding directing the assisted person to pay costs incurred by another party to the proceeding –

either the assisted person or that other party may request VLA to pay to that other party on behalf of the assisted person an amount representing the whole or a part of the costs that the assisted person was so directed to pay.

- (2) Subject to sub-section (3), VLA shall pay so much (if any) of the amount requested to be paid as VLA considers just and equitable.
- (3) VLA shall not pay an amount in respect of costs incurred in a proceeding at first instance unless it appears to VLA that the person who made the request will suffer substantial hardship if that amount is not paid by VLA.
- (4) Subject to sub-section (6), any amount paid by VLA under this section shall be deemed to have been paid by the assisted person.
- (5) Where a person is legally assisted in connexion with part only of any proceeding, the reference in this section to the costs of the other party in that proceeding is a reference to so much of those costs as is attributable to that part.
- (6) If VLA agrees to pay an amount in respect of costs under sub-section (2), VLA may require the assisted person –
 - (a) to reimburse VLA for the whole or part of the amount paid under sub-section (2); and
 - (b) to secure the reimbursement in any manner that VLA thinks fit; and

(Footnote continues on next page)

- 123 The third and fourth respondents support the order by reference to s 68L and s 117 of the Family Law Act. Primary reliance is placed upon s 117. Sub-sections (1) and (2) of s 117 state:

"(1) Subject to subsection (2) and section 118, each party to proceedings under this Act shall bear his or her own costs.

(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsection (2A) and the Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just."

- 124 Section 118 empowers the Court to dismiss frivolous or vexatious proceedings and to make such order as to costs as it considers just.
- 125 Sub-section 117(1) of the Family Law Act authorises a departure from what may be taken as the usual course in litigation, that costs follow the event, to provide that parties will, subject to s 117(2) and s 118, be required to bear their own costs. Sub-section 117(2) confers a broad general jurisdiction (subject to s 117(2A) and the Rules of Court) to make such orders as to costs, and security for costs as the Court considers just.
- 126 Sub-section 117(2A) provides a catalogue of the matters to which the Family Court may have regard if an order different from that contemplated by s 117(1) is to be made. All of these matters, except for the last, are matters expressly concerned with the conduct and circumstances of the parties. The last could hardly however, be expressed in wider terms:

"(g) such other matters as the court considers relevant."

- 127 The prosecutor urges that the repeated references to parties in s 117(2A) and the concern of s 117(1) with parties only, operate to narrow the very broad language of s 117(2): in short, that s 117 does not authorise the making of a costs order against a non-party.

(c) pay interest on the reimbursement at any time and upon any terms and conditions determined by VLA.

- (7) VLA may not require the payment of interest under sub-section (6)(c) at a rate which exceeds 70% of the rate fixed under section 2 of the **Penalty Interest Rates Act 1983**."

- 128 It is interesting that, by contrast with s 91B¹¹⁷ and s 92¹¹⁸ of the Act which deem an intervener to be a "party", s 68L, which relates to the separate representation of a child, contains no such deeming provision. Although therefore a child is in a different position from a party, by reason of s 68L(2) and s 117, an order may be made against a party in favour of a child separately represented. It is an entirely different question whether such an order can be made against a non-party such as the prosecutor. It attracts the application of the general proposition that a provision conferring jurisdiction or granting powers to a court should not be so read as to

117 "91B INTERVENTION BY CHILD WELFARE OFFICER

- (1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.
- (2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:
 - (a) the officer may intervene in those proceedings; and
 - (b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party."

118 "92 INTERVENTION BY OTHER PERSONS

- (1) In proceedings other than proceedings for principal relief, any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.
- (1A) In proceedings for principal relief, a person in relation to whom an order has been made under subsection 69W(1) requiring a parentage testing procedure (within the meaning of Part VII) to be carried out may apply for leave to intervene in the proceedings, and the court may make an order entitling the person to intervene in the proceedings.
- (2) An order under this section may be made upon such conditions as the court considers appropriate.
- (3) Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party."

make conditions or impose limitations which are not found in the words used¹¹⁹. Considerations which might limit the construction of such a grant to a body other than a court do not apply¹²⁰.

129 Both sides accepted that the powers of the Family Court with respect to costs are those given by statute. The third and fourth respondents argued that one difficulty about too narrow a construction of s 117 is that it might inhibit the Family Court in making orders against lawyers and intermeddlers pursuant to an inherent power of the kind possessed by the Royal Courts of Justice and their successors.

