HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

AUSTRALIAN EDUCATION UNION APPLICANT

AND

GENERAL MANAGER OF FAIR WORK AUSTRALIA & ORS RESPONDENTS

Australian Education Union v General Manager of Fair Work Australia
[2012] HCA 19
4 May 2012
M8/2011

ORDER

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter, and dismissed.

On appeal from the Federal Court of Australia

Representation

P J Hanks QC with J H Kirkwood for the applicant (instructed by Holding Redlich)

Submitting appearance for the first respondent

R C Kenzie QC with E P White for the second and third respondents (instructed by Ryan Carlisle Thomas)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with C P Young intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with N M Schwarz intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

CATCHWORDS

Australian Education Union v General Manager of Fair Work Australia

Statutes – Acts of Parliament – Interpretation – Presumptions as to legislative intention – Presumption against retrospective operation – Full Federal Court of Australia held that registration of Australian Principals Federation ("APF") under *Workplace Relations Act* 1996 (Cth) ("WR Act") invalid because of absence of "purging rule" terminating membership of organisation of persons no longer entitled to be members – WR Act renamed *Fair Work (Registered Organisations) Act* 2009 (Cth) and s 26A inserted validating purported registrations made invalid because of absence of purging rule – Whether s 26A operated to validate registration of APF.

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Whether s 26A in substance dissolved or reversed the orders of the Full Federal Court – Whether s 26A impermissibly usurped or interfered with exercise of Commonwealth judicial power – Whether s 26A invalid.

Words and phrases – "registered organisation", "retrospective operation", "usurpation of judicial power".

Constitution, Ch III.
Acts Interpretation Act 1901 (Cth), s 8.
Fair Work (Registered Organisations) Act 2009 (Cth), ss 26A, 171A.
Workplace Relations Act 1996 (Cth), Sched 1B.

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 The *Fair Work (Registered Organisations) Act* 2009 (Cth) ("the FW(RO) Act") establishes a system for the registration of associations of employers and employees and sets out standards which such associations must meet in order to gain the rights and privileges accorded to registered associations under the FW(RO) Act and the *Fair Work Act* 2009 (Cth).

2 Section 26A of the FW(RO) Act 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."

The applicant for special leave, the Australian Education Union ("the AEU"), is an association which represents teachers, principals and other educational staff in schools and colleges throughout Australia and is registered as an association of employees under the FW(RO) Act. The third respondent, the Australian Principals Federation ("the APF"), is an association which represents principals in schools and colleges in Victoria and Western Australia. The second respondent is the President of the APF. The first respondent, the General Manager of Fair Work Australia, has entered a submitting appearance.

3 The first issue in this application for special leave, referred to the Full Court, is whether, as a matter of construction, s 26A operates to validate the registration, under the FW(RO) Act, of the APF. In 2008 that registration was held to be invalid by the Full Court of the Federal Court on the basis of a deficiency in the APF rules of the kind referred to in s 26A(b). The decision of the Full Court was *Australian Education Union v Lawler*[1]. The deficiency was

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1 (2008) 169 FCR 327.

the absence of a "purging rule" to terminate the membership of persons no longer qualified for membership by reason of their employment. The decision led to the enactment of s 26A which was intended to validate registrations prior to 1 July 2009 rendered invalid by reason of such a deficiency[2]. It was enacted in conjunction with a statutory purging rule embodied in s 171A which applied to all associations from 1 July 2009. The second issue is whether, if s 26A does validate the registration of the APF, it was beyond the power of the Commonwealth Parliament as an impermissible usurpation of or interference with the exercise of the judicial power of the Commonwealth.

4 The Full Court in *Lawler* ordered the issue of a writ of certiorari to quash a decision of the Australian Industrial Relations Commission ("the Commission") made on 27 January 2006, that an application by the APF for registration as an organisation under the *Workplace Relations Act* 1996 (Cth) ("the WR Act") be granted. The Court made a similar order in relation to a decision of the Full Bench of the Commission dismissing an appeal by the AEU from the decision of 27 January 2006. The Full Court also ordered that:

> "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)."

5 For the reasons that follow special leave to appeal should be granted, the appeal should be treated as instituted and heard instanter, but the appeal should be dismissed. Section 26A, on its proper construction, validated the purported registration of the APF. So construed it did not involve an impermissible usurpation of or interference with judicial power reserved to courts exercising federal jurisdiction pursuant to Ch III of the Constitution.

6 It is useful to commence with a consideration of the legislative history of the impugned provision and its statutory setting.

Legislative and litigious history

7 The dispute between the AEU and the APF which has led to the present proceedings dates back some 14 years. The APF was formed at a meeting of school principals in February 1998 and was then called the Victorian Principals Federation[3]. It applied for registration as an organisation pursuant to the

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2 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 129 [794].

3 *Australian Education Union v Lawler* (2008) 169 FCR 327 at 351 [96].

WR Act. The AEU, then itself a registered organisation, objected to the application. Although the application for registration was successful at first instance in the Commission, it was unsuccessful on appeal.

8 The *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002 (Cth) introduced new registration provisions into the WR Act. Those provisions were contained in Sched 1B entitled "Registration and Accountability of Organisations". Section 18 of Sched 1B set out the kinds of associations which could apply for registration as an organisation under the Act. One of that class was:

> "an association of which some or all of the members are employees who are capable of being engaged in an industrial dispute"[4].

If all of the members did not fall into that category the other members had to be officers of the association or persons specified in s 18(3) or independent contractors who, if they were employees performing work of the kind which they usually performed as independent contractors, would be employees eligible for membership of the association.

9 In December 2003, the APF again applied for registration as an organisation under the WR Act pursuant to s 18(1) of Sched 1B. The AEU again objected. On 27 January 2006, Ross VP found in favour of the APF stating at the conclusion of his reasons for decision:

> "I am satisfied that the application before me is a valid application which relevantly complies with the RAO Regulations. I am also satisfied as to the requirements set out in s 19 of the *RAO Schedule* have been met [sic]. The application before me for registration of the Australian Principals Federation is, therefore, granted."

10 On 30 January 2006, the Industrial Registrar under the WR Act entered the particulars of the APF in the Register of Organisations ("the Register") maintained pursuant to s 13(1) of Sched 1B. The entry in the Register set out the name of the APF and its rule relating to eligibility for membership. The Registrar's action was taken pursuant to s 26 of Sched 1B to the WR Act which relevantly provided[5]:

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4 *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002 (Cth), Sched 1, Item 2, inserting s 18(1)(b) into Sched 1B to the WR Act.

5 Subsection (6) providing for copy and replacement certificates is not reproduced.

> "(1) When the Commission grants an application by an association for registration as an organisation, the Industrial Registrar must immediately enter, in the register kept under paragraph 13(1)(a), such particulars in relation to the association as are prescribed and the date of the entry.
>
> (2) An association is to be taken to be registered under this Schedule when the Industrial Registrar enters the prescribed particulars in the register under subsection (1).
>
> (3) On registration, an association becomes an organisation.
>
> (4) The Industrial Registrar must issue to each organisation registered under this Schedule a certificate of registration in the prescribed form.
>
> (5) The certificate is, until proof of cancellation, conclusive evidence of the registration of the organisation specified in the certificate."

As appears from the text of s 26, the term "registration" refers to the act of the Industrial Registrar entering the prescribed particulars in the Register "under subsection (1)." Such an entry is only made "under subsection (1)" if made after the Commission has granted the application for registration. An entry made in the absence of a valid grant by the Commission would not be valid. That is to say, it would have no legal effect.

