0IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M8 of 2011**

BETWEEN:

AUSTRALIAN EDUCATION UNION
Applicant

AND

GENERAL MANAGER OF FAIR WORK AUSTRALIA, TIM LEE
First Respondent

PRESIDENT OF AUSTRALIAN PRINCIPALS FEDERATION, FRED WUBBELING
Second Respondent

AUSTRALIAN PRINCIPALS FEDERATION
Third Respondent

SECOND AND THIRD RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The issues presented by the application are:

   (a) whether, on its proper construction, s.26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (the FWRO Act) operates to validate the registration of the third respondent (the **APF**) under that Act, which registration had been quashed by the Full Federal Court on 18 July 2008 in *Australian Education Union v Lawler*[1] (*Lawler*), before the commencement of s.26A (the statutory interpretation question); and

[1] (2008) 169 FCR 327; [2008] FCAFC 135.

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(b) if s.26A purports to validate the registration of the APF, whether s.26A is, to that extent, invalid as an impermissible usurpation of, or interference with, the judicial power of the Commonwealth (the Constitutional question).

PART III: SECTION 78B NOTICES

3. The Applicant filed Notices in compliance with s.78B of the *Judiciary Act* on 17 January 2011 and again on 26 September 2001, after the matter was referred to the Full Court.

PART IV: MATERIAL FACTS

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4. The second and third respondents do not contest the relevant facts set out in Part V of the applicant's submissions.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5. To the applicant's statement of applicable constitutional provisions, statutes and regulations should be added:

(a) s.26 of the *Fair Work (Registered Organisations) Act 2009* (Cth);

(b) s.26 of Schedule 1B of the *Workplace Relations Act 1996* (Cth);

(c) items 40A and 40B of Schedule 22, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth); and

(d) ss.171A and 230(2) of the *Fair Work (Registered Organisations) Act 2009* (Cth).

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6. Section 26 of the FWRO Act is the substantive provision currently in force for the registration of organisations and is reproduced in the Schedule.

7. At the time of the decision of the Australian Industrial Relations Commission and the registration of the Third Respondent the substantive registration provision was s.26 of Schedule 1B of the *Workplace Relations Act 1996* (Cth). The section is reproduced in the Schedule to these submissions. Schedule 1B was subsequently renumbered

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Schedule 1 by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) with effect from 26 March 2006.(See Full Court judgement at [5] and [6].)

8. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the FWTPCA Act) renamed Schedule 1 of the Workplace Relations Act 1996 (Cth) as the *Fair Work (Registered Organisations) Act 2009* (Cth) (the FWRO Act) and amended s.26 to reflect the terminology applying under the Fair Work legislation.

9. Section 26A of the FWRO Act was one of a number of provisions that addressed the issue identified in *Lawler*. Items 37E, 40A and 40B of Schedule 22 to the FWTPCA Act introduced to the newly named FWRO Act, s.26A, s.171A and an amendment to s.230 (2)(b) respectively. Items 40A and 40B of the FWTPCA Act are reproduced in the Schedule.

10. The full text of s 171A and s.230 (2) of the FWRO Act as currently in force are reproduced in the Schedule.

PART VI: ARGUMENT

A. THE STATUTORY INTERPRETATION QUESTION

Applicable principles of statutory interpretation

11. The applicable principles of statutory interpretation, including that of statutes with retrospective effect, are not in issue in this case.

12. Here the meaning of s.26A of the FWRO Act was determined correctly to be manifested with such clarity that no further recourse to rules of statutory construction about retrospective legislation, including appeals to considerations of fairness, was necessary[2].

13. Section 26A was obviously intended to have retrospective effect, at least in part, in that it provides that as at a past date the law shall be taken to have been that which it was not.

