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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

Australian Government Solicitor
50 Blackall Street
Barton ACT 2600
DX5678 Canberra

Date of this document: 28 October 2011
Contact: David Lewis

File ref: 11068924
Telephone: 02 6253 7541
Facsimile: 02 6253 7303
E-mail: david.lewis@ags.gov.au

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 of the Commonwealth (**Commonwealth**) intervenes, in the interests of the respondents, in this special leave application and in any appeal that may result from the special leave application, pursuant to s 78A of the *Judiciary Act 1903* (Cth). If leave to intervene in the special leave application is necessary, the Commonwealth seeks that leave.

PART III WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. If leave is necessary, it should be granted. The Commonwealth has an undoubted statutory right to intervene in any appeal that may result from the special leave application and hearing the Commonwealth on that application is the most efficient course.

PART IV RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. Subject to full reference being made to the provisions of Chapter III of the Constitution, the Commonwealth accepts the statement of applicable constitutional and statutory provisions set out in the applicant's submissions and in the submissions of the second and third respondents.

PART V ISSUES PRESENTED BY THE APPLICATION ON WHICH THE COMMONWEALTH MAKES SUBMISSIONS

A. INTRODUCTION

5. This application raises issues about the proper construction and validity of s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**Act**) where, prior to its enactment, the Full Federal Court had made the following order:[1]

> A writ of certiorari issue to quash the registration of the Australian Principals Federation pursuant to Sch 1B to the *Workplace Relations Act 1996* (Cth).

6. The Commonwealth advances the following propositions:

---

[1] *Australian Education Union v Lawler* (2008) 169 FCR 327 at 433.

6.1. Section 26A operates by accepting that the Federation's purported registration was ineffective and retrospectively attaching to the ineffective registration all of the rights and privileges afforded to a lawful registration.

6.2. So construed, s 26A does not impermissibly usurp, or interfere with, the judicial power of the Commonwealth.

B. SECTION 26A RESTROSPECTIVELY ATTACHES TO THE INEFFECTIVE REGISTRATION ALL OF THE RIGHTS AND PRIVILEGES AFFORDED TO A LAWFUL REGISTRATION

7. Seven points may be made to demonstrate that s 26A operates analogously to the provisions considered and upheld in *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd*[2] (***Engine-Drivers and Firemen's Case***) and *The Queen v Humby; Ex parte Rooney*.[3]

8. First, the task of statutory construction must begin with the text of the provision. The language which has actually been employed in the text is the surest guide to its meaning. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision.[4] That a provision has retrospective operation is part of the context. Recourse to presumptions of construction must not detract from this task. There are common law presumptions about the interpretation of provisions that have retrospective effect, most relevantly that stated in *Lemm v Mitchell* (which concerned legislation intended to confer a right of suit retrospectively) as referred to and applied in the *Engine-Drivers and Firemen's Case*:[5]

> In the absence of appeal the judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, unless it be excluded by the legislature in explicit and unmistakable terms. ... It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of law in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting.

But, in terms, those presumptions express a conclusion and ultimately return the Court to its constitutional task of interpreting the text of the statute by the application

---

2 (1913) 16 CLR 245.

3 (1973) 129 CLR 231.

4 *Alcan (NT) v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ). See also, *Commissioner of Taxation v BHP Billiton Limited* (2011) 85 ALJR 638 at 646 [47] (French CJ, Heydon, Crennan and Bell JJ); *AB v WA* [2011] HCA 42 at [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

5 *Lemm v Mitchell* [1912] 1 AC 400 at 405; *Engine-Drivers and Firemen's Case* (1913) 16 CLR 245 at 259 (Griffith CJ), 270-271 (Barton J). See also KR Handley, *Res Judicata* (4th ed, 2009) at [17.25].

of rules of interpretation accepted by all arms of government in the system of representative democracy.[6]