11 The effect of valid registration can be seen by referring to the definition of "organisation" in s 6 of Sched 1B as "an organisation registered under this Schedule." Section 27 of Sched 1B provided that an organisation is a body corporate with perpetual succession and associated powers in respect of the acquisition or disposition of real or personal property.

12 The AEU appealed from the decision of Ross VP to a Full Bench of the Commission. The Full Bench dismissed the appeal on 26 September 2006. The AEU then applied to this Court for an order to show cause why mandamus, prohibition and certiorari should not issue and for a declaration to be made in relation to the granting of the APF's application for registration under the WR Act, the act of registration and the dismissal of the AEU's appeal to the Full Bench. This Court remitted that application to the Federal Court on 19 February 2007. The application was heard by a Full Court of the Federal Court. The decision that followed was the *Lawler* decision. The Full Court held that at all relevant times the APF was not an association of a kind referred to in s 18(1)(b)

of Sched 1B and that the Commission did not have jurisdiction to grant its application for registration[6].

13 Following the decision of the Full Court, a handwritten notation was made against the entry in the Register relating to the APF. It was in the following terms:

> "Registration of Australian Principals Federation was quashed by order of the Full Federal Court of Australia on 18 July 2008 (VID 153 of 2007) [2008] FCAFC 135.
>
> See page 140 of Volume 10 of the Register."

At page 140 of volume 10 of the Register the orders made by the Full Court were set out.

14 By the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) ("the Amending Act") Sched 1B to the WR Act, which had been renumbered as Sched 1[7], was transformed into the FW(RO) Act. The Amending Act enacted s 26A of the FW(RO) Act. The Amending Act also enacted a new s 171A which provided:

> "(1) If a person is a member of an organisation and the person is not, or is no longer:
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> …
>
> (b) if the organisation is an association of employees – a person of a kind mentioned in paragraph 18B(3)(a), (b), (c) or (d); …
>
> the person's membership of the organisation immediately ceases.
>
> (2) Subsection (1) has effect despite anything in the rules of the organisation."

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6 (2008) 169 FCR 327 at 350 [88] per Lander J, 420 [270] per Jessup J.

7 Item 2 of Sched 5 to the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth). See also Items 1, 2 and 3 of Sched 1, Items 2 and 3 of Sched 2 and Item 3 of Sched 22 to the Amending Act.

Section 171A had the effect of imposing on all organisations a statutory "purging rule".

15 A Revised Explanatory Memorandum for the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 ("the Memorandum") explained the purpose of s 26A[8]:

> "Section 26A addresses the 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] [FCAFC] 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."

The Memorandum referred to the significant ramifications of the *Lawler* decision for federal organisations that were registered without the ability to "purge" members no longer eligible to be members of the association. The decision, it was said, enabled the validity of those registrations to be called into question along with any instruments such as agreements or awards to which such organisations were party or any action which the organisation had taken in reliance on its registered status. The Memorandum continued[9]:

> "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."

In addition to the processes under the FW(RO) Act for registration of associations as organisations there are provisions for the cancellation of registration.

16 On 1 July 2009, upon the coming into effect of s 26A, a further entry was made in the Register relating to the APF. It referred the reader to page 140 of volume 10 of the Register which set out the text of s 26A of the FW(RO) Act and its commencement on 1 July 2009.

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8 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 128 [792].

9 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 129 [794].

Procedural history

17 On 17 September 2009, the AEU filed an application in the Federal Court seeking a declaration that the APF was not, by operation of s 26A of the FW(RO) Act, an organisation within the meaning of s 6 of that Act. The AEU sought the issue of a writ of mandamus directing the General Manager of Fair Work Australia to remove the APF from the Register kept by him pursuant to s 13(1)(a) of the FW(RO) Act or, in the alternative, to record in the Register an annotation that the APF is not, by operation of s 26A, an organisation within the meaning of s 6 of the FW(RO) Act. The AEU also sought a writ of prohibition restraining the General Manager of Fair Work Australia from treating the APF as an organisation by operation of s 26A. The application was dismissed by North J on 22 April 2010[10]. The AEU appealed from that decision to the Full Court of the Federal Court. On 20 December 2010 the Full Court (Greenwood, Tracey and Buchanan JJ) dismissed the appeal[11].

18 On 2 September 2011, an application for special leave to appeal to this Court from the judgment and order of the Full Court was referred by Gummow and Hayne JJ to a Full Court of this Court for argument as on an appeal.

The primary judge's reasons

19 The primary judge's reasons leading to his dismissal of the AEU's application involved the following steps:

- Section 26A applied to associations purportedly registered before its commencement[12].
- The order of the Full Court had effect ab initio so that the APF was to be regarded as never having been registered and therefore as having been "purportedly registered"[13].
- The generality of s 26A covered the purported registration of the APF[14].

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10 *Australian Education Union v Lee* (2010) 196 IR 90.

11 (2010) 189 FCR 259.

12 (2010) 196 IR 90 at 99 [46].

13 (2010) 196 IR 90 at 99-100 [47]-[48].

14 (2010) 196 IR 90 at 100 [49].

- The consequences flowing from reading s 26A as retrospectively validating the registration of the APF were not so unfair as to suggest that Parliament did not intend such a reading[15].

The decision of the Full Court

20 As to the construction of s 26A the Full Court held that:

- the occasion for the operation of the section arose from particular identified reasons for invalidity of registration[16];

- if the invalidating defect in an association's rules existed at the time of registration, s 26A operated to overcome it from that time[17];

- there were no indications in s 26A or in the Memorandum that the APF was intended to be excluded from the class of associations affected by the section[18]; and

- section 26A was intended to operate as part of a general set of provisions dealing with the same problem (ie the absence of a purging rule). Section 171A of the FW(RO) Act eliminated that problem with respect to registration of associations occurring after 1 July 2009[19].

Those conclusions disposed of the constructional argument. However, a constitutional argument was raised in the Full Court which had not been put before the primary judge. The argument was that, if upon its proper construction s 26A applied to the registration of the APF, it would constitute an impermissible usurpation of or interference with the judicial power of the Commonwealth vested by Ch III of the Constitution in federal courts[20]. The Full Court rejected that argument, holding that s 26A simply validated the registration of the APF

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15 (2010) 196 IR 90 at 102 [58].

16 (2010) 189 FCR 259 at 265 [16].

17 (2010) 189 FCR 259 at 265 [16].

18 (2010) 189 FCR 259 at 265 [17].

19 (2010) 189 FCR 259 at 265 [18].

20 (2010) 189 FCR 259 at 266 [21].

and other associations by removing, as a criterion of validity, the need for a purging rule. The existence of an earlier order of the Full Court did not reduce the legislative competence of the Parliament any more than would the existence of pending proceedings concerning the validity of the APF's registration[21]. The Full Court went further, however, and made the broad proposition that[22]:

> "If an Act that affects and alters rights in pending litigation does not interfere with the exercise of judicial power, it is difficult to see how an Act that operates on a state of affairs after the exercise of judicial power has been completed can interfere with the exercise of judicial power in a way that is inconsistent with the Constitution."

The breadth of that statement is questionable. It was broader than was necessary for the resolution of the constitutional argument.

Proposed grounds of appeal

21 Assuming the grant of special leave, the proposed grounds of appeal relied upon by the AEU are:

> "2.1 properly construed, s 26A of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (the FWRO Act) does not operate to validate the registration of the Australian Principals Federation, and the Full Court erred in holding otherwise;
>
> 2.2 if, contrary to ground 2.1, s 26A of the FWRO Act purports to validate the registration of the Australian Principals Federation, s 26A is, to that extent, invalid as an impermissible usurpation of or interference with the judicial power of the Commonwealth, and should be read down so as not to validate the registration of the Australian Principals Federation."