14. The question was whether this amounted to a clear intention to alter retrospectively the position of the respondent federation whose position had otherwise been dealt

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[2] *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1971) 92 WM (NSW) 823 at 842 per Mason JA.

with earlier in *Lawler*. This question cannot be answered without an appreciation that what parliament was addressing in the legislation was the statutory requirement to be satisfied to allow any association of employees to be and remain registered under the Federal Industrial legislation. The provision was part of a new legislative regime[3] in which parliament was determining that the presence of the defect identified in law should not be, and was not in future to be, a disqualifying feature in the case of a body which had been (at any time), or is to be, registered under the Act. In that statutory regime parliament provided a description of associations which were taken to be validly registered or entitled to be registered in the future.[4]

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15. If an association answered the statutory description it was to be treated as not having a disqualifying characteristic. The legislation was made retrospective because it was clear that many organisations which had been "purportedly" registered had the disqualifying defect.[5]

16. This was a reflection of the general rule parliament wished to have applied in respect of the registration of organisations as an ongoing feature of the Act. In enacting s.26A and s.171A, parliament determined that the requirement for a purging rule is not to be any part of the regime of registration of Federal organisations.

17. There are no indicators in the language of s.26A or the Explanatory Memorandum that the third respondent was to be excluded[6].

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18. Contrary to the submission of the applicant at paragraph [37], the presence of s.171A and its role in the new statutory scheme was directly relevant to a consideration of the reach of s.26A.

19. In these circumstances, the Full Court was correct to conclude that a construction resulting in the third respondent being the only association excluded from coverage by the legislative provision was to be rejected.

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3 See also s.171A and s.230 (2)(b) of the FWRO Act.

4 Sections 26A and 171A were introduced by Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) Schedule 22, by Items 37E and 40A respectively and s.230 (2)(b) was amended by Item 40B.

5 Revised Explanatory Memorandum paragraph 792.

6 See in particular the reference to "any" in the Explanatory Memorandum referred to by the Full Court at [17].

20. The language of s.26A makes it clear that it was intended to operate in relation to circumstances and events which were not restricted to those in existence at or immediately before the commencement of s.26A both because it did not say "immediately before" and because of its operation in tandem with s.26A(b) which clearly was not so restricted. As the Full Court appreciated (at [16]), s.26A (b) assumes the invalidity of registration regardless of whether there had been any declaration of legal rights in respect of it or whether it was declared void *ab initio* by a Court.

21. If the defect existed at the time of the purported registration, then s.26A operated to overcome it from the operative date of s.26A.

22. Most significantly, s.26A was part of a general set of provisions designed to deal with the problem of the absence of a purging or from organisations as a whole. It was part of a regime designed to ensure that attempts to register in the past (s.26A) or in the future (see s.171A) were not thwarted by the absence of a purging rule.

23. A reference in s.26A of the FWRO Act to registration "under this Act" included registration under Schedule 1B to the *Workplace Relations Act 1996* (Cth) (the WRA) (subsequently renumbered Schedule 1) as the title of the WRA was changed to the FWRO Act by Schedule 22 of the FWTPCA Act (see Full Court judgment at [5] and [6]). This was not in dispute.

24. The validating operation only took effect from the commencement of the operation of s.26A. From that date, an earlier purported registration which would have been invalid was taken to be valid and to have always been valid.

25. After the decision of Ross VP on 27 January 2006 the Registrar of the Australian Industrial Relations Commission entered the prescribed particulars of the APF into the register of registered organisations whereupon the APF became purportedly a registered organisation (s.26 Workplace Relations Act 1996 Schedule 1B). That purported registration was attended by jurisdictional error and as such it was properly characterised as a purported registration before the commencement of s.26A. The APF was clearly "purportedly registered" prior to the Federal Court orders in *Lawler*. It appeared on the register as a matter of fact. The contention that the Full Court's order rendered the registration void *ab initio* does not alter this historical fact. Whilst

the order of the Full Court in *Lawler* quashed the legal effect of the purported registration it did not alter the historical fact of the purported registration.

