IN THE HIGH COURT OF AUSTRALIA **No M8 of 2011**

MELBOURNE REGISTRY

BETWEEN:

AUSTRALIAN EDUCATION UNION

Applicant

AND:

GENERAL MANAGER OF FAIR WORK AUSTRALIA, TIM LEE

First Respondent

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PRESIDENT OF AUSTRALIAN PRINCIPALS FEDERATION, FRED WUBBELING

Second Respondent

AUSTRALIAN PRINCIPALS FEDERATION

Third Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification

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

20 ### Part II: The issues

2. The issues presented by the application are:

    1. 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

    2. 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
30 judicial power of the Commonwealth (the **constitutional question**).

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

Date of document: 30 September 2010
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Part III: Section 78B Notices

3. The Applicant (the **AEU**) gave notices under s 78B of the *Judiciary Act 1903* (Cth) when its application for special leave was filed on 17 January 2011. Following the referral of the application to the Full Court on 2 September 2011, the AEU has now given further notices.

Part IV: Citation of judgments below

4. The judgments below are reported as follows:

   1. Full Federal Court: *Australian Education Union v Lee* (2010) 189 FCR 259.

   2. Primary Judge: *Australian Education Union v Lee* (2010) 196 IR 90.

Part V: Relevant facts

5. On 27 January 2006, Ross VP of the Australian Industrial Relations Commission (the **AIRC**) granted the APF's application for registration under the *Workplace Relations Act 1996* (Cth) (the **WR Act**); and, on or about 30 January 2006, the Industrial Registrar entered the prescribed particulars of the APF into the register of registered organisations, pursuant to s 26 of Schedule 1B to the WR Act. On 26 September 2006, the AEU's appeal against Ross VP's decision was dismissed by a Full Bench of the AIRC.

6. The AEU applied to the High Court for constitutional writs and that application was remitted to the Federal Court, where it was heard by a Full Court. On 18 July 2008 (in a matter commenced in the High Court and remitted to the Federal Court), the Full Court of the Federal Court ordered that writs of certiorari issue to quash the decisions of the AIRC and the registration of the APF.[2]

7. The Full Court found that the APF did not meet the criteria for registration in s 18 of Schedule 1B to the WR Act, in that the APF's rules did not contain a "purging rule" – a rule providing that persons who were no longer eligible to be members of the APF, because they had ceased to be employed as principals or assistant principals, would cease to be members of the APF.

8. No application for special leave to appeal against the Full Court's decision was filed. Rather, the APF applied to the AIRC for leave to alter its rules. The AEU objected to the APF's application. The APF's applications and the AEU's objections were heard by a Full Bench of the AIRC, which reserved its decision on 20 November 2008.

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2 *Australian Education Union v Lawler* (2008) 169 FCR 327; [2008] FCAFC 135.

9. On 1 July 2009, s 26A commenced operation.[3] It is reproduced in paragraph 68 below.

10. On 24 August 2009, the First Respondent informed the AEU and the APF that Fair Work Australia (**FWA**) regarded itself as obliged by s 26A to treat the APF as a registered organisation under the FWRO Act. The First Respondent proceeded to treat the APF as a registered organisation. The APF withdrew its pending application to alter its rules.

11. On 17 September 2009, the AEU commenced a proceeding in the Federal Court, contending that s 26A, properly construed, did not operate to validate the registration of the APF. On 22 April 2010, North J dismissed the AEU's application.[4] On 20 December 2010, a Full Court of the Federal Court dismissed the AEU's appeal from North J's judgment.[5] On 17 January 2011, the AEU filed the present special leave application. On 2 September 2011, Gummow and Hayne JJ referred the AEU's application for consideration by a Full Court.