9. Secondly, the language of s 26A is apt retrospectively to create, by reference to the ineffective registration, all of the rights and privileges of a lawful registration. In its terms, s 26A works upon a "purported registration". That is what the words "that registration" refer to in the concluding words of the provision. The statutory language of "purportedly registered" must include a registration that, in law, was no registration at all[7] because of jurisdictional error in the making of the decision.[8] It is not necessary for there to have been a court order quashing the registration in order for it to have been, in law, no registration at all. In any event, while a quashed registration never existed in law, it still existed in fact. Because a "purported" registration (whether quashed or not) existed in fact, it was capable of providing the factum upon which a statutory provision might operate.[9] By using a "purported" registration as the factum, s 26A does not affect the order made by the Full Federal Court in *Lawler*, nor does it purport to make valid in law a quashed registration. Further, s 26A does not declare the decision in *Lawler* to have been wrong in law.[10] To the contrary, s 26A accepts both the authority of *Lawler* and the orders made in the particular case. The text of the provision makes plain that a "purported" registration "is taken" to be and to have always been valid. That language ("is taken") is an implicit recognition of the invalidity of the registration. What was decided (and all that was decided) by the judicial review proceedings in *Lawler* was that as at the date of the decision, the Federation was not registered according to the law as it then stood. But nothing about that ruling insulates the rights and privileges of an unlawfully registered association from legislative change. Thus, Parliament has attributed to the outcome of a particular class of events (being purported registrations) the effect of a valid registration (being the rights and privileges that are afforded upon registration).[11] As a consequence, whatever the Federation did that an "organisation" could have done is to be treated as the act of an "organisation".

---

6 *Lacey v Attorney-General (Qld)* (2011) 85 ALJR 508 at 521 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also *Momcilovic v The Queen* (2011) 85 ALJR 957 at 984 [38], 1002 [111] (French CJ), 1009 [146(v)], 1015-1016 [183], 1028-1029 [261] (Gummow J), 1086 [545], 1101 [638] (Kiefel and Crennan JJ).

7 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51] (Gaudron and Gummow JJ).

8 Entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The jurisdictional error in the Federation's registration was decided in *Australian Education Union v Lawler* (2008) 169 FCR 327.

9 *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ) ("in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence"); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25], 187-188 [59]-[60] (Gaudron J), 200 [107] (McHugh J), 232-233 [208] (Gummow J), 280 [347] (Hayne and Callinan JJ).

10 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25] (Gaudron J), 232-233 [208] (Gummow J), 280 [347] (Hayne and Callinan JJ).

11 Compare *The Queen v Humby; Ex parte Rooney* (1973) 129 CLR 231.

The section heading[12] ("Validation of registration") provides a legislative shorthand to describe that attribution.[13]

10. Thirdly, s 26A takes its place in a group of provisions in Pt 2 of Ch 2 of the Act that deal with the registration of an association as an "organisation" under the Act.[14] To be an "organisation" is to have a statutory status and to be entitled to the rights and privileges conferred by registration.[15] But that status and those rights and privileges may be extended to others, including to those purportedly registered. And, Parliament may expressly register and de-register an association as an "organisation".[16] An "organisation" under the Act is a body corporate and has powers in relation to personal and real property.[17] Further, an "organisation" may obtain representation rights under Ch 4 of the Act, and under the *Fair Work Act 2009* may be a "bargaining representative" in respect of the making of enterprise agreements,[18] exercise rights of entry to workplaces,[19] be covered or bound by agreements and awards[20] and make applications for orders in relation to breaches of the *Fair Work Act*.[21] It is this bundle of rights and privileges that is conferred by registration under the Act which is effective in law.

11. Fourthly, this construction of s 26A is confirmed by the decision in the *Engine-Drivers and Firemen's Case*.[22] The Federated Engine-Drivers and Firemen's Association of Australasia (**Association**) was registered as an organisation and in October 1910 it brought a plaint in the Commonwealth Court of Conciliation and Arbitration under the *Commonwealth Conciliation and Arbitration Act 1904* against numerous corporations alleging an industrial dispute between the parties and seeking an award. The respondents objected to jurisdiction. On 27 June 1911, the High Court decided that the Association could not be registered under the *Commonwealth Conciliation and Arbitration Act 1904* and therefore the objection to jurisdiction was fatal to the plaint.[23] However, the plaint was not thereafter dismissed by the Commonwealth Court of Conciliation and Arbitration. On 23 November 1911, s 4 of the *Commonwealth Conciliation and Arbitration Act 1911* was enacted in the following terms.