26. The conclusion that s.26A operated at the time of the purported registration is clear from the words "before the commencement of the section" (section 26A(a)). There is no cause to introduce further words into the section to read down the effect of those general words[7].

27. The third respondent is an association whose registration "would but for this section, have been invalid". Prior to the decision of the Court, the APF was clearly in this position. The words "would have been invalid" have the effect that the section is to operate on the events completed at some time in the past as if they existed in law. Arguments of merger of the judgment are beside the point because s.26A is directed to periods of time including periods prior to the Federal Court order in *Lawler*. Neither is it an answer to say that this position did not prevail at the time of the introduction of s.26A. Again, the Act is speaking of a period prior to the introduction of s.26A. Section 26A(b) speaks as at all times covered by s.26A. So, if at any time prior to the introduction of s.26A it was true that an association was purportedly registered (ie covered by s.26A (a)) and the registration would have been but for s.26A invalid, the registration is validated.

28. The applicant relies on the reference to the need to address uncertainty regarding the registration of certain associations as supporting its proposition that the language of s.26A is inapt to refer to the third respondent. The language of s.26A makes no reference to the intention of parliament to address uncertainties as to the legal status of purportedly registered associations. The purpose of the section is manifest and as such is not to be read down by the use of second reading speeches or the Explanatory Memorandum[8].

29. In any event the "uncertainty" of which the revised Explanatory Memorandum speaks is broader than any uncertainty of that existence as a registered organisation, and includes uncertainty about the status of acts done by an association whilst purportedly registered[9].

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7 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113-116 per McHugh J.
8 *SAEED v Minister for Immigration and Citizenship* (2010) 2451 CLR 252; [2010] HCA 23 at 264-265 [31].
9 See revised Explanatory Memorandum paragraph 793.

30. Considerations of fairness, to the extent relevant, necessarily involve consideration of the objects and purpose of the legislation as well as the balancing of the consequences for all parties affected by the legislation. The purpose reflects the policy assessment that the non-compliance does not justify such a severe consequence. Each of the applicant and the third respondent has expended money and used resources. Alleged unfairness to a party should also be measured against its subject matter[10], including in this case the broader public purpose of the legislation: see also s5 (4) of the FWRO Act.

31. The applicant in paragraph 34 contends that the Full Court failed to identify and correctly apply the principles of statutory interpretation relevant to retrospective validating legislation such as s.26A. To the contrary, the Court applied general principles of statutory interpretation. It did not rely on the absence of an intention to exclude the APF. Only after having concluded the effect of s.26A did the Court observe that there existed no countervailing indications that the APF should be excluded (see [16] Full Court). The conclusion of the Full court that "the overall scheme did not disclose an intention to make exceptions of the kind for which the AEU contended" was in the context of the Full Court identifying that the intention of s.26A was to "operate as part of a general set of provisions". The Court did not consciously disregard the presumption against retrospectivity. Rather it concluded that s.26A was clear in its terms with no consequential need to resort to any particular rules of statutory interpretation.

32. In any event, the Full Court made it clear at [20] that, had it been necessary to pursue the authorities in relation to unfairness arising from retrospectivity, no different conclusion from that reached by North J would have been appropriate.

B. THE CONSTITUTIONAL QUESTION

33. Section 26A is a law of general application applicable to events existing prior to the decision of the Full Court and prospectively operative on such past events. It is not an *ad hominem* law or one addressed to the judicial process or its outcome.

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[10] *Polyukhovich v The Commonwealth* (1971) 172 CLR 501; [1991] HCA 32 at 642 per Dawson J.

34. The constitutional question is to be approached on the basis of a consideration of the substance of the legislation. It is wrong to characterise s.26A as being directed to the alteration of rights "that have been decided".