Part VI: Argument

A. The statutory interpretation question

Applicable principles of statutory interpretation

12. Section 26A must be construed in light of the common law presumption that legislation affecting rights or obligations:

> ... is not to be construed as retrospective in its operation unless the legislature has clearly expressed that intention, and .... is not to be construed as retrospective to any greater extent than the clearly expressed intention of the legislature indicates.[6]

13. Section 26A, as with other "validating" provisions, is obviously intended to have a degree of retrospective operation. But the presumption against retrospectivity still operates:

> The common law presumption against retrospectivity ... [is] not spent when it is clear that Parliament intended a statute to operate retrospectively. Such a statute will only be given retrospective operation to the extent necessitated by the words of the statute, construed in their full context and in accordance with legislative purpose, but no greater extent.[7]

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3 Section 26A was inserted by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), which simultaneously transformed Schedule 1 (previously Schedule 1B) of the WR Act into the FWRO Act.

4 *Australian Education Union v Lee* (2010) 196 IR 90; [2010] FCA 374.

5 *Australian Education Union v Lee* (2010) 189 FCR 259; [2010] FCAFC 153.

6 *R S Howard & Son Ltd v Brunton* (1916) 21 CLR 366 at 371 (Griffith CJ).

7 *Attorney-General (NSW) v World Best Holdings* (2005) 63 NSWLR 557 at [48] (Spigelman CJ).

14. Where a party has already taken steps to pursue its rights through litigation, the authorities recognise that retrospective legislation can work particular unfairness. That unfairness is heightened further where the party has actually obtained the benefit of a curial determination:

> The present case is higher on the scale of unfairness or injustice than the factual situation in [*Bawn Pty Ltd v Metropolitan Meat Industry Board* (1970) 72 SR (NSW) 466; 92 WN (NSW) 823]. This is not a mere pending action. In the present case the steps taken before the Parliament intervened extended to actually pursuing the proceedings through trial and receiving a formal order of the court, albeit one subject to an appeal in this Court.[8]

15. Different courts have adopted different formulations of the approach to be taken to such legislation. In *Zainal bin Hashim v Government of Malaysia*,[9] where legislation was amended between a decision at first instance and an appeal, the Privy Council said:

> [F]or pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature. [Emphasis added.]

16. A relevantly identical approach appears to have been taken by the Victorian Court of Appeal in *State of Victoria v Robertson*.[10]

17. On the other hand, in *World Best Holdings*, at [51], Spigelman CJ suggested that such an approach may be too wide and preferred an analysis by which the issue is "determined in accordance with the full range of relevant factors that are employed to determine the intention of Parliament": at [53]; proceeding "on an assumption that Parliament intended to act fairly": at [54]; and on the basis that the particular provision in question "must be interpreted in the light of the language used and its purpose": at [62]. However, Mason P was "troubled with the invocation of 'unfairness' …": at [153].

18. Whatever formulation is adopted, it is well established that there must be a clearly expressed intention, not merely that the legislation operate retrospectively in a general sense, but that it operate specifically to affect rights and obligations already determined by a court in a particular case.

19. Applying those well-established principles of statutory construction, the necessary clear intention to alter retrospectively the rights determined by the Full Federal Court in

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8 *World Best Holdings* (2005) 63 NSWLR 557 at [62] (Spigelman CJ).

9 [1980] 1 AC 734 at 742.

10 (2000) 1 VR 465 at [21].

Lawler cannot be found, either in the language of s 26A or in the Revised Explanatory Memorandum (the **REM**) that accompanied the amending Bill.[11] Rather, the language of s 26A and the REM suggest that s 26A was intended to address the uncertainty faced by other organisations, the registration of which was vulnerable to challenge on the same basis as in *Lawler*, and to prevent such challenges by retrospectively validating their registration.

20. Such a construction ensures that s 26A still has a sensible, appropriately confined retrospective operation, in the sense that it confirms the validity of past acts of purported registration, the validity of which may otherwise be open to doubt or challenge, and gives the language of s 26A a natural, precise and meaningful operation.

