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 REPLY TO THE ATTORNEYS-GENERAL FOR THE COMMONWEALTH AND SOUTH AUSTRALIA

PART I: CERTIFICATION

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

PART II: ARGUMENT

Engine-Drivers Case

2. *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (the ***Engine-Drivers*** **case**)[1] neither requires nor supports the conclusion that s 26A of the FWRO Act was intended to apply to the APF or, if it does, is a valid law.[2]

3. The statutory mechanism employed in the *Commonwealth Conciliation and Arbitration Act 1911* (the **1911 Act**), the legislation considered in the *Engine-Drivers* case, was decisively different from that in s 26A of the FWRO Act.

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1 (1913) 16 CLR 245.

2 Commonwealth Attorney-General's submissions, paragraphs 7, 8, 11, 19.

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3.1 The 1911 Act altered a number of substantive provisions in the principal Act,[3] including the definition of "industry" so as expressly to include within that definition a "handicraft".[4] That amendment had the effect of expanding the registration criteria for organisations, which were expressed by reference to the term "industry".[5]

3.2 The 1911 Act then provided that "the registration ... of any association purporting to be registered before the commencement of this Act 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*"[6] (emphasis added).

3.3 That is, the mechanism used in the 1911 Act changed the underlying definitions in the principal Act and applied those definitions retrospectively (with a flow-on effect to the rules governing registration). It was thus a mechanism that altered substantive rules, rather than interfering with any judicial decision.

3.4 Section 26A is different. It simply says that a "purported registration" (meeting a certain description) is taken "to be valid and to have always been valid". Section 26A operates directly on invalid registrations and transforms them into valid registrations, without changing the underlying definitions or rules governing registration.[7] To the extent that it applies to the APF, it therefore squarely attacks the exercise of judicial power in *Lawler*, which was exclusively concerned with the validity of the decision to register the APF.

4. In the *Engine-Drivers* case (unlike the present case), it appears to have been conceded by the successful parties in the litigation that preceded the 1911 Act[8] that the amendments operated to validate the union's registration.[9] That is understandable, because those parties were not other unions (like the AEU), whose primary concern was with registration, but were employers, who were concerned with the competence of a claim that had been brought against them seeking the finding of an industrial dispute

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3 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (the **1904 Act**).

4 (1913) 16 CLR 245 at 257-258 (Griffith CJ).

5 The registration criteria were relevantly contained in s 55 of the 1904 Act.

6 Section 4 of the 1911 Act.

7 Nor do ss 171A or 230(1)(b), which accompanied s 26A, change the rules governing registration. They simply facilitate the "purging" of ineligible members.

8 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398.

9 (1913) 16 CLR 245 at 269 (Barton J).

and the making of an award.[10] Consequently, it appears that the point of interpretation that is contested in the present case was not argued in the *Engine-Drivers* case.

5. The *Engine-Drivers* case is also distinguished by the fact that no remedy, let alone certiorari, had issued in relation to the invalid registration.

5.1 The earlier proceeding before the High Court was a case stated by the President of the Commonwealth Court of Conciliation and Arbitration (the **Arbitration Court**). The proceeding before the Arbitration Court had been brought by a union against employers, seeking the making of an award in settlement of an industrial dispute.

5.2 The questions posed in the case stated included (1) whether the union had been validly registered, and (2) whether invalidity in its registration was fatal to the proceeding. The High Court answered the first question in the negative and the second question in the affirmative.[11]

5.3 However, when the amending Act was passed, the proceeding before the Arbitration Court remained pending.[12] There is nothing to indicate that anyone had taken steps to have the union removed from the register. The union was therefore vulnerable to deregistration, but remained registered and was in that sense in the same position as other "craft" unions whose registration was called into question by the High Court's answers to the case stated.

5.4 By contrast, in the present case, the Full Court's decision in *Lawler*, that the APF had been invalidly registered, was perfected by the issue of the writ of certiorari, which quashed the APF's registration *ab initio*. The writ placed the APF in a very different position from other unions that may have lacked a purging rule. Following *Lawler*, the Industrial Registrar was obliged to, and did, treat the APF as unregistered.[13] He was not obliged to, and there is no evidence that he did, treat other organisations in the same way.