35. There is a clear distinction between substantive laws designed to be of general application and laws designed to interfere with judicial process. (See *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88; [1986] 47 (the *BLF* case)).[11] Laws that have been held to usurp the judicial power by reason of interference with the judicial process are laws, which have affected either the discretion or judgment of the Court or the rights, authority or jurisdiction of the Court.[12]

36. Section 26A deals with the question of what features an association must possess in order to be able to continue to participate in the federal industrial system. In the *BLF* case at 95, it was accepted that there was nothing in the nature of participation in the system of industrial regulation created by the Federal Act that makes registration (or deregistration) uniquely susceptible to judicial determination.

37. Just as it is within the power of Parliament to select the organisations that will be able to participate in the federal industrial system, or the qualities that such organisations must have in order to qualify for registration, so it can make a general determination having retroactive impact as to what these qualities are taken to be.

38. For the purpose of determining validity under Chapter III the Court has drawn a clear distinction between legislation in respect of powers that are exclusively judicial and those that take their character from a body or tribunal on which they are conferred. It has been recognised that a statute affecting litigation with respect to the guilt of a particular individual or group of individuals charged with criminal offences involves quite different considerations from one affecting litigation as to rights which parliament may choose to have determined, either by a judicial or non-judicial body[13].

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11 at 96 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

12 *Chu Kheng Lim* (1992) 176 CLR 1, *Liyanage v R [1967] 1 AC 259: State of South Australia v Totani (2010) 85ALJR 19; [2010] HCA 39 at [135].*

13 See *Bachrach v Queensland* (1998) 195 CLR 547 at [18].

39. A distinction has also been recognised between laws of general application and legislation *ad hominem*.[14]

40. In this case s.26A did nothing to interfere with the judicial process including the order made by the Federal Court. It did not mention the proceedings in *Lawler* at all.[15] It provided that, as and from 1 July 2009, certain registrations were to be taken to be valid for all purposes and was clearly designed to facilitate the participation of all affected associations in the Federal system into the future.

41. As the Full Court recognised at [37], s.26A operated to cure the invalidity recognised by the order in *Lawler*, but did not interfere with the order. It addressed the prior question of the third respondent's registration and the conditions on which that registration would be recognised as valid after s.26A came into effect.

42. In these circumstances, acceptance of the correctness of the passage from Quick and Garran's 1901 *The Annotated Constitution of the Australian Commonwealth* does not avail the applicant.

43. Like the legislation considered in the *BLF* case, s.26A is simply a provision determining status under the Federal system and is no different in essence to legislation that said "from 1 July 2009 associations of employees that have made applications since 1990 will be deemed to be registered". This would not be struck down on the basis that it could not apply to the third respondent or any other organization, which had been through some form of judicial process in relation to registration during the relevant period.

44. The judgment in *Lawler* was a judgment dealing with registration of the third respondent judged by then current standards. Now Parliament has determined that the general standards have changed (for everyone). Parliament was not obliged to exempt from its regime organisations that have been through the system and had been adjudged by different standards. The fact that Parliament accomplished this result by

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[14] *Polyukhovich v The Commonwealth* (1971) 172 CLR 501; [1991] HCA 32 at 650 per Dawson J; *Liyanage v R* [1967] 1AC 259; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 per Mason CJ, Dawson, McHugh JJ.

[15] *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 564.

saying "you are deemed always to have been validly registered" makes no difference to this result.[16]

45. The Australian authorities provide no support for the conclusion that there is a substantive limitation on parliament's power to pass general retrospective laws that extinguish or alter pre-existing rights or liabilities including those which have been the subject of judicial determination.[17] Neither do they provide support for the view that validity is dependant on whether general retrospective laws have an impact on circumstances in which litigation is pending or whether it has been concluded. A retrospective law is still a law determining what thereafter ought to be the respective rights and liabilities of persons including those who have been through civil disputes.