Statutory language of clarification, not alteration, of legal status

21. It would have been simple for Parliament to have stated that the decision in *Lawler* was itself reversed or modified, or to have referred specifically to the APF. Alternatively, Parliament could have used clear words to the effect that an association was taken to have been validly registered whether or not its registration had been quashed by a court. However, none of those things was done. The provision does not evince any intention to alter or affect binding curial determinations made as to the legal status of any association. Rather, s 26A was drafted using only the minimum language necessary to confirm or clarify the validity of the registration of other associations, the legal status of which may have been tainted with uncertainty in the wake of *Lawler*.

22. Section 26A(a) operates where an "association was purportedly registered as an organisation under this Act before the commencement of this section". The APF was not such an association. The effect of the Full Court's decision in *Lawler* was that its registration was void *ab initio*. It was neither "registered" nor "purportedly registered". A writ of certiorari:

> ... both removes the record of the relevant decision into the court and quashes the decision. It expunges the decision and wipes the slate clean. There never was such a decision in law.[12]

Parliament must be taken to have been aware of the legal effect of a writ of certiorari and to have selected its statutory language with that knowledge.

23. On the other hand, the language of s 26A(a) was apt to apply to associations, other than the APF, without a "purging rule". The use of the term "purportedly registered" was

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11 *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (Cth).

12 *Ruddock v Taylor* (2003) 58 NSWLR 269 at [21] (Spigelman CJ).

necessary given the availability of the argument, in the wake of *Lawler*, that such associations had not been validly registered.

24. Section 26A(b) requires that the "association's purported registration would, but for this section, have been invalid". Again, this wording was inapt to apply to the APF. It was not the case that, but for s 26A,the APF's registration "would have been invalid" by reason of the absence a purging rule from its rules: any basis for invalidity had merged in the order of the Full Federal Court by the time of the enactment of s 26A.

    1. The APF's registration had been quashed *ab initio*.

    2. There was no "registration" or "purported registration", valid or otherwise, upon which s 26A could operate.

    3. It might have been said, before the Full Federal Court quashed the APF's registration, that the registration would have been invalid by reason of the absence a purging rule from its rules. However, that was no longer the situation when s 26A was enacted: at that time, the APF had no registration, valid or invalid.

25. Again, the language of s 26A(b) was appropriate to cover associations other than the APF. The purported registration of such associations would, applying the reasoning of the Full Court in *Lawler*, have been invalid because they did not have a "purging rule". The APF had no registration, because the Full Federal Court's order had quashed its registration.

26. In short, the language of s 26A points to an intention to address uncertainty as to the legal status of other associations in the wake of *Lawler*, rather than to affect the rights determined as between the AEU and the APF in *Lawler* or to alter the legal status of the APF, about which there was no uncertainty.

The Revised Explanatory Memorandum

27. This construction of s 26A is strongly supported by the REM, which relevantly read:

    > 792. This item inserts new section 26A. Section 26A addresses uncertainty regarding the registration of certain associations under the WR Act in light of the decision of the Full Federal Court in Australian Education Union v Lawler [2008] FCFCA 135 (Lawler). This decision held that if an association did not include in its rules a provision removing from membership people who were no longer eligible to be members of the association, then that association was not validly registered under the WR Act.
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    > 793. The Government considers that this decision could have significant ramifications for federal organisations that were registered without the

ability to 'purge' members who are no longer eligible to be members of the association under the WR Act. The decision enables the validity of those registrations to be called into question. Similarly, any instruments (for example, agreements or awards) to which such organisations are a party or action the organisation has taken in reliance on its registered status could also be questioned.

794. To avoid these potential ramifications, new section 26A will validate the registration of any association whose purported registration as an organisation would be invalid because the association's rules did not have the effect of terminating the membership of people who were not of a particular kind.

795. Section 26A will validate the federal registration of associations that were invalidly registered as an employer organisation, an employee organisation or an enterprise association. From the commencement of section 26A, the registration of these associations will be taken to be valid and to have always been valid. However, section 26A will not validate the registration of an association that was invalid for any other reason than that specified in paragraph 26A(b).

