IN 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

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

Filed on behalf of the Intervener by:

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Part I: Certification

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

Part II: Basis of Intervention

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

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Constitutional and legislative provisions

4. South Australia accepts the Second and Third Respondents' statement of applicable constitutional provisions, statutes and regulations.

Part V: Submissions

In sum

5. South Australia contends:

    i. as to the construction question:

        a. certiorari annihilates legal effects and consequences. It does not operate to deny, as a matter of historical fact, that a decision maker purported to exercise a power purportedly vested in him or her, that the purported exercise of that power occurred in a particular factual context, and that the purported exercise of power in the particular factual context was quashed. It does not expunge or annihilate the factual history of the proceeding from the record as if it never occurred. It is open to a legislature to select such factual history as a trigger for a legislative consequence.

        b. unfairness is not a free standing concept that courts may invoke as a basis to refuse to give a particular statute a retroactive operation. Whilst it may be presumed that Parliament does not intend unfair consequences, unfairness must give way to any contrary intent.

    ii. as to the constitutional question:

a. on the assumption that on its proper construction s26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) operates to validate the registration of the Third Respondent, South Australia contends that it does not constitute an impermissible usurpation of, or interference with, the judicial power of the Commonwealth. Ch III contains no prohibition, express or implied, that rights decided in concluded legal proceedings shall not be the subject of legislative declaration or action.

b. the principle recognised in *Plaut v Spendthrift Farm Inc*[1] does not assist the Applicant. It does not stand for the proposition that Congress, and by analogy the Commonwealth Parliament, cannot enact a law that attaches a legislative consequence to the exercise of administrative power affected by jurisdictional error, subject to a court order or otherwise.

The relevance of the consequence of certiorari

6. Central to the Applicant's construction argument is the effect of certiorari. The contention appears to be that the legal effect of certiorari has the consequence that the decision upon which it operates, and the relevant factual context in which that decision was made, cannot serve as a factum which the legislature may select as the trigger for a legislative consequence.[2] The contention goes beyond attributing to certiorari an absolutist quality, in the sense that the impugned decision is deemed invalid and ineffective for *all legal* purposes,[3] to denying the existence of the application and decision to grant registration as historical facts.

7. That the function of certiorari is to quash the legal effect and legal consequences of a decision is settled.[4]

8. It may be argued that a decision of an administrative decision maker that is affected by jurisdictional error is not necessarily of no legal effect[5] and that the legal consequences of any

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1 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995).

2 Applicant's Submissions at [22], [24]-[25], [31].

3 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th Ed (2009) LawBook Co, 720.

4 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ), 178 (Dawson and Toohey JJ); *Ainsworth and Anor v Criminal Justice Commission* (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J).

5 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [11]-[12] (Gleeson CJ), [46] (Gaudron and Gummow JJ), [141]-[142] (Hayne J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-9 (McHugh, Gummow, Kirby and Hayne JJ); *Jadwan v Department of Health* (2003) 145 FCR 1 at [28]-[42] (Gray and Downes JJ); *Devaigne v Askar* (2007) 69 NSWLR 327.

finding of jurisdictional error may depend upon the particular statute vesting power in the decision maker.[6] Whatever the answer to such questions, the issue is the *legal* consequences or *legal* effects of the decision affected by jurisdictional error.

9. If jurisdictional error committed by an administrative decision maker resulting in the making of an order in the nature of certiorari necessarily has the consequence that in law the impugned decision is annihilated and is to be regarded as no decision at all, such outcome does not address the issue at the heart of the Applicant's argument. If South Australia understands the Applicant's contention correctly, it is that the consequence of certiorari can only be legislatively overcome by a statute evincing an intention to alter or affect the binding curial determination of the court.[7] That is, without any legislative reversal of the annihilation achieved by certiorari, the decision annihilated cannot ground as a matter of fact any future legislative consequence.

10. Authorities such as *Crane v Director of Public Prosecutions* are to the contrary.[8] Those authorities, which hold that a decision that is a nullity is still a decision upon which an appeal right may operate, may be understood as standing for the proposition that, whatever the legal effect of certiorari or of jurisdictional error, a statute may nevertheless select, or include within a selected class of decision, a *purported or invalid* decision as a factual trigger for a legislative consequence.[9] In general a legislature can select whatever factum it wishes as the trigger of a particular legislative consequence.[10] Hence in *Re Macks; Ex parte Saint* the relevant State legislation, the validity of which was upheld, created new rights and liabilities by reference to earlier ineffective judgments of Federal courts.[11]

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6 *Jadwan v Department of Health* (2003) 145 FCR 1 at [28]-[42] (Gray and Downes JJ); *Berowra Holdings Pty Ltd* (2006) 225 CLR 364. See also *Boddington v British Transport Police* [1999] 2 AC 142 at 172 (Lord Steyn); HWR Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 *Law Quarterly Review* 499; (1968) 84 *Law Quarterly Review* 95.

