

AUSTRALIAN EDUCATION UNION v GENERAL MANAGER FAIR WORK AUSTRALIA & ORS (M8/2011)

Court appealed from: Full Court of the Federal Court of Australia
[2010] FCAFC 153

Date of judgment: 20 December 2010

In December 2003 the 3rd respondent, the Australian Principals Federation (the APF), applied to the Australian Industrial Relations Commission (the AIRC) for registration as a organisation under the *Workplace Relations Act 1996* (Cth) (the WR Act). The applicant (the AEU) objected to that registration. In January 2006 Vice-President Ross of the AIRC granted the application for registration. The APF was then entered into the register of registered organisations under the WR Act. An appeal by the AEU to the Full Bench was dismissed in September 2006. The AEU sought constitutional writs in the High Court: that application was remitted to the Federal Court, where the Full Court ordered that writs of certiorari issue to quash the decision of the AIRC and the APF's registration. The Full Court found that the APF did not meet the criteria for registration under the WR Act because its rules did not contain a "purging rule", ie a rule providing that people no longer eligible to be members because they had ceased to be employed as principals would cease to be APF members. The APF then applied to the AIRC for leave to change its rules. The AEU objected to the application. The matter was heard by a Full Bench of the AIRC, which in November 2008 reserved its decision.

On 1 July 2009 s26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (the FWRO Act) came into operation. It provides:

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.*

In August 2009, the 1st respondent informed both the APF and the AEU that Fair Work Australia regarded itself as obliged by s26A to treat the APF as a registered organisation under the FWRO Act. The APF withdrew its pending application to alter its rules. The AEU commenced action in the Federal Court contending that s26A, properly construed, did not operate to validate the APF's registration. North J dismissed that application. The AEU's appeal to the Full Federal Court was unsuccessful.

The questions of law said to justify a grant of special leave are:

- whether properly construed, s26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) operates to validate the registration of the Australian Principals Federation (APF) under that Act, which registration had been quashed by the Full Federal Court on 18 July 2008 in *Australian Education Union v Lawler* [2008] FCAFC 135 before the commencement of s26A; and

- if s26A purports to validate the registration of the APF, whether s26A is, to that extent, invalid as an impermissible usurpation of or interference with the judicial power of the Commonwealth.

The special leave application was referred to a Full Court of this Court for argument as on an appeal on 2 September 2011.

The Attorneys-General for the Commonwealth and for South Australia are intervening in the application.