The AEU sought orders by way of declaration, mandamus and prohibition in the terms of the orders sought in its original application to the Federal Court.

22 Special leave should be granted. The proceedings in the Full Court involved questions of law of public importance because of their general application. Those questions related to the approach to construction of a statute said to have a retrospective validating operation curative of the effects of a

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21 (2010) 189 FCR 259 at 268-269 [32].

22 (2010) 189 FCR 259 at 269 [34].

judicial decision and whether such a statute may involve an impermissible intrusion into the exercise of judicial power.

The construction of s 26A

23 In support of its submissions that s 26A did not validate the registration of the APF, the AEU invoked common law principles of interpretation with respect to legislation said to affect the law or pre-existing rights and obligations with effect from a date prior to the commencement of the legislation. Any consideration of such principles in a case of contested statutory construction should also involve at least a consideration of whether statutory rules of interpretation have any application. Reference should be made in that context to s 8 of the *Acts Interpretation Act* 1901 (Cth) ("the AIA") as it then applied. Subject to a contrary intention appearing, it provided that the repeal of an Act shall not "revive anything not in force or existing at the time at which the repeal takes effect"[23]. Nor shall it "affect the previous operation of any Act so repealed"[24], nor affect any "right privilege obligation or liability acquired accrued or incurred under any Act so repealed"[25].

24 Section 8 applied to any enactment[26] which in substance worked a repeal even if it was expressed to be an amending Act. Characterisation is not always straightforward. It is determined by the "substantial effect" of the legislation[27]. In many cases, however, the same result will be reached whether by application of the provisions of the appropriate Interpretation Act or "by the general principles of the common law that are designed to avoid giving a retrospective effect to a statutory enactment."[28] As Windeyer J said in *Ogden Industries Pty*

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23 AIA, s 8(a). Section 8 has been replaced by a new s 7(2) in similar terms but applying expressly to amending as well as repealing statutes: *Acts Interpretation Amendment Act* 2011 (Cth) which commenced 27 December 2011.

24 AIA, s 8(b).

25 AIA, s 8(c).

26 In this respect it is to be read with s 12 of the AIA, which provides that "[e]very section of an Act shall have effect as a substantive enactment without introductory words."

27 *Mathieson v Burton* (1971) 124 CLR 1 at 11 per Windeyer J; [1971] HCA 4.

28 *Mathieson v Burton* (1971) 124 CLR 1 at 22 per Gibbs J. In *Mathieson* Barwick CJ (McTiernan J agreeing), Menzies and Gibbs JJ applied common law principles of interpretation on the basis that the amending statute did not effect a

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Ltd v Lucas[29] concerning the equivalent Victorian provision[30], which expressly applied to amending Acts[31]:

> "the statute states in effect the common law principle, using some economy of words to do so."

25 In the end it is not necessary to decide whether ss 26A and 171A of the FW(RO) Act could be said to have worked a "repeal" of any provision of the WR Act and thereby attract the application of s 8. That is because the application of the common law to the construction of s 26A, applying criteria at least as stringent as the "contrary intention" necessary to overcome s 8, leads to no different result than that which would have resulted from the application of that section. Section 26A was plainly intended to do what its text plainly said it did. A consideration of the common law principles follows.

26 The common law principles of interpretation require careful consideration of the adjective "retrospective" in its application to statutes[32]. Interference with existing rights does not make a statute retrospective. Many if not most statutes affect existing rights[33]. As Fullagar J said in *Maxwell v Murphy*[34]:

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repeal. They reached the same result as Windeyer J who applied s 8 on the basis that the amendment did work a repeal. See Barwick CJ at 5-6, McTiernan J at 7, Menzies J at 7-8, Windeyer J at 13-14 and Gibbs J at 19-26.

29 (1967) 116 CLR 537; [1967] HCA 30.

30 *Acts Interpretation Act* 1958 (Vic), s 7(2).

31 (1967) 116 CLR 537 at 582.

32 For discussion of definitional difficulties see Sampford, *Retrospectivity and the Rule of Law*, (2006) at 17-23.

33 *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 546-547 per Isaacs J; [1922] HCA 17; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Federated Clerks Union of Australia, NSW Branch* (1950) 81 CLR 229 at 245 per Fullagar J; [1950] HCA 29, both citing Buckley LJ in *West v Gwynne* [1911] 2 Ch 1 at 11-12.

34 (1957) 96 CLR 261 at 285; [1957] HCA 7. For further judicial discussion of the definition see *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 433 per Isaacs J; [1923] HCA 38; *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 at 195 per Williams J; [1942] HCA 23; *R v Commonwealth Court of Conciliation and*

(Footnote continues on next page)

> "I think that the word 'retrospective' has acquired an extended meaning in this connexion. It is not synonymous with *'ex post facto*', but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law."

In *Chang Jeeng v Nuffield (Australia) Pty Ltd*[35] Dixon CJ referred to "the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes."[36] Repeating a passage from his judgment in *Maxwell v Murphy*, the Chief Justice said[37]:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

27 There have been many formulations of the common law principle in the decisions of this Court and of other common law courts to which this Court has referred from time to time. It is not necessary to travel beyond the general statement by Dixon CJ, save to consider its application in relation to legislation said to affect prior judicial decisions. In the end, the Court must construe statutes by reference to their text, context and purpose.

28 In aid of its preferred construction of s 26A, the AEU pointed to the unfairness to it of the construction adopted by the Full Court. The unfairness was defined by reference to the AEU's loss of the benefit of the judgment it had secured in *Lawler* and the waste of resources expended in obtaining it. Considerations of fairness at this level of particularity are not of great assistance in the construction of a statutory rule with general application. It may be accepted that "justice" and "fairness" denote values underpinning the common law approach to the construction of statutes affecting pre-existing rights and obligations. There is no novelty in that proposition. In 1923 in *George Hudson*

Arbitration; Ex parte Federated Clerks Union of Australia, NSW Branch (1950) 81 CLR 229 at 245 per Fullagar J; *Wheeler v War Veterans' Home* (1953) 89 CLR 353 at 378 per Dixon CJ, Webb and Kitto JJ; [1953] HCA 29.

35 (1959) 101 CLR 629; [1959] HCA 40.

36 (1959) 101 CLR 629 at 637 (McTiernan and Windeyer JJ agreeing at 639 and 650).

37 (1959) 101 CLR 629 at 637-638.

Ltd v Australian Timber Workers' Union[38], Isaacs J quoted the 6th edition of *Maxwell on Statutes*, which in turn referred to the Institutes for the proposition that[39]:

> "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation."

Isaacs J described that proposition as "the universal touchstone for the Court to apply to any given case." More than 70 years later, Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd*[40] said of the presumption against retrospective construction:

> "the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule."

29 The AEU's argument based upon the particular unfairness to it of s 26A is unpersuasive. It does not offer, and almost certainly could not offer, any comprehensive analysis and weighing of the interests, both public and private, which may have been benefited fairly or disadvantaged unfairly by the validating legislation, either generally or in its application to the APF. Nor is this Court in a position to make broad judgments, appropriate to the Parliament, about the balance of fairness in relation to the legislative validation of the APF's registration.

30 The preceding observations should not be taken as minimising the importance of the rationale underlying the common law principles of construction. In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law. The existence of those assumptions is, in the words of Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[41]:

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38 (1923) 32 CLR 413.