7 Applicant's Submissions at [21].

8 *Crane v Director of Public Prosecutions* [1921] 2 AC 299; *Russell v Bates* (1927) 40 CLR 209; *Olivo* (1942) 28 Cr App R 173; *Calvin v Carr* [1980] AC 574; *R v Cockrell* (2005) 2 QdR 448; *R v Swansson; R v Henry* (2007) 69 NSWLR 406. See also *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] 41 FLR 338.

9 *Crane v Director of Public Prosecutions* [1921] 2 AC 299 at 323 (Lord Atkinson); *Russell v Bates* (1927) 40 CLR 209 at 214 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

10 *Baker v The Queen* (2004) 223 CLR 513 at [8]-[10] (Gleeson CJ), [43] (McHugh, Gummow, Hayne and Heydon JJ); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [25] (Gleeson CJ), [107] (McHugh J), [208] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1 at [71] (French CJ), [369] (Heydon J), [420] (Crennan and Bell JJ).

11 *Re Macks; Ex parte Saint* (2000) 204 CLR 158. See also *The Queen v Humby; Ex parte Rooney* (1973) 129 CLR 231.

11. It follows that the legal effect of certiorari is not to the point. Irrespective of whether a decision is void, voidable, valid, invalid or a nullity, it clearly existed as a fact. The true inquiry is whether or not the relevant statutory provision, here s26A of the *Fair Work (Registered Organisations) Act 2009* (Cth), acts upon a decision quashed upon issue of certiorari as a factum triggering the legislative consequence for which it provides. More particularly, the inquiry in this case is whether or not the Federation was purportedly registered as an organisation under the *Workplace Relations Act 1996* (Cth), and, if it was, whether or not that purported registration was invalid, at any time, because the Federation's rules did not have the effect of terminating the membership of, or precluding from membership, persons who were persons of a particular class or classes.

12. The effect of certiorari and orders 1 and 3 of the Full Court of the Federal Court in *AEU v Lawler* on the registration of the Federation are relevant only to the question of whether or not a "purported decision", within the meaning of s26A, was made.[12] Here as a matter of fact an application was made under s18 of Schedule 1B of the *Workplace Relations Act 1996* (Cth). It was granted under s19 of that Schedule. Registration was effected in compliance with s26.[13] Subsequently by order of the Federal Court that registration was quashed. Certiorari does not deny the occurrence of these events as a matter of fact.

13. The legal effect of certiorari has, in truth, no bearing on what is a question of fact and the application of the statute to the relevant facts.

Unfairness and the construction of retroactive laws

14. While unique considerations apply in construing retroactive legislation, it remains that the proper construction of a statute must be determined in accordance with the full range of relevant factors that are employed to determine the intention of Parliament.[14] Those factors are as identified by this Court in *Project Blue Sky Inc v Australian Broadcasting Commission*.[15]

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12 *Australian Education Union v Lawler* (2008) 169 FCR 327 at 433.

13 See the history of the proceedings as set out in the judgment of Jessup J in *Australian Education Union v Lawler* (2008) 169 FCR 327 at 351.

14 *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [53] (Spigelman CJ).

15 *Project Blue Sky Inc v Australian Broadcasting Commission* (1998) 194 CLR 355.

To the extent that it is the 'intent' of Parliament that is to be discerned, it is the intent manifested by the legislation.[16]

15. Unfairness associated with the retroactive operation of laws is a factor to be considered in the process of construction as it is assumed that Parliament does not intend to act unfairly.[17] It has been said that:

> ...the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.[18]

16. Otherwise put:

> The strength of the presumption against retrospectivity in any particular case, and accordingly the ease or difficulty with which it may be overcome, must, I would think, depend on the nature and degree of the injustice which would result from giving a statute a retrospective operation. Where a palpable injustice would result, the presumption should be given its fullest weight. In such a case it is but common sense to require the clearest indication of legislative intention that such an unjust result was intended. On the other hand, where to give retrospective operation to a statute might be considered to work some injustice to others, there would, on principle, seem little reason for giving much weight to the presumption. In such a case, where the Legislature has used language which is apt to give to its statute retrospective operation, it would appear to be a matter of conjecture to presume that it preferred the interests of the one to the others.[19]