28. The REM began by stating that s 26A "addresses uncertainty regarding the registration of certain associations under the WR Act in light of the decision" in *Lawler*: paragraph 792. There was no such uncertainty in the case of the APF – its registration had been quashed.

29. The REM continued in a similar vein, referring to the "significant ramifications" the decision could have for federal organisations without a purging rule: paragraph 793. There were no such ramifications for the APF – its rights had been finally determined by the Full Court, and it was not an organisation.

30. The REM continued to explain that the purpose of s 26A was "[t]o avoid these potential ramifications": paragraph 794. The use of those words was a clear expression of the Government's intent, and points convincingly away from an intention retrospectively to alter the result in *Lawler*.

31. Finally, the REM stated that s 26A would validate the registration of associations that were "invalidly registered": paragraph 795. Again, the APF was not "invalidly registered" – it was not registered at all.

Considerations of fairness

32. To the extent that fairness is a consideration[13], the Full Court's construction of s 26A plainly would involve substantial unfairness to the AEU.

    1. The AEU pursued its rights to finality before the Full Federal Court in *Lawler* and obtained a judgment in its favour, against which the APF did not seek to appeal. That benefit of the judgment would be lost, and the resources expended in obtaining it wasted.

    2. The AEU then expended further resources challenging an application by the APF to amend its rules, which remained pending when s 26A was enacted, and was subsequently withdrawn by the APF. Those resources would also be wasted.

    3. The AEU would further be deprived of its position as the only registered organisation able to exercise the statutory rights conferred by registration on behalf of the principal class of government schools (such as negotiating, making and enforcing enterprise agreements and exercising the statutory right of entry).

    4. Fairness requires that the APF abide the outcome of concluded litigation and pursue registration on the basis that it is currently unregistered.

Errors in the judgment appealed from

33. With respect, the Full Federal Court erred in holding that s 26A operated to validate the registration of the APF.

34. First, the Full Court failed to identify and correctly apply the principles of statutory interpretation relevant to retrospective validating legislation such as s 26A. As explained above, those principles required the Full Court to look for a clear intention to interfere with the rights determined as between the AEU and the APF – in other words, a clear intention to include the APF within the operation of s 26A. Instead, the Full Court wrongly looked for an intention to exclude the APF: (2010) 189 FCR 259 at [17]-[20].

35. Indeed, it appears the Full Court consciously disregarded the presumption against retrospectivity, and treated s 26A as it would have any other provision. Having reached a conclusion about the meaning of s 26A, their Honours said, at [20]:

> No occasion arises to be drawn into a debate about principles of construction concerning the operation of retrospective legislation, nor the circumstances in which such legislation will be read down.

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13 *World Best Holdings* at [54] (Spigelman CJ).

36. Their Honours then stated that they agreed with the analysis of North J "so far as such issues might have been thought to apply to the present case". This tends to confirm what is apparent from their Honours' analysis – that the presumption against retrospectivity was not truly applied.

37. Further, and apart from the failure to apply the correct principles of interpretation, their Honours wrongly construed both the language of s 26A: at [16]; and the REM: at [17]; the proper reading of which is as submitted in paragraphs 21-31 above. The Full Court also erred in relying, at [18], on the presence of s 171A in the FWRO Act. Section 171A simply operates prospectively as a legislative "purging rule". It does not bear on the degree of retrospective operation that s 26A is intended to have. Its presence makes it no more likely that Parliament intended to disturb retrospectively the result in *Lawler* as between the AEU and the APF.

C. The constitutional question

38. If, as the Full Court decided, s 26A restored the registration that had been quashed, then it is, to that extent, invalid as an interference with or usurpation of the judicial power of the Commonwealth. In essence that is because:

1. the separation of powers in Chapter III of the Constitution prevents Parliament from reversing or dissolving a final judgment given in the exercise of the judicial power of the Commonwealth;

2. the decision of the Full Court in *Lawler* was such a judgment; and

3. s 26A, as construed by the Full Federal Court in this case, would in substance dissolve or reverse the orders of the Full Court in *Lawler* quashing the registration of the APF.