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46. A law of general application which happens to have an effect on persons who have been through the judicial process cannot be said in any sense to diminish the independence of the judiciary or public confidence in the administration of justice.[18]

47. Section 26A does not resemble any provision of a type that has been found to offend Chapter III.

48. The second and third respondents do not contest the accuracy of the description of the judicial power referred to in paragraph 41 of the applicant's submission. However, it is of critical importance to recognise that the binding determinations and adjustment of rights and interests with which the judicial power is clearly concerned are determinations and adjustments of the rights and interests of parties as they exist or are deemed to exist at a particular point of time.

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49. In addition to contesting the applicant's characterisation of s.26A as a provision directed to reversing or dissolving a court's order, the second and third respondents also contest the assertion that the Court has not yet considered the validity of legislation directly impacting on rights or liabilities that had been dealt with in concluded litigation.

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16 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 503-2 and 579.

17 *Zainal bin Hashim v Government of Malaysia* [1980] 1 AC 734 is an example in which a litigant had pursued a cause of action and obtained an order; *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1: [1992] HCA 64 at [34-[35] per Brennan and Dawson JJ; *Nicholas v R (supra)* at [141].

18 *Nicholas v R* (1998) 193 CLR 173: [1998] HCA 9 at [141] per Gummow J.

50. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 the Court held valid s54N (2) of the *Migration Act 1958* (Cth) which authorised the detention of persons whose release previously had been ordered by a Court.[19]

51. In *Nicholas v The Queen* (1998) 193 CLR 173, Gummow J at [141] identified both "the declaration of what thereafter ought to be the respective rights and liabilities of parties to a civil dispute" and "the alteration or abrogation by statute of antecedent substantive rights or status" in pending litigation as matters that did not involve the use or usurpation of judicial power. His Honour referred to *Alexander*'s case[20] as recognising the existence of arbitral power to determine what ought to be the respective rights and liabilities of parties in relation to each other as not impacting on the exercise of judicial power which was concerned with the ascertainment, declaration and enforcement of the rights and liabilities of parties as they exist or are deemed to exist as a particular time.

52. Similarly, in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, Deane J, though of the view that the *War Crimes Act* did usurp the exercise of the judicial power of the Commonwealth, pointed out that the focus of civil litigation is upon the determination of rights and liabilities under the law as it exists at the time of the proceedings, and explained at length why civil legislation, which operates retrospectively by extinguishing or altering pre-existing rights or liabilities, will not contravene the doctrine of separation of powers merely because it retrospectively creates, extinguishes or alters civil rights and liabilities or because it requires the Courts to recognise and enforce in subsequent civil litigation the retrospective operation of its provisions. The limited scope for discerning a contravention of the doctrine of separation of powers in cases not involving impermissible interference with the proper discharge of judicial power by the Courts or a purported legislative exercise of the judicial function was explained, in the civil context, as resting on the basis that both the legislature and the judicature may, within the limits of their respective functions, each settle questions of rights and liabilities under the civil law.[21]

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19 Per Mason CJ at 10; Brennan, Deane, Dawson JJ at 32,33,34-35; Gaudron J agreeing at 58.
20 *Waterside Workers Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.
21 Page 608.

53. The law considered in *R v Humby; ex parte Rooney* (1973) 129 CLR 231 operated on concluded matters. It gave legal effect to invalid acts and matters all of which had been finalised. The law operated not just as a deeming provision but one that had the effect, by force of the Act, of making valid that which had been determined to be invalid.

54. The appellant's submissions pay no regard to these and other Australian judicial developments in relation to Chapter III. These developments have also seen repeated acknowledgment of the validity of legislation directed to circumvent pending litigation, even if *ad hominem* in nature.

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55. Contrary to paragraph 54 of the appellant's submission, these developments are inconsistent with the strict approach taken by the United States Supreme Court in *Plaut v Spendthrift Farm Inc.*[22] The approach of the majority in *Plaut* was based on the existence of rigid and absolute walls between the judicial and legislative branches, leading to the conclusion that Congress could not disturb the final judgment of the Federal Court, even where considerations of encroachment or a risk to liberties were not involved. The minority judgments[23], acknowledging the validity of some co-mingling of branch functions so long as they posed no danger of aggrandisement or encroachment, are clearly closer to the position reached in the Australian authorities.