39 (1923) 32 CLR 413 at 434, quoting Maxwell, *On the Interpretation of Statutes*, 6th ed (1920) at 381 referring to 2 Inst, 292.

40 [1994] 1 AC 486 at 525.

41 (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40.

> "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

31 Consistently with its underlying rationale, the resistance of the common law to construing statutes as taking effect before the dates of their enactment is graduated according to the extent of their propounded effects. In *R S Howard & Sons Ltd v Brunton*, Griffith CJ said[42]:

> "it is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the Legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the Legislature indicates."

That graduated response was also reflected in the quotation by Lord Mustill in *L'Office Cherifien* from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe*[43]:

> "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."

32 In *Attorney-General (NSW) v World Best Holdings Ltd*[44] Spigelman CJ referred to the judgments of Staughton LJ and Lord Mustill and said[45]:

> "This approach requires the court to determine the scope and degree of the unfairness or injustice that is applicable in the particular case. The greater the unfairness or injustice, the less likely it is that Parliament intended the Act to apply. Where Parliament has used general words the courts will apply the well established technique of reading them down."

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42 (1916) 21 CLR 366 at 371, Barton J agreeing at 373; see also at 375 per Isaacs J; [1916] HCA 21. See also *Moss v Donohue* (1915) 20 CLR 615 at 621 per Griffith CJ; [1915] HCA 61.

43 [1991] 2 All ER 712 at 724.

44 (2005) 63 NSWLR 557.

45 (2005) 63 NSWLR 557 at 572 [59].

While "fairness" and "justice" denote values underlying the relevant common law principles, it is neither necessary nor desirable, as a general rule, that the task of construction be mediated by broad evaluative judgments invoking that terminology. They carry the risk that the courts may then exceed their proper constitutional function. It is sufficient to focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations.

33 The common law approach to the construction of retroactive statutes is particularly stringent in its application to statutes which are said to affect judicial decisions. The Privy Council in *Lemm v Mitchell*[46] said that explicit language was required[47]:

> "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."

Lemm v Mitchell was considered by this Court in *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd*[48] ("the *Second Engine Drivers Case*").

34 The *Second Engine Drivers Case* concerned the construction of a provision introduced into the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) which validated the purported registration of associations as organisations under that Act. The contested question in this Court was whether that provision overcame the effect of an earlier judgment of the Court on a case stated from the Commonwealth Court of Conciliation and Arbitration ("the CCCA"). In that earlier judgment, this Court held that the CCCA had no jurisdiction to entertain a plaint pending before it by an association invalidly registered. In the event, this Court, by statutory majority, held that the plaint had become valid from the date that the validating legislation came into effect, but not so as to affect the result of this Court's earlier decision. It was therefore possible for the President of the CCCA to proceed on the plaint as validated.

35 The decision in the *Second Engine Drivers Case* offers little support for the AEU's argument. It was concerned with the effect of validating legislation on

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46 [1912] AC 400.

47 [1912] AC 400 at 406.

48 (1913) 16 CLR 245; [1913] HCA 71.

a pending plaint in the CCCA. The judgments, however, contain some general observations about the construction of legislation said to affect judicial decisions. Griffith CJ would have required "very clear and explicit words to validate retrospectively supposed judicial proceedings which were wholly null and void when taken."[49] Barton J said that when two constructions of a statute are open, only one of which involves the alteration of judicially defined rights, "the construction which would alter rights already ascertained by judicial authority is not the one which the Courts will accept."[50] On the other hand, in *Mabo v The State of Queensland*[51], Brennan, Toohey and Gaudron JJ observed that declaratory Acts are frequently passed to overcome the effect of a judicial decision and said[52]:

> "The effect of such a statute is to change the law and the courts are thereafter bound to take the law as the statute declares it to be. If the statute declares what the law has been, the courts are commanded to decide future cases in conformity with the declaration though the circumstances to which the declaration applies occurred prior to the enactment of the statute … The statute does not, however, affect final judgments already given pursuant to the earlier law … The operation of a declaratory statute, like the operation of any other statute, depends upon the intention of Parliament ascertained by construction of its terms".

36 The text of s 26A attached to the act of purported registration of an association all the legal consequences of a valid registration in those cases in which the purported registration would otherwise have been invalid merely because of the absence of a purging provision in the association's rules. The purported registration was to be taken always to have been valid. That is to say, the legal consequences of a valid registration were attached to a purported registration, validated by s 26A, as though they had always attached to it. The section changed the law so as to overcome the vitiating consequences, for the registration of associations under the WR Act, of the law as stated in *Lawler*.

37 The language used by the Parliament was explicit. It left no room for a contention that s 26A only validated purported registrations from the date upon which the section was enacted. It was not argued otherwise. The legislative

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49 (1913) 16 CLR 245 at 259.

50 (1913) 16 CLR 245 at 271.

51 (1988) 166 CLR 186; [1988] HCA 69.

52 (1988) 166 CLR 186 at 211-212.

intention was manifested by the text[53]. The question of construction before this Court was whether, despite its generality, the language used by the Parliament did not extend to validate the purported registration of the APF.

38 Contrary to the submissions made by the AEU, the invalid registration of the APF was from the outset a "purported registration". That term was apt to describe the physical act of the Industrial Registrar in making an entry in the Register purportedly pursuant to s 26, albeit it was an act devoid of legal effect by operation of the law as stated by the Full Court in *Lawler* and, in the case of the APF, by operation of the order for the issue of a writ of certiorari. The order of the Court did not rewrite history. The historical fact of the making of the entry remained and answered the description of a "purported registration".

39 It was submitted for the AEU that the rationale of s 26A, as set out in the Memorandum, was to overcome "uncertainty regarding the registration of certain associations under the WR Act" in light of the *Lawler* decision[54]. There was, it was said, no "uncertainty" about the validity of the APF registration. The decision in *Lawler* had made the position clear. That submission was, with respect, unattractive. The word "uncertainty" used in the Memorandum was not a statutory term. Indeed, "certainty", "clarify" and "for the avoidance of doubt" are terms sometimes used euphemistically in second reading speeches or explanatory memoranda about a proposed law designed to overcome the effects of a judicial decision which are certain, clear and beyond doubt. The term "uncertainty" in this case did not usefully inform any construction which could overcome the generality of the language in s 26A. Its language applied equally to the "purported registration" of the APF as it did to the "purported registration" of any other association.

40 Section 26A, properly construed, applied to validate the purported registration of the APF and to treat it as always having been valid. That leaves for determination the constitutional question.

41 The AEU's challenge to the validity of s 26A, in its application to the purported registration of the APF, depended upon its characterisation of the section as an impermissible interference with or intrusion in the judicial power of the Commonwealth. That challenge should be placed in context by identifying

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53 Legislative intention is here used in the sense explained in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]; [2011] HCA 10.

54 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 128 [792].

the jurisdiction and the power exercised by the Full Court of the Federal Court in *Lawler* in ordering the issue of a writ of certiorari to quash the registration of the APF and the effect of that order in relation to the impugned registration.

