

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

128
No. M 18 of 2011

B E T W E E N:

**THE BOARD OF BENDIGO REGIONAL INSTITUTE OF
TECHNICAL AND FURTHER EDUCATION**

Appellant

and

10 **GREGORY PAUL BARCLAY**
and
AUSTRALIAN EDUCATION UNION

First Respondent

Second Respondent

RESPONDENTS' SUBMISSIONS

- 20
1. The Respondents oppose an order for costs.
 2. The Respondents draw the Court's attention to the decision of the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v CSBP Limited (No 2)* [2012] FCAFC 64. The Respondents do not contend that decision was wrongly decided and concede that s 570 of the *Fair Work Act 2009* (Cth) does not apply to this proceeding.
 - 30 3. The Court should exercise its discretion not to award costs in this matter against the Respondents. When seeking special leave to appeal the Appellant's Summary of Argument expressly sought 'No order as to costs'. In its accompanying Draft Notice of Appeal the orders sought by the appellant did not include an order for costs: AB 418. The position advanced by the Appellant in the Summary of Argument and the Draft Notice of Appeal were the basis on which the special leave was sought and granted. After special leave has been granted on that basis, the appellant should not be permitted to resile from its position. Otherwise,
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Filed on behalf of the Respondents

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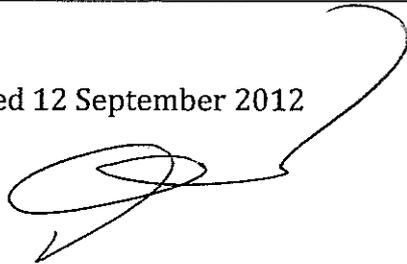
appellants would be encouraged to waive any right to costs when seeking special leave to appeal and then make an application for costs at the time of judgment.

- 10 4. After obtaining leave to appeal the Appellant filed submissions on 11 November 2011. It set out the orders sought. Those orders did not include an order for costs. The Appellant did not indicate during the hearing that it would be seeking to amend its notice of appeal to seek an additional order.¹ There is no suggestion by the Appellant that the repeated failure to seek an order for costs was a mere oversight rather than a deliberate forensic choice.

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Dated 12 September 2012



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David Shaw
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¹ *Aktas v Westpac Banking Corporation Limited [No 2]* (2010) 241 CLR 570; [2010] HCA 47 at [4] and [7].