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56. It is to be noted that, in *Nicholas* (supra) Gummow J (at [141]) referred to *Plaut* and contrasted it with Australian authority as well as pointing out that *Plaut* had been the subject of academic criticism.[24]

57. Section 26A, like the legislation considered in *Nelungaloo Pty Ltd v The Commonwealth*[25] and *R v Humby* (supra) is not a direction to the Court, but rather legislation which operates of its own force to achieve its purposes.

58. The Full Court was correct to conclude (at [32]) that the existence of an earlier order of the Court does not, any more than would the existence of pending proceedings

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22 514 US 211.
23 Page 1469-1473.
24 Footnote [210] and see "Leading Cases" Harvard Law Review, Vol 111 (1995) 229.
25 (1948) 75 CLR 495.

concerning the validity of the Federation's registration, signify any reduction in legislative competence or effect.

59. The power of parliament to pass retrospective legislation affecting pending litigation is established. Further the power of parliament to pass legislation, including retrospective legislation, regarding established rights has also been considered and no principle arises by which immunity from a general provision and a general law for those who have been the subject of earlier Court processes is established.

60. The second and third respondents submit that the principles established in relation to Chapter III include the following:

(a) parliament has undoubted competence to make new law or amend law (even if retrospective) and *ad hominem* in nature;

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(b) Chapter III contains no express or implied prohibition that rights in issue in legal proceedings should not be the subject of legislative declaration or action (*R v Humby* at 250);

(c) parliament does not have power to mandate to the Courts by an Act which, in truth, leaves the law unchanged. Parliament cannot control the operation of law otherwise than by altering it, nor can it say that the existing law will be applied in a particular way;

(d) if the true character of an act were to set aside or reverse a judgment under cover of a declaratory law or otherwise then Chapter III of the Constitution would be infringed. Parliament is entitled to change the law and the limitation

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is only that it must do so within its legislative competence and it is only if the legislation is not in substance an amendment to the law but rather a direction to the judicial branch that Chapter III is infringed. From the time of the decision in *Liyanage v R* [1967] 1 AC 259 the authorities confirm that, in addition to specificity and retrospectivity, the true purpose of the legislation is to be examined and for this purpose, substance is to prevail over form;

(e) at least since the *BLF* case for Chapter III purposes a clear distinction has been recognised between legislation which interferes with the judicial process itself and legislation which interferes with the substantive rights which are at issue

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in proceedings. In the *BLF* case even the *ad hominem* nature of the legislation and the fact that it addressed an issue central to pending proceedings did not give rise to invalidity because the enactment was substantively legislative, 0within parliament's legislative competence, and not directed to the judicial process[26]. See also *Nicholas v R* where the legislation was both *ad hominem* and retrospective but held to be valid because, whilst commanding the Court to disregard the commission of unlawful acts, it fell short of dictating the outcome of the proceeding;

(f) the Court has drawn a clear distinction between legislation in respect of powers that are exclusively judicial and those that take their character from a body or tribunal on which they are conferred.

61. Here:

(a) parliament was enacting legislation on a matter clearly within its legislative competence and affecting rights which parliament could choose to have determined either by a judicial or non judicial body;

(b) s.26A is part of a regime designed to change the law in respect of the registration of organisations which had a previously disqualifying factor;

(c) the new regime (of which s.26A was a part, together with s.171A) changed the law in respect of registration so as to remove the requirement for a purging rule in respect of past or future applications for registration. It is not an *ad hominem* law but was designed to change the legislative regime because the issue which had been exposed in *Lawler* was seen as an unnecessary restriction on registration generally. The Full Court recognised this in paragraph [37];