The order for certiorari

42 The proceedings which led to the *Lawler* decision were commenced in this Court invoking its original jurisdiction under s 75(v) of the Constitution. That jurisdiction is conferred in "all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The relief sought in this Court was by way of mandamus, prohibition, certiorari and declaration. The remitter to the Federal Court was done in the exercise of the power conferred upon this Court by s 44(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). That section empowers this Court to remit a matter "to any federal court ... that has jurisdiction with respect to the subject-matter and the parties". A source of the jurisdiction of the Federal Court upon the remitter was to be found in s 847(3) of the WR Act, read with s 847(2)[55]. Section 847(3) provided that the Federal Court has jurisdiction "with respect to matters remitted to it under section 44 of the *Judiciary Act 1903*." Section 847(2) relevantly provided that:

> "For the purposes of section 44 of the *Judiciary Act 1903*, the Court is taken to have jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth holding office under this Act".

43 The jurisdiction conferred upon the Federal Court by s 847(2) and (3) of the WR Act, like that conferred upon it by s 39B(1) of the Judiciary Act and that conferred upon this Court by s 75(v) of the Constitution, was defined by the remedies specified in the provision. The jurisdiction, however, was not conditioned upon the outcome of the proceedings but upon its proper invocation.

44 The power to grant certiorari in the exercise of the jurisdiction conferred by s 75(v) of the Constitution and its statutory equivalents may be implied from the grant of jurisdiction. It also derives from the statutory powers ancillary to the

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55 The general statutory jurisdiction conferred on the Federal Court by s 39B(1) of the Judiciary Act, in terms analogous to s 75(v) of the Constitution, was qualified by s 39B(2)(a) so as not to apply to Commonwealth officers holding office under the WR Act. That limitation was removed with effect from 1 July 2009 by the *Fair Work (State Referral and Consequential and Other Amendments) Act* 2009 (Cth), Sched 5, Item 38.

exercise of that jurisdiction conferred upon this Court by s 32 of the Judiciary Act and upon the Federal Court by s 23 of the *Federal Court of Australia Act* 1976 (Cth)[56]. The power to grant certiorari in the exercise of that jurisdiction depends upon the existence of a basis for the grant of mandamus or prohibition or an injunction against an officer of the Commonwealth. Jurisdiction is not conferred "in a matter in which certiorari is sought"[57]. Jurisdictional error must be asserted and demonstrated to enliven the jurisdiction and to ground the issue of mandamus or prohibition[58]. Certiorari may be granted which is ancillary to those constitutional writs or by way of alternative, where it is more appropriate to do so for practical reasons. *Pitfield v Franki*[59], which involved a successful challenge to the registration of an association as an organisation under the *Conciliation and Arbitration Act* 1904 (Cth), was such a case. Barwick CJ said[60]:

> "On the view I have taken there was no authority in the Commission to effect the registration. Lack of that authority would ground equally prohibition or certiorari dependent upon the state of affairs when the prerogative writ was sought."

45 The order made in *Pitfield*[61] was in very similar terms to the third of the orders for the issue of certiorari made by the Full Court in *Lawler*. Although the power of this Court to make such an order has not been doubted, the basis for it has been the subject of some consideration in this Court[62].

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56 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14] per Gaudron and Gummow JJ; [2000] HCA 57; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 477 per Barwick CJ; [1981] HCA 7; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604 per Brennan CJ; [1997] HCA 13.

57 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25 per Gibbs J; [1980] HCA 36.

58 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 393-394 [19] per Gleeson CJ, 403 [54] per Gaudron and Gummow JJ, 465-466 [261]-[265] per Hayne J; [2002] HCA 16.

59 (1970) 123 CLR 448; [1970] HCA 37.

60 (1970) 123 CLR 448 at 459-460, Owen J agreeing at 467; see also at 463 per McTiernan J, 467 per Menzies J.

61 (1970) 123 CLR 448 at 475.

62 *R v Marshall; Ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 at 609 per Mason J; [1975] HCA 37; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15

(Footnote continues on next page)

46 The orders for the issue of writs of certiorari made in *Lawler* were founded upon jurisdictional error. The power of the Court to make those orders was not in dispute in this case. The effects of those orders may be expressed in the words of the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission*[63]:

> "The function of certiorari is to quash the legal effect or the legal consequences of the decision or order under review."

In that case, certiorari was refused because no legal consequences attached to the report of the Criminal Justice Commission which it was sought to quash. The act of registration which was the subject of the third order in *Lawler* attracted legal consequences. The issue of certiorari quashed those legal consequences. The act of registration remained an historical fact.

The constitutional question

47 The AEU argued that if s 26A "restored the registration [of the APF] that had been quashed" it was to that extent invalid as an interference with or usurpation of the judicial power of the Commonwealth. The premise upon which that argument was based was that s 26A, on the construction given to it by the Full Court of the Federal Court, "would in substance dissolve or reverse the orders of the Full Court in *Lawler* quashing the registration of the APF." The argument fails because the premise is incorrect.

48 As a general rule, the Parliament of the Commonwealth, which is empowered to define the jurisdiction of federal courts and to invest the courts of the States with federal jurisdiction, cannot "direct [those] courts as to the manner and outcome of the exercise of their jurisdiction."[64] It cannot interfere with or

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at 25-26 per Gibbs J (Barwick CJ agreeing at 18, Mason J agreeing at 29, Wilson J agreeing at 34), 33-34 per Aickin J; cf *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215 per Wilson and Dawson JJ; [1984] HCA 82; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 348 per Wilson, Deane and Gaudron JJ who regarded certiorari as an ancillary remedy only; [1989] HCA 2.

63 (1992) 175 CLR 564 at 580; [1992] HCA 10. See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 per Brennan CJ, Gaudron and Gummow JJ, 178 per Dawson and Toohey JJ; [1996] HCA 44.

64 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ; [1992] HCA 64; *Nicholas v The Queen* (1998)

(Footnote continues on next page)

intrude into the exercise of the judicial power. Section 26A, however, does not purport to direct courts exercising federal jurisdiction as to the manner or outcome of its exercise. It states a rule attaching legal consequences to an entry in the Register kept under the FW(RO) Act.

49 The AEU submitted that the effect of s 26A, if applicable to the purported registration of the APF, was to "reverse or dissolve" the orders made in *Lawler*. In so submitting, it correctly accepted that the Parliament could enact a law which would affect, or even render nugatory, pending proceedings in a court exercising federal jurisdiction. As this Court said in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*[65]:

> "It is well established 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."

50 The AEU relied upon passages in *The Annotated Constitution of the Australian Commonwealth* by Quick and Garran in which the authors referred to Thomas Cooley's *Constitutional Limitations* written in 1868, and the following passage from that text[66]:

> "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

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193 CLR 173 at 185-186 [15] per Brennan CJ; [1998] HCA 9. See also *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96; [1986] HCA 47.

65 (1986) 161 CLR 88 at 96. See also *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 579-580; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250; [1973] HCA 63. See also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563 [19]; [1998] HCA 54.

66 Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, (1868) at 94, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 722.

> as a court of review to which parties might appeal when dissatisfied with the rulings of the courts." (citation omitted)

Quick and Garran themselves wrote[67]:

> "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."

The last proposition would be too broad if understood as stating a simple test for the validity of legislation affecting pending or completed litigation. We agree with Gummow, Hayne and Bell JJ that it did not[68]. If a court exercising federal jurisdiction makes a decision which involves the formulation of a common law principle or the construction of a statute, the Parliament of the Commonwealth can, if the subject matter be within its constitutional competence, pass an enactment which changes the law as declared by the court. Moreover, such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment. Section 26A was such a law. Its constitutional vice was said to lie in its effect upon the consequences of the orders made by the Full Court of the Federal Court in *Lawler*.