17. The quintessential example of unfairness in retroactive legislation is legislation which renders unlawful past conduct which was previously lawful. Where the injustice of giving a law an ex post facto operation is apparent, the presumption is at its strongest.[20]

18. Considerations of fairness in the present case not only concern the position of the Applicant, but also of the Federation and its members and others who may be affected in that they have acted in reliance on a purported registration:

> But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not

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16 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also, *Singh v The Commonwealth* (2004) 222 CLR 322 at [19]-[20] (Gleeson CJ); *NAAV v Minister for Immigration* (2002) 123 FCR 298 at 410-412 (French J).

17 *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [49], [54] (Spigelman CJ).

18 *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724 (Staughton LJ), cited in *New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [56] (Spigelman CJ).

19 *Doro v Victorian Railways Commissioners* [1960] VR 84 at 86 (Adam J).

20 *Polyukhovich v Commonwealth* (1991) 172 CLR 502 at 643 (Dawson J).

> affect some vested right, but when contemplated in its total effect, justice may be overwhelmingly on the other side.[21]

19. The words of s26A plainly indicate that it is to have a retrospective operation. In fact, it only has a retrospective operation.

20. Once that is accepted, the different treatment of registrations which have been the subject of a Court order appears unwarranted. A similar issue has been discussed in relation to the effect of a retrospective law on pending proceedings:

> Once it is accepted that the general principle of construction recognizes that a statute may operate retrospectively so as to disturb and alter substantive rights which accrued before the commencement of the statute, provided that the statutory intention in that behalf is manifested with sufficient clarity, it is not easy to see why any different rule should be applied to the possible operation of the statute on rights which have already accrued, but are the subject of pending proceedings, at the time when the statute commences to operate. True it is that in the latter case an added element of injustice may arise in the form of a liability to costs in circumstances in which the award of costs lies not in the discretion of the court, but follows automatically the result of the litigation. Nevertheless, it does not seem that the injustice which will or may result from an interference with substantive rights in pending suits is in general so much greater that a stronger presumptive rule should be applied in such a case, in particular a rule which, according to its formulation, insists on a specific or explicit reference to rights in pending actions as a preliminary to the application of the new statute to those rights.[22]

21. It may be accepted that a case such as the present is, like *Attorney-General of New South Wales v World Best Holdings Ltd*, "higher on the scale of unfairness or injustice than the factual situation in *Bawn*" given that the steps taken before Parliament intervened extended to taking the matter to trial and obtaining a formal order of the court.[23] However, the presumption cannot hold out against the plain meaning of the words of the section.

The Constitutional Question

22. The usurpation argument advanced "must signify some infringement of the provisions which Ch III makes respecting the exercise of federal judicial power".[24]

23. Subject to the Constitution, the Commonwealth Parliament may legislate to enact laws with retroactive operation.[25] It can thereby alter rights and liabilities with effect from any time

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21 *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 434 (Isaacs J).

22 *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1971) 92 WN(NSW) 823 at 842 (Mason JA).

23 *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [62] (Spigelman CJ).

24 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J) as cited with approval in *Haskins v The Commonwealth* (2011) 85 ALJR 826 at [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

25 *R v Kidman* (1915) 20 CLR 425; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 714-715, 717-720 (McHugh J).

prior to the commencement of the legislation. Consequently, laws imposing retroactive criminality will not for that reason alone offend Ch III.[26]

24. Two relevant limitations operate here: first, the Commonwealth Parliament may not purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction.[27] Second, the Parliament may not itself exercise the judicial power of the Commonwealth.[28] Here the issue is whether a law which retroactively alters rights decided in concluded legal proceedings is a law that exceeds either or both of these limitations.

25. At the outset it should be observed that Parliament can legislate so as to deregister an industrial organisation.[29] There is nothing in the nature of registration and participation in the industrial system:

> ... or in deregistration which makes deregistration uniquely susceptible to judicial determination, as the discussion in *Re Ludeke* reveals. Nor is there anything in the nature of deregistration which makes is unsusceptible to legislative determination. Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organization so selected should be subsequently excluded and, if need be, to exclude that organization by an exercise of legislative power.[30]

If Parliament can legislate so as to deregister an industrial organisation,[31] it stands to reason that it can legislate so as to validate the registration of an industrial organisation.