> The registration, as an organisation under the Principal Act, of any association purporting to be registered before the commencement of this Act

---

12 Which, in any event, is not part of the Act: *Acts Interpretation Act 1901*, s 13(3).

13 *The Queen v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 248-249 (Mason J); *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 579 (Dixon J).

14 "Organisation" means an organisation registered under the Act, s 6.

15 See the Act, ss 5(2), 5(4).

16 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 94-95 (Gibbs CJ, Mason, Brennan, Deane, Dawson JJ).

17 The Act, s 27.

18 *Fair Work Act 2009*, s 176.

19 See *Fair Work Act 2009*, Ch 3, Pt 3-4.

20 *Fair Work Act 2009*, ss 143(3), 183.

21 *Fair Work Act 2009*, s 539.

22 (1913) 16 CLR 245.

23 (1911) 12 CLR 398.

> shall be deemed to be as valid to all intents and purposes, and to have constituted the association an organisation as effectually as if this Act had been in force at the date of the registration.

While the text of that provision differs from s 26A, its purpose, structure and legal operation is similar to it. Thereupon, the Court of Conciliation and Arbitration was asked to proceed with the plaint. On a case stated to the High Court, the Court differed as to whether, its 1911 decision establishing the plaint was a nullity, this question was *res judicata*. The Court decided by statutory majority that s 4 did not operate retrospectively to validate the commencement of *judicial proceedings* which were null and void when commenced. However, the Court did not doubt that, notwithstanding its earlier decision that the Association could not be registered under the 1904 Act, s 4 did operate, validly and retrospectively, to give to the purported rights, liabilities and privileges of the Association as an organisation under the *Commonwealth Conciliation and Arbitration Act 1911*, the legal effect of rights, liabilities and privileges of an organisation.

11.1. Thus, Griffith CJ held the language of s 4 to be apt for the purpose of retroactively validating past acts of the Association.[24]

11.2. Barton J accepted a concession that the effect of s 4 was that the original registration "is to be taken to have had the effect of turning it into an organization"[25] and concluded the Act "validate[d] the registration *ab initio*".[26]

11.3. Isaacs J reasoned that by s 4, the Association "was 'deemed' to have been such an organisation as Parliament intended, and as from the date of actual registration. That was obviously no interference with the former judicial decision. It was, as I have said, an implicit recognition of its correctness, because the new enactment uses the word 'deemed'".[27]

11.4. Higgins J said that s 4 deemed the Association to have been registered since the date of its actual registration so that "whatever it did that an organization could do is treated as the act of an organization".[28] Higgins J explained that the section imposed a "future duty" on those concerned with questions about the validity of an association's registration, so that any question in a future proceeding about the validity or effectiveness of an association's acts would be answered by the section which changed the law to be

---

24 (1913) 16 CLR 245 at 260 (Griffith CJ).

25 (1913) 16 CLR 245 at 269 (Barton J).

26 (1913) 16 CLR 245 at 271 (Barton J).

27 (1913) 16 CLR 245 at 278 (Isaacs J). See also at 277: the words of s 4 are "not only retrospective but clear and all embracing."

28 (1913) 16 CLR 245 at 280 (Higgins J).

applied to associations that were *de facto*, but not *de jure*, registered.[29]

12. Fifthly, notions of "unfairness",[30] to the extent that they might be considered relevant to the construction of statutes with retrospective operation,[31] will impact litigation involving private rights in a manner that differs from litigation involving public law rights. *Certiorari* involves the exercise of public power. It is a remedy that operates *in rem* and not just *inter partes*. It relevantly operates to quash, in law, an administrative act. In the present case, a bundle of rights attached to the administrative act, many of which touch and affect third parties. Any "unfairness" to the applicant must be assessed in that context and by reference to "unfairness" to the Federation, its "members" and any employers with which it had dealings.