51 The AEU sought support for its submissions in the decision of the Supreme Court of the United States in *Plaut v Spendthrift Farm Inc*[69]. That case concerned legislation which mandated the reinstatement by federal courts of claims dismissed because they had not been brought within a statutory limitation period subsequently extended by the same legislation. The legislation was directed at judicial proceedings. Scalia J, delivering the opinion of the majority, said[70]:

> "Having achieved finality … 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." (emphasis in original)

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67 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 722.

68 Reasons of Gummow, Hayne and Bell JJ at [77].

69 514 US 211 (1995).

70 514 US 211 at 227 (1995).

Putting to one side consideration of differences in constitutional context, *Plaut* is of no assistance to the AEU. It concerned a statute directed to the reinstatement of proceedings which had been dismissed. It did not enunciate a more general rule that any legislation affecting the underlying foundation of a judicial decision is invalid. That much was made clear in relation to prospective relief under an existing injunction by the later decision of the Supreme Court in *Miller v French*[71] in which the Court said that[72]:

> "when Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction here is a 'final judgment' for purposes of appeal, it is not the 'last word of the judicial department.' The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." (citation omitted)

52 The Solicitor-General of the Commonwealth, intervening on behalf of the Attorney-General, submitted that, contrary to the argument advanced by the AEU, s 26A did not restore the registration that had been quashed. Indeed the section accepted the invalidity, as determined by the Full Federal Court, of the APF's registration.

53 As the Solicitor-General submitted, it would be an impermissible interference with the judicial power of the Commonwealth if the Parliament were to purport to set aside the decision of a court exercising federal jurisdiction. There is no such interference, however, if Parliament enacts legislation which attaches new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences. That was the substantive operation of s 26A. It changed the rule of law embodied in the statute as construed by the Full Federal Court in *Lawler*. We agree with Gummow, Hayne and Bell JJ that s 26A assumes that *Lawler* was correctly decided[73]. To change that rule generally and for the particular case was within the legislative competence of the Commonwealth. The challenge to the constitutional validity of s 26A fails.

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71 530 US 327 (2000). See also *Pennsylvania v Wheeling and Belmont Bridge Co* 59 US 421 (1856).

72 530 US 327 at 347 (2000).

73 Reasons of Gummow, Hayne and Bell JJ at [96].

Conclusion

54 For the preceding reasons, special leave to appeal should be granted but the appeal should be dismissed.

55 GUMMOW, HAYNE AND BELL JJ. In 2003, the Australian Principals Federation ("the APF") applied to the Australian Industrial Relations Commission ("the Commission") for registration as an organisation under the *Workplace Relations Act* 1996 (Cth). The Australian Education Union ("the AEU" – the applicant in this Court) objected to the registration of the APF.

56 On 27 January 2006, a Vice President of the Commission (Ross VP) decided that the APF satisfied the criteria set out in s 19 of Sched 1B to the *Workplace Relations Act* for registration of associations other than enterprise associations and granted the APF's application for registration as an organisation. Section 26(1) of Sched 1B then provided:

> "When the Commission grants an application by an association for registration as an organisation, the Industrial Registrar must immediately enter, in the register kept under paragraph 13(1)(a), such particulars in relation to the association as are prescribed and the date of the entry."

The Industrial Registrar made the relevant entry in the register of organisations on 30 January 2006.

57 The AEU appealed to a Full Bench of the Commission against the decision of the Vice President. On 26 September 2006, the Full Bench (Lawler VP, Kaufman SDP and Smith C) dismissed the appeal.

58 The AEU applied to this Court for constitutional writs and associated relief alleging that the decision of the Vice President and the decision of the Full Bench were affected by jurisdictional error in that (among other things) the decisions had proceeded upon a misconstruction of s 18 of Sched 1B to the *Workplace Relations Act*. The proceeding was remitted to the Federal Court of Australia. A Full Court of that Court (Lander and Jessup JJ, Moore J dissenting) held[74] that the Commission was not competent to grant an application for registration if the association of employees seeking registration had within its membership, or had the capacity to accept as members in accordance with its rules, any persons who did not fall within one or more of the categories set out in s 18(1)(b) of the Schedule. The particular deficiency found[75] was that the rules of the APF did not provide for "purging" from its membership those who were no longer employed as school principals (or who otherwise no longer fell within the

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74 *Australian Education Union v Lawler* (2008) 169 FCR 327.

75 (2008) 169 FCR 327 at 343-344 [46]-[49] per Lander J, 358 [107]-[108], 407-408 [238]-[240] per Jessup J.

relevant statutory definitions). The Full Court ordered[76] that writs of certiorari issue to quash the decision of the Commission made in January 2006 that the application by the APF for registration be granted and to quash the decision of the Full Bench of the Commission made in September 2006 that the appeal to the Full Bench against the decision to grant registration be dismissed. The Full Court also ordered that "[a] writ of certiorari issue to quash the registration of the [APF] pursuant to Sch 1B to the *Workplace Relations Act*".

Subsequent legislative amendments

59 Substantial amendments were made to the *Workplace Relations Act* in 2009 in consequence of the enactment of the *Fair Work Act* 2009 (Cth). The short title of the *Workplace Relations Act* was altered[77] to the *Fair Work (Registered Organisations) Act* 2009. By the same amending Act, s 26A was inserted[78] into the (renamed) *Fair Work (Registered Organisations) Act*. That section provided:

> "If:
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> (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;
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> that registration is taken, for all purposes, to be valid and to have always been valid."

And by the same amending Act, s 171A was inserted[79] into the *Fair Work (Registered Organisations) Act* to provide for the automatic purging from the

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76 (2008) 169 FCR 327 at 433.

77 *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), Sched 22, item 3.

78 *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009, Sched 22, item 37E.

79 *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009, Sched 22, item 40A.

membership of registered organisations of those who no longer met a relevant criterion for membership.

60 Following the enactment of these amendments, the AEU brought further proceedings in the Federal Court of Australia claiming, among other things, a declaration that the APF was not, by operation of s 26A, an organisation within the meaning of s 6 of the *Fair Work (Registered Organisations) Act*. The AEU's application was dismissed[80] by North J and its appeal to the Full Court of the Federal Court (Greenwood, Tracey and Buchanan JJ) was also dismissed[81]. The AEU sought special leave to appeal to this Court and the application for special leave was referred for argument before a Full Court as on an appeal.

61 In this Court, the AEU submitted that, on its true construction, s 26A did not apply to the APF. If, contrary to that submission, s 26A did apply to the APF, the AEU then submitted that s 26A was to that extent invalid. Neither submission should be accepted. Special leave to appeal should be granted and the appeal treated as instituted and heard instanter but dismissed.

The construction of s 26A

62 The AEU submitted that, action having been taken and orders having been made by the Federal Court in *Australian Education Union v Lawler* ("the *Lawler* matter") to quash the registration of the APF, before s 26A was enacted, the APF was not an association which met the requirement stated in par (a) of s 26A:

> "an association was purportedly registered as an organisation under this Act before the commencement of this section".

The AEU submitted, in effect, that the only associations which satisfied the requirement in par (a) of s 26A were associations whose registration as an organisation was vulnerable to challenge but had not been quashed before s 26A was enacted. That is, the AEU gave the phrase "an association was purportedly registered" a meaning which treated the notion of registration as a continuing state which had to persist until the time of enactment of s 26A. The AEU thus sought to have par (a) of s 26A read as if it said "an association *is* purportedly registered … *immediately* before the commencement of this section".

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80 *Australian Education Union v Lee* (2010) 196 IR 90.

81 *Australian Education Union v Lee* (2010) 189 FCR 259.