26. It should also be observed that it is settled that:

> ...Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.[32]

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26 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 535-6 (Mason CJ).

27 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at [15] (Brennan CJ), [73] (Gaudron J), [146] (Gummow J); *International Finance Trust Company Ltd & Anor v New South Wales Crime Commission* (2009) 240 CLR 319 at [50] (French CJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [47]-[48] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

28 *R v Kirby & Ors; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

29 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

30 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 95 (The Court).

31 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

32 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96 (The Court). See also *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495.

27. As indicated above,[33] Parliament may choose ineffective purported judicial acts as the factum upon which legal consequences will attach. No reason arises to doubt that Parliament may similarly treat ineffective administrative decisions.

28. Turning to the second of the two limitations referred to at [24] above; Ch III is not offended if the impugned law does not decree that the judgment which determined that the relevant decision or judicial act was invalid is wrong and to be ignored as if Parliament had sat as a court hearing an appeal from that judgment and determined that it be overruled and an alternative conclusion substituted. If a law of the Commonwealth were to operate in this way it would amount to an exercise of judicial power. Section 26A does not operate in this way. Here s26A operates in acknowledgement and acceptance of the decision in *AEU v Lawler* and ascribes a legislative consequence without in any way altering the character of the decision in that case. As Heydon J noted in *Haskins v Commonwealth*:

> The technique upheld in *R v Humby; Ex parte Rooney* has limits. It operates by attaching to invalid Acts consequences which it declares these invalid Acts always to have had, It does so by providing that rights and liabilities exist, "as if" various events had happened. The expression "as if" is an expression which "always introduces a fiction or a hypothetical contrast. It deems something to be what it is not or compares it with what it is not". The employment of that technique is capable of satisfying the following words of McHugh J:
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> > Subject to the Constitution, it is within the legislative power of ... the Commonwealth ... to provide, by legislation, that the rights and liabilities of certain persons will be as declared by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power. "Subject to the Constitution" means, in the case of the Commonwealth, that there must be a relevant head of power under which the law is enacted and that the law must not offend Ch III or any express or implied prohibition in the constitution.[34] (footnotes omitted)

29. It is irrelevant to the exercise of legislative power that a party has obtained a successful decision in the courts. In *Nicholas v The Queen*[35] Gummow J provided an example of what would not involve the exercise of judicial power as being "the declaration of what thereafter [that is, after the exercise of judicial power] ought be the respective rights and liabilities of parties to a civil dispute". The declaration alters the general law but not the dispositive order consequent upon the exercise of judicial power in a particular case.

30. Almost every case of remedial legislation will involve the "fruits of victory" being taken from a litigant. The legislation under consideration in *R v Humby; Ex parte Rooney*[36] would have

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33 At [10].

34 *Haskins v The Commonwealth* (2011) 85 ALJR 826 at [95].

35 *Nicholas v The Queen* (1998) 193 CLR 173 at [141].

36 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231.

taken the fruits of victory from the litigants in *Knight v Knight*[37] and *Kotsis v Kotsis.*[38] Likewise the legislation under consideration in *Re Macks; Ex parte Saint*[39] followed the decision in *Re Wakim; Ex parte McNally*[40] (though in neither case was a specific challenge to it made on that ground).

31. The inherent quality of the orders made in *AEU v Lawler* remain unaltered.[41] Section 26A attaches a new consequence to the purported decision the object of the orders. The record is not altered or deemed to be what it is not. Judicial power is not exercised.

32. Turning to the first of the two limitations referred to at [24] above; when legislation interferes with the judicial process itself, or where the pith and substance of a law is to circumscribe the judicial process, as in *Liyanage v The Queen*,[42] rather than the substantive rights that are at issue, Ch III may be offended.[43]

33. That is not this case. Section 26A does not deal with any aspect of the judicial process. Just as it does not matter that the motive or purpose of the Minister, Government, or Parliament may be to circumvent the proceedings and forestall a decision that might be given,[44] it does not matter that the motive or purpose is to alter the effect of a decision made.

34. Just as Ch III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action,[45] nor does Ch III contain any prohibition that rights decided in concluded legal proceedings shall not be the subject of legislative declaration or action.

Article III jurisprudence

35. The principle to be drawn from *Plaut v Spendthrift Farm Inc*[46] does not assist the Applicant. In that case the US Supreme Court held:

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37 *Knight v Knight* (1971) 122 CLR 114

38 *Kotsis v Kotsis* (1970) 122 CLR 69.