Interference with or usurpation of the judicial power of the Commonwealth – final judgments

39. In Australia, the principle that Parliament cannot reverse a final judgment given in the exercise of federal judicial power was articulated by Quick and Garran in 1901. When dealing with Chapter III, Quick and Garran argued:[14]

> The simple rule would seem to be that, just as the legislature cannot directly reverse the judgment of the court, so it cannot, by a declaratory law, affect the rights of the parties in whose case the judgment was given. A declaratory law must always be in a sense retrospective, and will not be unconstitutional because it alters existing rights; but it will be unconstitutional, and therefore inoperative, so far as it purports to apply to the parties or the subject-matter of particular suits in which judgment has been

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[14] J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted 1995 by Legal Books, at 722.

> given. That is to say, the legislature may *overrule* a decision, though it may not *reverse* it; it may declare the rule of law to be different from what the courts have adjudged it to be, and may give a retrospective operation to its declaration, except so far as the rights of parties to a judicial decision are concerned. In other words, the sound rule of legislation, that the fruits of victory ought not to be snatched from a successful litigant, is elevated into a constitutional requirement; but the general question of retrospective legislation is left to the discretion of the legislature.

40. The principle formulated by Quick and Garran does not appear to have been expressly dealt with in any subsequent Australian case.[15] It awaits the High Court's determination. The more general question of interference with federal judicial power has, of course, been considered in a number of cases. The principle formulated by Quick and Garran is consistent with those authorities.

41. The judicial power of the Commonwealth is the power to make:

> ... binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and [...] binding adjustments of rights and interests in accordance with legal standards.[16]

42. It was the judicial power of the Commonwealth that the Federal Court exercised when it issued writs of certiorari and quashed the APF's registration on 18 July 2008; and, just as the Parliament cannot direct a court as to the judgment or order that the court might make in exercise of its jurisdiction,[17] the Parliament cannot revoke, annul or reverse the exercise of that power.

43. Although the Parliament may legislate to affect or alter rights in issue in pending litigation,[18] it cannot direct a Chapter III court as to the manner and outcome of the exercise of the court's jurisdiction.[19] The Parliament cannot intrude into, and override, the exercise of the judicial power of the Commonwealth. Although Parliament can change the law, even after it has been declared by a court, Parliament cannot dissolve an order of the Federal Court. For example, Parliament could not legislate to:

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15 It has, however, arisen relatively recently in the United States, as discussed in paragraphs 47 to 54 below.

16 *Nicholas v R* (1998) 193 CLR 173 at 207.4, [70] (Gaudron J); see also 273.7, [237] (Hayne J).

17 *Nicholas v R* at 186.2, [15] (Brennan CJ).

18 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96.3 (the Court).

19 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ), quoted in *Nicholas v R* at 187.2, [15] (Brennan CJ).

1. forbid the release of a named person in respect of whom *habeas corpus* had been granted by a court;

2. quash a judgment of a court requiring the payment of damages; or

3. validate an administrative decision found by a court to be void for jurisdictional error.

44. Although the Parliament can legislate so as to remove the legal foundation on which a court has determined the outcome of a matter, it cannot reverse or dissolve a court's order – it cannot take over the appellate function.

45. None of the authorities identified by the Full Federal Court below or raised by the APF would allow the Parliament to legislate so as to reverse or dissolve a court's order, as s 26A would do if construed in the manner that North J and the Full Court found.

1. *Nelungaloo Pty Ltd v The Commonwealth*[20] involved legislation enacted while a proceeding was pending in the High Court. The legislation did not interfere with an existing court order.[21]

2. *R v Humby; Ex parte Rooney*[22] involved legislation[23] that attached legal consequences to purported decrees made by Masters of the Supreme Court of South Australia, and did so as an exercise of legislative power. The legislation did not take away from the parties to the earlier litigation (*Knight v Knight*[24]) the fruits of that litigation; it did not dissolve the declaration made in *Knight v Knight* that the Master lacked jurisdiction to determine a particular application for maintenance. Humby was not a party to that earlier litigation.