63 The construction of par (a) of s 26A urged by the AEU should not be accepted. The better construction of the paragraph is to read it as identifying the relevant class of associations by reference to whether, at some time before the enactment of s 26A, the particular association had been registered under the Act. Paragraph (a) of s 26A uses no words that are apt to direct attention to the *continuation* of the registration of an organisation. Section 26A takes as its relevant criterion the occurrence of a past event – purported registration as an organisation before the commencement of the section. That is, par (a) of s 26A is to be read as hinging about the *entry* of an organisation on the register at some time before, rather than on its continuing presence on the register at the time when, s 26A came into operation.

64 The AEU submitted that s 26A was to be "construed against the presumption that legislation does not interfere with final judgments, unless that is the clear intention of the legislature". No wider principle or presumption about "retrospective" legislation was debated in the course of argument and no party or intervener suggested that s 8 of the *Acts Interpretation Act* 1901 (Cth) (as then in force[82]), preserving accrued rights, bore upon the issues that are to be decided in this matter. There is, therefore, no occasion to consider what is meant when it is said that a statute has "retrospective" effect[83] or to consider how and when s 8 of the *Acts Interpretation Act* operates[84].

65 Rather, attention must be directed to whether s 26A did, as the AEU put it, "interfere" with a final judgment and, if it did, whether s 26A is valid. It is necessary to begin those inquiries by identifying what exactly was the judgment that the AEU had obtained.

The relief granted in the *Lawler* matter

66 As noted earlier, the Full Court of the Federal Court ordered in the *Lawler* matter that writs of certiorari issue to quash the decision of the Commission that the application by the APF for registration be granted and to quash the decision of the Full Bench of the Commission that the appeal to the Full Bench be

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82 See *Acts Interpretation Amendment Act* 2011 (Cth), Sched 1, item 13, Sched 3, item 4.

83 See, for example, *Maxwell v Murphy* (1957) 96 CLR 261; [1957] HCA 7; *Coleman v The Shell Company of Australia Ltd* (1943) 45 SR (NSW) 27.

84 See, for example, *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485; [2002] HCA 42.

dismissed. The Full Court also ordered that "[a] writ of certiorari issue to quash the registration of the [APF] pursuant to Sch 1B to the *Workplace Relations Act*".

67 In its terms this last order was not directed to quashing any decision; the order spoke of quashing "the registration". As pointed out in the course of the oral argument in this Court, an order in that form might be thought to have been modelled upon what this Court had ordered in *Pitfield v Franki*[85]. But as the reasons in that case show[86], the writ of certiorari that issued there was directed to the Deputy Industrial Registrar who, having decided that the organisation in question should be registered, gave effect to that decision by entering the necessary particulars in the register. That is, certiorari issued to quash the record of the relevant decision.

68 The procedures that had to be (and were) followed in this case were different from those that had been followed in *Pitfield v Franki*. In this case, the decision to grant the application for registration was taken by the Commission (Ross VP). As has already been pointed out, entry in the register was a step that the Industrial Registrar was obliged to take once the Commission had granted the APF's application for registration. Whether certiorari directed to the Industrial Registrar (now the General Manager of Fair Work Australia[87]) would lie to quash a decision to enter in the register the particulars prescribed by s 26(1) of Sched 1B to the *Workplace Relations Act* as distinct from, or in addition to, the decision to grant the application for registration may be a question that would require further consideration. It may be that any necessary rectification of the register by the Industrial Registrar (or General Manager) would follow as of course upon the quashing of the Commission's decision to grant the application for registration. It may be that rectification of the register could, even should, have been effected by the Commission, on application by an organisation, a person interested or the Minister under s 30(1)(b) of Sched 1B, on the ground that the organisation "was registered by mistake". It may be that rectification under the Act as it now stands could or should be effected by Fair Work Australia cancelling registration on its own motion under s 30(1)(c)(v) of the *Fair Work (Registered Organisations) Act*, on the ground that the organisation "is not … a federally registrable association". (If either of the latter paths were available, the legislation would prescribe the consequences of cancellation in a

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85 (1970) 123 CLR 448 at 475; [1970] HCA 37.

86 (1970) 123 CLR 448 at 451, 459-460 per Barwick CJ, 463 per McTiernan J; see also at 449.

87 *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 13(1)(b), 26(1).

way that may leave intact some steps taken by the organisation between the time of its purported registration and the time when the registration is cancelled.) These are, however, questions that need not be examined in this matter.

69 For present purposes, the critical observation about the orders made in the *Lawler* matter is that they gave effect to the Federal Court's conclusion that the decision to grant the APF's application for registration (and the decision to effect the registration) was not made lawfully and was invalid because affected by jurisdictional error. That is, the orders gave effect to the conclusion that, as the law *then* stood, the APF was not eligible for registration.

70 The Full Court reached this conclusion in the *Lawler* matter in proceedings brought by the AEU. However, those proceedings did not seek to vindicate any right which the AEU had. As H W R Wade wrote[88]:

> "certiorari is not confined by a narrow conception of *locus standi*. It contains an element of the *actio popularis*. This is because it looks beyond the personal rights of the applicant: it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers." (footnote omitted)

71 The writ of certiorari is not available as of right. It is a discretionary remedy[89]. It is available not only to persons directly affected by a jurisdictional error but also to third parties[90]. It is not, and could not be, suggested that the AEU had no entitlement to seek certiorari to quash the decision of the Commission to grant the APF's application for registration, but the AEU did not do that to redress some wrong done to it. It may be assumed that the AEU saw advantage in seeking and obtaining relief. But its application was directed to purposes not materially different from the purposes served by the constitutional writs of prohibition and mandamus. That is, the relief was sought and was granted to ensure that "officers of the Commonwealth obey the law and neither

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88 "Unlawful Administrative Action: Void or Voidable? Part 1", (1967) 83 *Law Quarterly Review* 499 at 503.

89 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 394 [21], 410 [80], 415-416 [95], 421 [106], 464-465 [260], 472-473 [281]-[285], 475 [293]; [2002] HCA 16.

90 *Re McBain* (2002) 209 CLR 372 at 464-465 [260].

exceed nor neglect any jurisdiction which the law confers on them"[91]. The *Lawler* matter concerned the Commission's power and duty to register those associations – and only those associations – that satisfied the criteria in Sched 1B. It was not directed to vindicating any private right of the AEU.

Section 26A invalid?

72 The AEU submitted in this Court that if s 26A restored the registration of the APF it was, to that extent, invalid as an interference with or usurpation of the judicial power of the Commonwealth. Central to the AEU's argument in this respect was the proposition that, if s 26A was construed as restoring the APF's registration, s 26A "would in substance dissolve or reverse the orders of the Full Court … quashing the registration". And the AEU submitted that the Parliament cannot reverse a final judgment given in the exercise of federal judicial power.

73 The principle which the AEU submitted should be adopted and applied was stated by Quick and Garran[92]:

> "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 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." (original emphasis)

The AEU accepted, however, that the principle stated by Quick and Garran has not subsequently been considered or adopted in any decision of this Court.

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91 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104]; [2003] HCA 2. See also *Re McBain* (2002) 209 CLR 372 at 465-466 [263].

92 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 722.

74 Quick and Garran founded[93] their statement of principle upon writings of the United States constitutional scholar Thomas Cooley[94]. Cooley distinguished[95] between a statute which "is only to operate upon future cases [even if] … it assumes the law to have been in the past what it is now declared that it shall be in the future" and "legislative action … to *reverse* decisions which the courts, in the exercise of their undoubted authority, have made" (emphasis added).