6. Although the conclusion in *Engine-Drivers* case about the effect of the 1911 Act on the validity of registration is distinguishable, the case does affirm the general principle of interpretation invoked by the AEU in the present case – namely, that legislation ought

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10 (1913) 16 CLR 245 at 251-252 (Mitchell KC in argument).

11 (1911) 12 CLR 398 per Griffith CJ, Barton and Isaacs JJ (O'Connor and Higgins JJ dissenting on the first question but not the second).

12 In the later proceeding, the respondent employers submitted that their attempts to have the matter brought back on before the Arbitration Court had been unsuccessful: (1913) 16 CLR 245 at 257 (Griffith CJ).

13 Exhibit DS-7: Letter from Fair Work Australia dated 15 July 2009 and attached extracts from Register: AB 151-154.

not be interpreted as altering rights determined as between parties in concluded litigation unless that intention is clearly expressed.[14]

Other matters

7. Section 26A does not simply "attach to the ineffective registration [of the APF] all of the rights and privileges afforded to a lawful registration".[15]

   7.1 In terms, it provides that a purported registration to which it applies "is taken, for all purposes, to be valid and to have always been valid". It operates directly on the *validity of registration* – it says nothing about rights or privileges associated with registration.

10 7.2 Furthermore, if s 26A applies to the APF, then it operates directly on the very thing that the Full Court in *Lawler* judged to be invalid (registration), providing that the registration is instead valid for all times and for all purposes. That is to be contrasted, for example, with the legislation in *Re Macks; Ex parte Saint,*[16] which expressly operated on rights and liabilities and left "ineffective judgments" undisturbed.

8. Cases holding that an appeal may lie from a decision vitiated by jurisdictional error are not to the point.[17] The issue in the present case is not whether such a decision may be the subject of appeal, but whether it may be the subject of legislative alteration where its validity has been finally determined in judicial proceedings.

20 9. Likewise, the facts in this case cannot be equated with those in cases where an injunction becomes unenforceable because the underlying law has changed.[18]

   9.1 An injunction is by its nature prospective, restraining or compelling action based on a particular state of fact and law. It is naturally susceptible to alteration if that state of fact or law changes.

   9.2 That is not the case with certiorari. Certiorari issues to quash a decision that has been found to be invalid. The task of determining the validity of the decision is uniquely judicial. Legislation cannot deem to be valid that which has been

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14 (1913) 16 CLR 245 at 259 (Griffith CJ), 270-271 (Barton J), citing *Lemm v Mitchell* [1912] AC 400.

15 Commonwealth Attorney-General's submissions, paragraphs 6.1, 10.

16 (2000) 204 CLR 158: Commonwealth Attorney-General's submissions, paragraph 10; South Australian Attorney-General's submissions, paragraph 10.

17 South Australian Attorney-General's submissions, paragraph 10.

18 Commonwealth Attorney-General's submissions, paragraph 22; South Australian Attorney-General's submissions, paragraphs 37-40.

finally determined to be invalid and quashed by a court exercising federal judicial power without interfering with that exercise of judicial power.

10. The interpretation of s 26A advanced by the APF respondents and the Attorneys-General is no more supported by the purposes of the FWRO Act than that advanced by the AEU.[19]

10.1 One can equally point to the fact that a purpose of the FWRO Act is to ensure that "associations of employers and employees are required to meet the standards set out in this Act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act".[20] *Lawler* decided that the APF did not meet those standards in an important respect.

10.2 It is entirely consistent with the purposes of the FWRO Act to require the APF to have its application for registration determined by Fair Work Australia in accordance with the standards now prescribed by that Act. Nor is there anything unfair about requiring it to do so.[21]

11. Section 26A should be interpreted so as not to reverse the rights determined as between the AEU and the APF in *Lawler*. If that is the intention of s 26A, then it is to that extent invalid.

Dated: 4 November 2011

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19 Commonwealth Attorney-General's submissions, paragraph 13.

20 FWRO Act, s 5(2).

21 Commonwealth Attorney-General's submissions, paragraph 12; South Australian Attorney-General's submissions, paragraphs 14-21.