130 The Court recently confirmed the powers of the Supreme Court of Queensland to award costs against non-parties in *Knight v FP Special Assets Ltd*¹²¹. It was held there that the discretion given by O 91 r 1 of the Rules of the Supreme Court of Queensland which provides,

"Subject to the provisions of the Judicature Act and these Rules, the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge"

was not confined to parties in the proceedings.

131 The majority (Mason CJ and Deane J, with whom Gaudron J agreed) in *Knight's Case* decided that the power to award costs against a non-party should, if the interests of justice require that it be made, be exercised in circumstances where¹²²:

"the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation."

119 *Hyman v Rose* [1912] AC 623 at 631 per Lord Loreburn LC; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ, 316 per Toohey and Gummow JJ; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 136-137 per Gaudron J.

120 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

121 (1992) 174 CLR 178.

122 (1992) 174 CLR 178 at 193.

132 It is not, and indeed on the facts it could not be, suggested that the conditions referred to in *Knight's Case*, or any like conditions, could be satisfied here.

133 The source of the power, if any, to make the order in question must be found in s 117(2). However that sub-section does not authorise the making of an order against the prosecutor for the following reasons.

134 First, to adopt the language of Gibbs J in *Ascot Investments Pty Ltd v Harper*¹²³:

"it would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations of third parties".

135 Secondly, the section should be read in the light of the history and jurisprudence that has evolved in relation to orders for costs.

136 In *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, Stephen J said this about the method to be used in construing an award of the Conciliation and Arbitration Commission¹²⁴:

"The right which it [the Agreement] confers is not one which is capable of exercise regardless of the unlawfulness under State law of the ground for its exercise. On the contrary it is a right the nature of which is to be understood against the background to its operation which general laws of the land, whether State or federal in origin, provide."

137 In *Morissette v United States*, the Supreme Court of the United States stated a similar proposition in these terms¹²⁵:

"And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."

138 These principles are applicable to costs orders and the provisions of the Family Law Act relating to them. Even if there were unlimited power under pars (xxi)

123 (1981) 148 CLR 337 at 354.

124 (1980) 142 CLR 237 at 246.

125 342 US 246 at 263 (1952).

and (xxii) of s 51 of the Constitution¹²⁶ to legislate to make third parties liable (a matter which was not argued here) explicit language to achieve such a purpose which would alter the historical rules regarding costs, would be required.

- 139 Thirdly, it is not an irrelevant matter that if the position contended for by the respondents were to be accepted, then, subject to the issue of constitutional validity, which was not argued, an incursion upon the funds of a State instrumentality might occur which could distort the operations and finances of such an instrumentality. Indeed, it might create a situation in which compliance with the order for costs would involve a breach of the State law establishing and regulating the affairs of the instrumentality.
- 140 The third and fourth respondents accepted that this circumstance bore upon the proper construction of s 117(2) tending to make it unlikely that the Commonwealth legislature would intend such a result.
- 141 Fourthly, the express provisions in s 91B and s 92 that operate to treat interveners in respect of children as parties and therefore amenable to orders for costs, the absence of any reference to non-parties in s 117, and, the emphasis in s 117(2A) upon parties, lead to a construction that s 117(2) is not a source of power for the making of an order against a non-party in the ordinary case.
- 142 In referring to the considerations which suggest that s 117 does not authorise the making of costs orders against third parties, I have looked at the matter from the viewpoint of the prosecutor which both in form and in substance is a stranger to the litigation. I do not intend to foreclose the power of the Court under s 117 to make an order in circumstances of the nature considered in the passage from *Knight's Case* set out earlier in these reasons, nor, whilst not ruling on the point, do I exclude from the scope of s 117(2) orders in the nature of interim orders for costs of the nature made by Bryson J in *Parker v Parker*¹²⁷. His Honour was exercising the jurisdiction of the Supreme Court of New South Wales under the *De Facto Relationships Act* 1984 (NSW) but, in support of the course which he took, referred to various authorities founded upon the Family Law Act.

126 "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

...

(xxi.) Marriage:

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

127 (1992) 16 Fam LR 458.