3. *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth*[25] also concerned pending, not concluded, proceedings. The legislation[26] did not take away the fruits of concluded litigation; it did not dissolve or reverse any order made in the exercise the judicial power of the Commonwealth.

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20 (1948) 75 CLR 495.

21 The legislation in question was s 11 of the *Wheat Industry Stabilization Act (No. 2) 1946* (Cth). It is discussed by Dixon J at 579.

22 (1973) 129 CLR 231.

23 Sections 5(3) and 5(4) of the *Matrimonial Causes Act 1971* (Cth).

24 (1971) 122 CLR 114.

25 (1986) 161 CLR 88.

26 *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth).

Although deregistration and, obviously, registration, of industrial associations are not "uniquely susceptible to judicial determination"[27] the validity of a decision to register does answer that description; and it was that question of validity that the final orders made by the Federal Court on 18 July 2008 in *Lawler* concluded – namely, that the (non-judicial) decision to register was invalid and should be quashed.

4. *Nicholas v R*[28] involved legislation[29] that directed a court, before which a person was charged with a drug offence, to disregard the fact that a law enforcement officer had committed an offence when undertaking a controlled operation. The prosecution then applied to the trial judge to lift a permanent stay granted before the legislation was passed. The Court held that the legislation could validly provide the basis on which a permanent stay order could be vacated; relevantly, the stay order was not the equivalent of a verdict or judgment.[30] In short, *Nicholas* was a case where proceedings were still pending; the proceedings had not been concluded by judgment (as the AEU's challenge to the registration decision was concluded on 18 July 2008).

5. *H A Bachrach Pty Ltd v State of Queensland*[31] concerned legislation[32] enacted by a State Parliament while proceedings were pending in State jurisdiction; the legislation did not dissolve a final judgment; and the case involved no exercise of federal judicial power.

46. In summary, while Parliament can re-define the essential conditions for registration, and can do so retrospectively, it cannot reverse or dissolve a final judgment given in the exercise of the judicial power of the Commonwealth; and it is not open to the First Respondent to proceed on the basis that the APF is registered when the registration decision has been quashed by the final order of the Full Federal Court.

The position in the United States

47. When formulating the principle that Parliament cannot reverse final judgments (see paragraph 39 above), Quick and Garran referred to the influential 19th century text,

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27 (1986) 161 CLR 88 at 95.5 (the Court).

28 (1998) 193 CLR 173.

29 *Crimes Amendment (Controlled Operations) Act 1996* (Cth), inserting a new s 15X into the *Crimes Act 1914* (Cth).

30 (1998) 193 CLR 173 at 198.3 [41] (Brennan CJ), 279.5, [255] (Hayne J).

31 (1998) 195 CLR 547.

32 *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld).

Thomas Cooley's *Constitutional Limitations*,[33] and in particular to the following passage:

> But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.[34]

48. Quick and Garran accepted that Cooley was writing in an American context[35] but considered that this was a "true test" of constitutionality under Chapter III.[36]

49. The principle has arisen for judicial consideration in the United States in the context of Article III of the United States Constitution, s 1 of which vests "[t]he judicial power of the United States ... in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish".

The similarity between Article III, s 1 and Chapter III, s 71 of the Australian Constitution (set out in paragraph 69 below) is obvious. "[t]he judicial power of the Commonwealth ... in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction".

50. In recent times, the United States Supreme Court has given full effect to the principle articulated by Cooley, and importantly has distinguished between pending and concluded litigation. In *Plaut v Spendthrift Farm Inc*,[37] the Supreme Court said:

> But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court". Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws" ...

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33 T Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, Little, Brown and Company, Boston, 1868.