13. Sixthly, it would not advance the purposes of the Act to construe s 26A (together with related provisions such as s 171A) in a way that would give the Act a different operation in relation to registered organisations whose registration had been held invalid by a court. The purposes of the Act include "assist[ing] employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered" (s 5(4)). That purpose would be best served if s 26A and related provisions operate to provide a uniform rule for the registration of all registered organisations.

14. Seventhly, explanatory memoranda must be used with care in the process of statutory construction.[32] In light of the clear legal operation of s 26A set out above, nothing in the explanatory memorandum will either add to, or detract from, an understanding of that operation. Accordingly, the applicant's parsing of the words of the memorandum is not helpful.[33]

C. SECTION 26A OF THE ACT IS VALID

15. Section 26A does not, by retrospectively attaching to the quashed registration all of the rights and privileges afforded to a lawful registration, in any way usurp, or interfere with, the judicial power of the Commonwealth and is valid.

---

29 (1913) 16 CLR 245 at 281-282 (Higgins J).

30 Applicant's Submissions at [32].

31 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 572-573 [59] (Spigelman CJ), 586 [153] (Mason P).

32 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

33 Applicant's Submissions at [27]-[31].

16. It is not the case that s 26A "restored the registration that had been quashed".[34] The section does not purport to decide the question of the validity of the Federation's registration;[35] it accepts its invalidity.

17. It would be a usurpation of, or interference with, the judicial power of the Commonwealth if Parliament was to set aside the decision of a court exercising federal jurisdiction. But it is no such usurpation or interference if Parliament enacts retrospective legislation which establishes new legal relationships by altering the rights and obligations upon which the Court's earlier decision was based.[36] That proposition is demonstrated by *The Queen v Humby; Ex parte Rooney*[37] and that is how s 26A operates. Further, because the legislation accepts the outcome of the judicial process, it does not affect its validity that s 26A operates upon the Federation's purported registration.

18. The applicant accepts that s 26A would not interfere with or usurp the judicial power of the Commonwealth in respect of the Federation if it had been enacted prior to the Full Federal Court's order in *Lawler*, and applied to the purported registration of the Federation.[38] On the applicant's argument, the question of any usurpation or interference with judicial power in relation to the Federation's registration is made to turn on any difference between a quashed registration and an unlawful registration that has not yet been quashed. Relevantly, there is none: in law, both are regarded as no registration at all. The order made by the Full Federal Court in *Lawler* determined the status of the Federation's registration as being invalid at the time of the decision, according to the law as it then stood. But the invalidity arose when the decision-maker entertained the application in the absence of jurisdictional facts.

19. As Dixon J said in *Nelungaloo* "a retrospective validation of an administrative act ... should be treated in the same way as if [the section] said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid. If such an enactment is a law with respect to the subject of defence, I can see no objection to its validity".[39] That is further confirmed by the decision in the *Engine-Drivers and Firemen's Case*[40] in which the respondents challenged s 4 on the basis that it was "an exercise by the federal Parliament of the judicial power of the Commonwealth".[41] The section was upheld. On its validity, Higgins J said the following.[42]

---

34 Applicant's Submissions at [38], [60].

35 Contrast with the Applicant's Submissions at [57]-[58].

36 Professor George Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) at 195.

37 (1973) 129 CLR 231.

38 Applicant's Submissions at [45(1)].

39 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579 (Dixon J).

40 (1913) 16 CLR 245.

41 (1913) 16 CLR 245 at 251 (Mitchell KC in argument).

42 (1913) 16 CLR 245 at 281 (Higgins J).

> To amend the law in consequence of a decision of the High Court is not the same thing as reversing the decision – not the same thing as saying the High Court was wrong.