- 143 Such orders appear to answer the description in s 117(2) of orders "as to costs". They, and the orders nisi made by Faulks J in this litigation, are not orders "as to ... security for costs". An order for security for costs is not an immediately operative determination as to where the burden of costs falls. Rather, the requirement of the provision of security is imposed as a condition for the continuation of proceedings by the party against whom the order is made¹²⁸.
- 144 The respondents sought to call in aid s 68L, stressing the wide ambit of the words in sub-section (2):
- "and may also make such other orders as it considers necessary to secure that separate representation".
- 145 Section 68L cannot be taken literally. If it were, the Family Court would have an unparalleled power to conscript a person, an agency or a corporation to represent separately a child, and to make all such ancillary orders, presumably as to funding that representation, as might be necessary to secure that end.
- 146 Even if s 68L could be regarded as a separate head of power, or as a head of power in conjunction with s 117(2) dealing with non-party costs, it must be read in the same way as s 117(2), and therefore not as authorising costs against the prosecutor.
- 147 Mr Walker SC for the third and fourth respondents referred to situations in which legal aid agencies might act oppressively by using superior financial power to overwhelm an unaided litigant. The cure for that, he submitted, could only be an order against such an agency. Surely, it was put, the legislation would have intended s 117(2) to cover a situation of this kind.
- 148 Misuse of legal funds would constitute an abuse or defective exercise of executive power. The cure for these will often only be by the political process, or rights of review created by statute. An excessively wide reading of s 117(2) or of s 68L, or the two together is not the solution.
- 149 In *Williams v Spautz*¹²⁹, Mason CJ, Dawson, Toohey and McHugh JJ adopted what was said by Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions*¹³⁰:

¹²⁸ *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 447-450; affd on other grounds [1983] 2 NSWLR 122.

¹²⁹ (1992) 174 CLR 509 at 518.

¹³⁰ [1964] AC 1254 at 1301.

"[A] court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction.... A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

150 The application of this principle together with the proposition stated by this court in *Knight's Case*¹³¹ provide ample means for a court, such as the Family Court, to act against abuse of its processes and to award costs against a non-party in an appropriate case.

151 That is enough to dispose of the application and to require that the order nisi be made absolute on the first ground.

152 It is therefore not necessary to deal finally with an argument that the order was so defective in form that it could not stand for that reason alone. The order is expressed as having been made in exercise of power conferred by s 117 of the Family Law Act. There was no stated reliance upon s 68L. To the extent that the latter provision might have been prayed in aid, it may, without deciding the point, be taken that that aid would not be denied by failure to specify s 68L in the order¹³². Upon application for prerogative relief under s 75(v) of the Constitution, the question would be whether the powers conferred by the Family Law Act under which the order was made are to be read as "requiring certainty of expression as a condition of [their] valid exercise" so that "in the end, the question comes back to *ultra vires*". The words are those of Dixon J in, respectively, *Cann's Pty Ltd v The Commonwealth*¹³³ and *King Gee Clothing Co Pty Ltd v The Commonwealth*¹³⁴.

153 Fletcher Moulton LJ, in *Gundry v Sainsbury* emphasised the nature of an award of party and party costs as an indemnity¹³⁵:

"The principle that party and party costs are only an indemnity – an imperfect indemnity, it is true, but never more than an indemnity – is... deeply rooted in our law".

131 (1992) 174 CLR 178.

132 cf *Brown v West* (1990) 169 CLR 195 at 203.

133 (1946) 71 CLR 210 at 227.

134 (1945) 71 CLR 184 at 196. See also Aronson and Dyer, *Judicial Review of Administrative Action*, (1996) at 358-361.

135 [1910] 1 KB 645 at 651.

- 154 The order of the Family Court here does not have the character of an indemnity in the sense stated by Fletcher Moulton LJ nor does it answer the description of an order for security for costs, which, as I have indicated earlier in these reasons, may aptly be described as an order specifying the amount and the means by which it is to be provided, to protect a party to litigation (usually but not always a plaintiff) against the costs which that party might incur.
- 155 Any order of a court should be precise. A party against whom it is made is entitled to know exactly what obligations it imposes. This order lacks that precision.
- 156 The order creates other problems with respect to its performance. It makes no provision for the receipt and holding of the sum ordered to be paid. The word "facilitate" as used in the order is an inappropriate expression for the imposition of an obligation. All of these matters would probably be sufficient to warrant the quashing of the order of the Family Court, but it is unnecessary to reach any final view on this aspect.
- 157 Accordingly I would order that the order nisi for certiorari should be made absolute, order 3 of Faulks J of the Family Court of 9 September 1997 be quashed and the order for prohibition be discharged.