39 *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

40 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

41 By analogy *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 (Stephen J).

42 *Liyanage v The Queen* [1967] 1 AC 259.

43 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96 (The Court).

44 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96 (The Court).

45 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J).

46 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995).

> Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.[47]

36. The Supreme Court reasoned that by retroactively commanding federal courts to reopen final judgments, Congress had violated the fundamental principle that Art III gives the judiciary the power "not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy - with an understanding that "a judgment conclusively resolves the case" because the judicial power is one to render dispositive judgments".[48]

37. The principle in *Plaut v Spendthrift Farm Inc*[49] was reaffirmed in *Miller v French*.[50] However, the Supreme Court held that the impugned provision in that case did not offend the principle in *Plaut*. In *Miller*, the Court described the decision in *Plaut* as follows:

> In *Plaut*, we held that a federal statute that required federal courts to reopen final judgments that had been entered before the statute's enactment was unconstitutional on separation of powers grounds. ...
>
> We concluded that this retroactive command that federal courts reopen final judgments exceeded Congress' authority. ...
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> *Plaut*, however, was careful to distinguish the situation before the Court in that case - legislation that attempted to reopen the dismissal of a suit seeking money damages from legislation that "altered the prospective effect of injunctions entered by Article III courts."[51]

38. *Miller* concerned the *Prison Litigation Reform Act* which provided that a court shall not grant prospective relief to remedy unconstitutional conditions in prisons unless certain conditions were satisfied. Injunctions already in effect were made subject to the same standards and were to be terminated if they had been granted without the required findings, unless the court, on ruling on a motion to terminate, made the required findings. The *Prison Litigation Reform Act* also included an "automatic stay" provision which automatically stayed existing injunctions not because of a ruling by a court under the applicable legal standards, but upon a period of time having lapsed since the filing of a motion.

39. The Court concluded that the automatic stay provision was valid for two reasons. First, unlike *Plaut*, the automatic stay provision concerned the prospective effect of injunctions:

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47 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995) at 227.
48 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995) at 218-9.
49 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995).
50 *Miller v French* 530 US 327 (2000).
51 *Miller v French* 530 US 327 (2000) at 343-344.

> Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law.[52]

40. Secondly, Congress had altered the underlying law by providing that courts must make certain findings before granting injunctive relief, such that existing relief became unenforceable to the extent of its inconsistency with new law.[53]

41. It is clear from *Miller* that the principle recognised in *Plaut* is limited. It prohibits a law of Congress that commands Article III courts to reopen final judgments that have been dismissed.

42. The relevant limitations imposed by Article III of the United States Constitution can be summarised as follows:

    i. a statute that would "prescribe rules of decision to the Judicial Department of the government in cases pending before it" is invalid.[54] However, that prohibition does not take hold when Congress *amends* applicable law, as compared with dictating specific results under previously applicable law.[55]

    ii. Congress cannot vest review of the decisions of Article III courts in officials of the executive branch.[56]

    iii. Congress cannot legislate to command Article III courts to reopen final judgments (in suits seeking money damages) that have been dismissed.[57]

    iv. It does not offend the separation of powers for Congress to enact a law that changes the rules applicable to the continuing enforcement of existing, prospective remedial orders and requiring the courts to apply the new rules to those orders, or to enact a law with the effect that prospective relief under an existing decree is no longer enforceable.[58]

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52 *Miller v French* 530 US 327 (2000) at 344.
53 *Miller v French* 530 US 327 (2000) at 347.
54 *United States v Klein* 13 Wall 128 (1872) at 146.
55 *Robertson v Seattle Audubon Soc* 503 US 429 (1992) at 441.
56 *Hayburn's Case* 2 Dall 409 (1792).
57 *Plaut v Spendthrift Farm Inc* 514 US 211 (1995).
58 *Miller v French* 530 US 327 (2000); *Pennsylvania v Wheeling & Belmont Bridge Co* 18 How 421 (1856) (*Wheeling Bridge II*).

43. None of the above principles is apt to have any application to s26A. Section 26A does not reopen the judgment in *AEU v Lawler* and therefore does not offend the principle in *Plaut v Spendthrift Farm Inc.*[59]

44. Section 26A is a valid law of the Commonwealth Parliament.

Dated: 28 October 2011

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[59] *Plaut v Spendthrift Farm Inc* 514 US 211 (1995).