And his Honour continued:[43]

> There is no usurpation of the function of determining the meaning of the Acts as they stand, or of applying the law as it stands to a given case. There is no reversal of the opinion of the High court, but a change in the law to be applied in all future proceedings in the same cause or in other causes.

20. Also, the cases which acknowledge that on an appeal by way of rehearing a court may take into account changes in the law[44] demonstrate that the application of changes in the law to circumstances the subject of judicial decisions does not impermissibly interfere with or usurp judicial power.

21. The decision referred to by the applicant from the United States is of little assistance in resolving this matter, except to demonstrate the quite extraordinary provision that was held to operate to usurp judicial power. *Plaut v Spendthrift Farm Inc*[45] concerned a provision that, in terms, legislatively "reinstated" a proceeding that had been dismissed by the exercise of judicial power. The reasoning of the majority in that case was based on the proposition that the provision at issue "retroactively command[ed] the federal courts to reopen final judgments." That is far removed from s 26A which operates by accepting the finality of the decision in *Lawler*. Nothing about s 26A annuls the judgment in *Lawler* nor says that the Federation was lawfully registered.

22. Of greater assistance from the United States, is the earlier decision in *Pennsylvania v Wheeling & Belmont Bridge Co.*[46] Congress had passed a law that declared existing bridges over a river to be lawful, following an earlier ruling by the Court that the bridges were unlawful and were to be removed or modified. The law was upheld on the basis that what was at issue was an executory injunction, the continuing enforceability of which depended on the bridges being unlawful. But with the amending law, the law had changed and so the injunction could not be enforced. In affirming the law, the Supreme Court distinguished its operation on different remedies:[47]

> If the remedy in this case had been an action at law and a judgment rendered in favour of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended not upon the public right of the free navigation of the river, but

---

43 (1913) 16 CLR 245 at 282 (Higgins J).

44 See eg *Lacey v Attorney-General (Qld)* (2011) 85 ALJR 508 at 524-525 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) and the cases cited there and *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107-111 (Dixon J).

45 514 US 211 (1995).

46 18 How 421 (1856). This case is referred to in argument by Counsel for the respondents in the *Engine-Drivers and Firemen's Case* at (1913) 16 CLR 245 at 251.5.

47 18 How 421 at 431-432 (1856).

> upon the judgment of the Court. The decree before us, so far as it respect the costs adjudged, stands upon the same principles and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge but enjoins the defendants against any reconstruction or continuance. ... If, in the meantime, since the decree, this right [of navigation] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.

Similar reasoning was applied by the Full Court of the Supreme Court of South Australia in *CSIRO v Perry (No 2)* where it was held the plaintiff was entitled to have a permanent injunction dissolved where a subsequent Act removed the unlawfulness on which the injunction was based.[48]

23. *Wheeling & Belmont Bridge Co* shows that close attention must be given to what was decided by the Court. In *Lawler*, certiorari was issued to quash a registration that was unlawful. What was decided was that the Federation was not lawfully registered. But that was all.[49] The Full Federal Court did not decide that the Federation could not be registered if the law were different. At most, what is protected by the Full Federal Court's order is the quashing of the Federation's registration. But it is not "unquashed" or "revived" by s 26A. It remains, at law, quashed and certain rights and privileges are created by reference to that ineffective registration by s 26A.

Date of filing: 28 October 2011

Stephen Gageler SC
Solicitor-General of the Commonwealth
Telephone: 02 9230 8903
Facsimile: 02 9230 8920
Email: stephen.gageler@ag.gov.au

Chris Young
Telephone: 03 9225 8772
Facsimile: 03 9225 8395
Email: chris.young@ag.gov.au

Counsel for the Attorney-General of the Commonwealth

---

48 *CSIRO v Perry (No 2)* (1988) 92 FLR 182.

49 Compare *Ruddock v Taylor* (2005) 222 CLR 612 at 621 [22]-[24], 627 [48] (Gleeson CJ, Gummow, Hayne and Heydon JJ) in which it was held that an inquiry into the lawfulness of a decision to quash a visa did not determine the outcome of an inquiry into the lawfulness of detention.