(d) the law does not amount to a direction to the Court in or as a result of the Full Court in *Lawler* and is expressed to operate on matters which existed before the proceedings in *Lawler*. It does not operate on the subject matter of the proceedings at all but rather, as described by the Full Court "*s.26A operated to*

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[26] Contrast *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 (the State *BLF* case) where legislation was held to infringe the separation of powers doctrine in that it contained a command to the Court.

cure the invalidity recognised by the order in Lawler but s.26A did not address, much less interfere with, the order. Section 26A addressed the prior question of the Federation of Registration and the conditions on which the registration would be valid"(Full Court [37]). The law operates and was designed to operate generally and not selectively or in a directed way towards individuals.

Severance

62. If, contrary to the above submissions, it is concluded that, although s.26A only has a validating effect from the date of the section coming into effect, the inclusion of the words "to have always been valid" involve an impermissible interaction with the decision of the Full Federal Court, those words are clearly severable in relation to their operation to the second and third respondents. Absent these words, the provision would simply then have the effect that the third respondent's registration would be taken to be valid prospectively from the commencement of s.26A. This would be on the basis that the third respondent was, at a point of time prior to the introduction of s.26A, purportedly registered. The fact that the Court had determined the validity of the third respondent's registration in the meantime would be completely immaterial on this basis.

63. There is no doubt that the true issue between the parties in this case is as to whether the third respondent is validly registered and not the question of whether such registration can be taken to have been valid at a period of time prior to s.26A coming into effect.

Alternative principle

64. Finally, as to the applicant's alternative formulation (at paragraph 38) even if this newly discovered principle did represent the law, the legislation in this case is in any event sufficiently certain.

Disposition

65. The second and third respondents contend that the application for special leave to appeal should be dismissed.

66. If the application for special leave to appeal is successful the appeal should be dismissed.

67. In relation to the application for special leave to appeal the second and third respondents rely on the above contentions and submit, in relation to the statutory interpretation question:

(a) the case does not involve questions of principle concerning the proper interpretation of retrospective legislation. The asserted error identified by the applicant is not an error in relation to the proper approach to interpretation of retrospective legislation;

(b) the Full Court considered the effect of s.26A to be clear in circumstances where the registration of the Federation fell into a class intended to be addressed and were it was "also clear" that s.26A was intended to operate as part of a general set of provisions intended to address the problem of the absence of a purging rule from registered organisations as a whole;

(c) there is insufficient doubt that the conclusion reached by the Full Court that the third respondent was embraced by s.26A is wrong. In circumstances where the Full Court clearly appreciated that:

(i) s.26A was a general provision reflecting a parliamentary intention to change the requirements for all organisations which had been previously registered under the FW(RO) Act;

(ii) the provision was expressed in general terms that embraced the position of the third respondent; and

(iii) the Act provided no basis for the conclusion that the third respondent was the only organisation to be exempted from the scheme that was designed to operate generally into the future;

the Full Court was entitled to form the view that the parliamentary intent was clear.

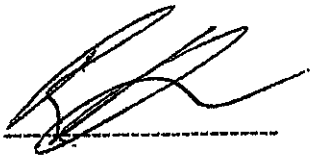
68. As to the constitutional question, no constitutional question is raised in this case where the applicant has mischaracterised s.26A and its relationship with the order of the Full Court.

69. Given that the third respondent is the only association excluded from the beneficial operation of s.26A the decision is not one of sufficient public importance such that leave to appeal should be granted.

Costs

70. The second and third respondent agree that this proceeding is one to which s.329 of the FWRO Act applies, namely a proceeding in a matter arising under that Act. Whatever the outcome of the proceeding, there will be no order as to costs.

Dated 21 October 2011



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SCHEDULE

References in Part V of the Second and Third Respondents' Submissions

Fair Work (Registered Organisations) Act 2009(C'th) Section 26

26 Registration

(1) When FWA grants an application by an association for registration as an organisation, the General Manager must immediately enter, in the register kept under paragraph 13(1)(a), such particulars in relation to the association as are prescribed and the date of the entry.