34 Cooley, op cit, p 94.

35 Quick and Garran, op cit, p 721

36 Quick and Garran, op cit, p 722.

37 514 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.[38]

51. The Court made clear that this principle did not depend on the characterisation of the law as *ad hominem*:

> To be sure, [the legislation in this case] reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner – viz., with particular rather than general effect – that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.[39]

52. The Court also noted the time it had taken for the issue to arise:

> Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.[40]

53. Five years later, the Supreme Court re-affirmed the principle in *Miller v French*.[41]

54. Although care must be taken in applying decisions from a different constitutional context, there is nothing in the principle embodied in those two decisions that is inconsistent with the Chapter III jurisprudence developed by the High Court of Australia. To the contrary, the principle involves the natural application of that jurisprudence to a novel scenario: a statute that reverses or dissolves final orders made in the exercise of federal judicial power as between the parties to those orders.

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38 514 US 211 (1995) at 227. The Court referred with approval to Cooley at 225.

39 514 US 211 (1995) at 227-228.

40 514 US 211 (1995) at 230.

41 530 US 327 (2000) at 342-344.

Errors in the judgment appealed from

55. Although the constitutional question was only raised by the AEU on the eve of the Full Court hearing, with respect, the Full Court erred in holding that no constitutional matter arose: see (2010) 189 FCR 259 at [26]-[38].

56. The present legislation fits neither category of case referred to by the Full Court at [27]. It is not a mere declaration as to what should thereafter be the rights and liabilities of parties to a civil dispute. Nor is it the alteration or abrogation by statute of antecedent rights in pending litigation. In the present case, the legislation (if construed as North J and the Full Court found) operates to dissolve the orders made by the Federal Court on 18 July 2008.

57. Further, while registration of an industrial associations is, of course, susceptible to legislative, executive and judicial determination, the Full Court, at [31], missed the distinction between:

    1. a decision to register; and

    2. a decision on the validity of a decision to register.

58. The latter is uniquely susceptible to judicial determination; and the judgment of the Federal Court in *Lawler* was a decision of the latter kind – it finally determined that the Commission's decision to register was invalid, and quashed that decision – an exercise of the High Court's 75(v) jurisdiction and the Federal Court's s 39B(1) jurisdiction; since the Federal Court exercised its jurisdiction pursuant to a remittal by the High Court under s 44 of the Judiciary Act.[42]

59. At [32] and [34], the Full Court erred in rejecting any distinction between pending and concluded proceedings. As the United States Supreme Court explained in *Plaut v Spendthrift Farm Inc*,[43] while proceedings are still pending, it remains the task of a court to apply the law as Parliament declares it; but once proceedings are concluded, the court has finally determined the controversy as between the parties and it is not open to Parliament to reopen or reverse the decision made by the court as between those parties.

60. Finally, at [37], the Full Court erred in its characterisation of s 26A. It does not matter that s 26A does not refer to the Full Court's orders – if that were a requirement, Parliament could always circumvent the constitutional prohibition by avoiding any reference to the order being impeached. But s 26A, as construed by the Full Court,

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42 *Lawler* at [7].

43 See paragraph 50 above.

does interfere with the Federal Court's orders in *Lawler*. It restores a registration that had been quashed by certiorari. In substance and effect, it reverses or dissolves the Court's orders. It seeks to substitute, for the judgment of the Full Federal Court, the judgment of the legislature as to the legal status of the APF. It goes beyond the alteration of antecedent rights, and retrospectively changes rights judicially determined as between the parties.