(2) An association is to be taken to be registered under this Act when the General Manager enters the prescribed particulars in the register under subsection (1).

(3) On registration, an association becomes an organisation.

(4) The General Manager must issue to each organisation registered under this Act a certificate of registration in the prescribed form.

Note: Certificates of registration issued under the *Workplace Relations Act 1996* continue in force (see the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002*).

(5) The certificate is, until proof of cancellation, conclusive evidence of the registration of the organisation specified in the certificate.

(6) The General Manager may, as prescribed, issue to an organisation a copy of, or a certificate replacing, the certificate of registration issued under subsection (4) or that certificate as amended under section 160.

Workplace Relations Act 1996 (C'th) Schedule 1B, Section 26

26 Registration

(1) When the Commission grants an application by an association for registration as an organisation, the Industrial registrar must immediately enter, in the register kept under paragraph 13(1)(a), such particulars in relation to the association as are prescribed and the date of entry.

(2) An association is to be taken to be registered under the Schedule when the industrial Registrar enters the prescribed particulars in the register under the subsection (1).

(3) On registration, an association becomes an organisation.

(4) The Industrial Registrar must issue to each organisation registered under this Schedule a certificate of registration in the prescribed form.

Note: Certificates of registration issued under the *Workplace Relations Act 1996* continue in force (see the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002*).

(5) The certificate is, until proof of cancellation, conclusive evidence of the registration of the organisation specified in the certificate.

(6) The Industrial Registrar may, as prescribed, issue to an organisation a copy of, or a certificate replacing, the certificate of registration issued under subsection (4) or that certificate as amended under section 160.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009(C'th) Schedule 22, Items 40A and 40B

40A After section 171 of Schedule 1

Insert:

171A Cessation of membership if member is not an employee etc.

(1) If a person is a member of an organisation and the person is not, or is no longer:

(a) if the organisation is an association of employers – a person of a kind mentioned in paragraph 18A(3)(a), (b), (c) or (d); or

(b) if the organisation is an association of employees – a person of a kind mentioned in paragraph 18B(3)(a), (b), (c) or (d); or

(c) if the organisation is an enterprise association – a person of a kind mentioned in paragraph 18C(3)(a), (b), (c) or (d);

the person's membership of the organisation immediately ceases.

(2) Subsection (1) has effect despite anything in the rules of the organisation.

40B Paragraph 230(2)(b) of Schedule 1

After "under", insert "section 171A, or under".

Fair Work (Registered Organisation) Act 2009(C'th) Sections 171A and s.230(2)

171A Cessation of membership if member is not an employee etc.

(1) If a person is a member of an organisation and the person is not, or is no longer:

(a) if the organisation is an association of employers—a person of a kind mentioned in paragraph 18A(3)(a), (b), (c) or (d); or

(b) if the organisation is an association of employees—a person of a kind mentioned in paragraph 18B(3)(a), (b), (c) or (d); or

(c) if the organisation is an enterprise association—a person of a kind mentioned in paragraph 18C(3)(a), (b), (c) or (d);

the person's membership of the organisation immediately ceases.

(2) Subsection (1) has effect despite anything in the rules of the organisation.

230 Records to be kept and lodged by organisations

(1) .....

(2) An organisation must:

(a) enter in the register of its members the name and postal address of each person who becomes a member, within 28 days after the person becomes a member;

(b) remove from that register the name and postal address of each person who ceases to be a member under section 171A, or under the rules of the organisation, within 28 days after the person ceases to be a member; and

(c) enter in that register any change in the particulars shown on the register, within 28 days after the matters necessitating the change become known to the organisation.

Note 1: This subsection is a civil penalty provision (see section 305).

Note 2: An organisation may also be required to make alterations to the register of its members under other provisions of this Act (see, for example, sections 170 and 172).