Severance

61. Section 26A is invalid to the extent that it purports to validate the registration of the APF that had been quashed by the Full Federal Court in *Lawler*. It should be read down to the extent of that invalidity, so as not to apply to the APF.[44]

62. At the special leave hearing on 2 September 2011, the Court asked whether s 26A ought be read down to a lesser extent – so that the APF's registration might be taken "to be valid" (prospectively, from the commencement of s 26A) but not "to have always been valid" (retrospectively, from the date of the initial registration).[45]

63. In the AEU's submission, s 26A, read down in that more limited way, would still interfere impermissibly with the judicial power of the Commonwealth. The purpose and effect of certiorari is to quash a decision vitiated by jurisdictional error. In practice, it is then up to the decision-maker to remake the decision in accordance with the law. Here, that required the APF to pursue its registration application, as it proceeded to do before the intervention of s 26A. Whether s 26A were construed as restoring the APF's registration *ab initio* or only from the commencement of s 26A, either construction would have the effect of reversing the order for certiorari. The quashed registration would be restored, without any further action on the part of the APF or the decision-maker.

64. Of course, it may be that the two constructions have different practical consequences for the APF. For example, if it is found that s 26A operated to validate the APF's registration not from 31 January 2006, but only from 1 July 2009, then in the intervening 3½ years the APF would not have had the body corporate status that registration confers[46] and would not have been a legal entity. But the effect of the two constructions on the writ of certiorari is the same: the registration is no longer quashed and the effect of the writ is undone.

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44 *Acts Interpretation Act 1901* (Cth), s 15A; *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 14 (Mason CJ).

45 [2011] HCATrans 245 at page 6, line 198 (Hayne J).

46 WR Act Schedule 1B section 27.

65. In summary, the only way that s 26A can be brought within the legislative power of the Commonwealth is if s 26A is read down to exclude the APF altogether.

An alternative principle

66. If it were considered that the constitutional principle formulated by Quick and Garran goes further than the jurisprudence on Chapter III developed by this Court, the AEU would urge the adoption of an alternative principle:

    1. To maintain the integrity of the judicial power of the Commonwealth, legislation ought not be construed as retrospectively altering rights finally determined as between particular parties by a court exercising federal judicial power unless that intention is clearly expressed.

    2. For the reasons set out earlier in paragraphs 21 to 31 above, such a clear expression is absent from s 26A.

D. Costs

67. This proceeding is one to which s 329 of the FWRO Act applies, namely a proceeding (including an appeal) in a matter arising under that Act. Whatever the outcome of the proceeding, there ought be no order as to costs.

Part VII: Applicable provisions

68. Section 26A of the FWRO Act provides as follows:

> **26A Validation of registration**
>
> If:
>
> (a) an association was purportedly registered as an organisation under this Act before the commencement of this section; and
>
> (b) the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not have the effect of terminating the membership of, or precluding from membership, persons who were persons of a particular kind or kinds;
>
> that registration is taken, for all purposes, to be valid and to have always been valid.

69. The first sentence of s 71 of the Constitution is as follows:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

70. Those provisions are still in force, in that form, at the date of making these submissions.

Part VIII: Orders sought

71. The Applicant seeks the following orders:

1. Special leave to appeal be granted.

2. The appeal be treated as instituted and heard instanter, and be allowed.

3. The order made by the Full Court of the Federal Court of Australia on 20 December 2010 be set aside and, in place thereof, it be ordered that the appeal to that Court be allowed and the order made by North J on 22 April 2010 be set aside.

4. It be declared that the Australian Principals Federation is not, by operation of s 26A of the FWRO Act, an organisation within the meaning of s 6 of the FWRO Act.

5. A writ of mandamus issue directing the First Respondent:

   (a) to remove the Australian Principals Federation from the register of organisations kept by the First Respondent pursuant to s 13(1)(a) of the FWRO Act; or

   (b) in the alternative, to record in the register of organisations kept by the First Respondent pursuant to s 13(1)(a) of the FWRO Act an annotation that the Australian Principals Federation is not, by operation of s 26A of the FWRO Act, an organisation within the meaning of s 6 of the FWRO Act.

6. A writ of prohibition issue to restrain the First Respondent from treating the Australian Principals Federation as an organisation, within the meaning of s 6 of the FWRO Act, by operation of s 26A of the FWRO Act.

7. The Third Respondent be removed as a party to the proceeding.

Dated: 30 September 2011

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