75 The proposition, or "simple rule", advanced by Quick and Garran was stated in the context of their discussion[96] of separation of powers and was a particular elucidation of the general proposition[97] "that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional". Quick and Garran recognised[98] that there is not "a hard and fast line between judicial and legislative acts" and that a "law which is retrospective, or which declares or modifies existing rights, may often have the effect of a judicial decision".

76 Because there is no "hard and fast line", it is very much to be doubted that any single, all-embracing proposition could be devised which would mark off statutes which are beyond power – because the statute impermissibly interferes with the exercise of the judicial power – from those which are not. In particular, the proposition made[99] by the Full Court in this matter that:

> "If an Act that affects and alters rights in pending litigation does not interfere with the exercise of judicial power, it is difficult to see how an Act that operates on a state of affairs after the exercise of judicial power

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93 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 721-722.

94 *A Treatise on the Constitutional Limitations*, (1868).

95 *A Treatise on the Constitutional Limitations*, (1868) at 94.

96 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 719-723.

97 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 720.

98 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 721.

99 (2010) 189 FCR 259 at 269 [34].

> has been completed can interfere with the exercise of judicial power in a way that is inconsistent with the Constitution"

is very likely stated too broadly, both as to its premise about alteration of rights in pending litigation and as to its conclusion about completed litigation.

77 The "simple rule" advanced by Quick and Garran is not to be understood as attempting to state any general or all-embracing rule. The rule stated by Quick and Garran dealt only with concluded litigation. It did not address questions of the kind that are presented when a statute alters the law that is to be applied in litigation that has been commenced but not concluded. It did not address the questions that may be presented when a statute seeks to direct the outcome in one or more identified, or identifiable, proceedings pending in federal jurisdiction. It did not seek to provide a single test for the validity of legislation that affects pending or completed litigation.

78 Not all forms of legislation that have an effect on pending litigation or on the rights and obligations of parties to completed litigation are necessarily invalid as a usurpation of or an impermissible interference with judicial power. As Mason J said in *R v Humby; Ex parte Rooney*[100]: "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action." Yet in *Chu Kheng Lim v Minister for Immigration*[101], three members of the Court (Brennan, Deane and Dawson JJ) said that:

> "It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates."

79 This Court has not often had to consider whether legislation is invalid as an impermissible interference with the exercise of judicial power in future, pending or completed litigation in federal jurisdiction. The more recent cases to which reference may be made are *Humby*[102], *Australian Building Construction*

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100 (1973) 129 CLR 231 at 250; [1973] HCA 63.

101 (1992) 176 CLR 1 at 36-37; [1992] HCA 64.

102 (1973) 129 CLR 231.

Employees' and Builders Labourers' Federation v The Commonwealth[103], *Polyukhovich v The Commonwealth* (*War Crimes Act Case*)[104], *Chu Kheng Lim*[105], *Nicholas v The Queen*[106], *H A Bachrach Pty Ltd v Queensland*[107] and *Re Macks; Ex parte Saint*[108].

Some United States decisions

80 By contrast, the Supreme Court of the United States first looked at issues of this kind in 1801 in *United States v Schooner Peggy*, where Marshall CJ said[109]:

> "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. … I know of no court which can contest its obligation."

81 After the Civil War, the United States Supreme Court decided[110] that part of an Act of Congress intended to bar claims by Confederate supporters to compensation for confiscation of property during the War was an impermissible interference in pending and future litigation. The Act in issue had changed the law with effect in pending and future cases to provide that a presidential pardon reciting a person's involvement in aid of the Confederate cause was to be deemed conclusive evidence that the recipient *had* supported that cause and to provide further that, on proof that such a pardon had been granted (and accepted without demur), the "jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant"[111].

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103 (1986) 161 CLR 88; [1986] HCA 47.

104 (1991) 172 CLR 501; [1991] HCA 32.

105 (1992) 176 CLR 1.

106 (1998) 193 CLR 173; [1998] HCA 9.

107 (1998) 195 CLR 547; [1998] HCA 54.

108 (2000) 204 CLR 158; [2000] HCA 62.

109 5 US 103 at 110 (1801).

110 *United States v Klein* 80 US 128 (1871).

111 80 US 128 at 129 (1871); 16 Stat 230 at 235 (1870).

82 More than a century later, the Supreme Court decided[112] that an Act of Congress which in terms "determine[d] and direct[ed]" that, if the management of certain identified national forests accorded with standards that the Act fixed, this would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" expressly identified pending litigation[113] was not an impermissible interference in pending litigation. The Court concluded, unanimously, that the impugned Act "compelled changes in law, not findings or results under old law"[114] and that there was, accordingly, "no occasion to address any broad question of Article III jurisprudence"[115].

83 Three years later, in *Plaut v Spendthrift Farm Inc*[116], the Supreme Court held invalid an Act of Congress[117] which provided for reinstatement of certain actions dismissed as time-barred. The Court held[118], by majority, that the Constitution forbids the Congress from interfering with the final judgments of federal courts. In giving the opinion of the Court, Scalia J said[119]:

> "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." (original emphasis)

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112 *Robertson v Seattle Audubon Society* 503 US 429 (1992).

113 103 Stat 701 at 747 (1989).

114 503 US 429 at 438 (1992).

115 503 US 429 at 441 (1992).

116 514 US 211 (1995).

117 105 Stat 2236 at 2387 (1991).

118 514 US 211 at 218-225 (1995).

119 514 US 211 at 227 (1995).

84 More recently, in *Miller v French*[120], the Supreme Court upheld the validity of an Act of Congress[121] which provided that the filing of a motion in a federal court to terminate prospective relief under an injunction which had been granted in a civil action challenging the consistency of prison conditions with federal civil rights "shall operate as a stay" of that relief beginning, in some cases, 30 days after filing of the motion and ending when the court ruled on the motion. The Supreme Court distinguished[122] an award of damages in an action at law from a continuing executory decree. It held[123] that the decree remains subject to alteration due to changes in the underlying law, and the impugned provisions did not unconstitutionally suspend or reopen the judgment of an Art III court.

Legislation may intersect with litigation at different points

85 The purpose of mentioning these United States decisions is not to attempt some comprehensive survey of United States law in this area. To undertake that task would require examination of many more decisions of the Supreme Court, including those dealing with the related questions of when and to what extent the Congress may restrict the jurisdiction of federal courts[124]. Nor is the reference that has been made to decisions of the Supreme Court of the United States intended to offer any opinion about how cases of the kind discussed in those decisions would be determined in Australia. Rather, the important, if obvious, point to be made by reference to those cases is that legislation can intersect with past, pending or future litigation in federal jurisdiction in many different ways. *How* it does so will be important.

86 The legislation in question may affect litigation that has not yet been commenced, litigation that has been commenced but remains pending in the

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120 530 US 327 (2000).

121 18 USC §3626(e)(2).

122 530 US 327 at 344-345 (2000).

123 530 US 327 at 346-350 (2000).

124 See, for example, Chemerinsky, *Federal Jurisdiction*, 5th ed (2007) at 181-196; Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 280-285; Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic", (1953) 66 *Harvard Law Review* 1362; Anderson, "Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise", (2000) 39 *Brandeis Law Journal* 417.

judicial system (whether at first instance or on appeal), or litigation that has been completed. The United States cases suggest that different considerations again may be engaged in respect of completed litigation according to the nature of the relief that has been granted[125]: for example, different considerations may apply in relation to injunctions, especially mandatory injunctions, which always remain within the court's supervision, from those that apply to an award of damages or a decision that property held by one party is held on trust for another.

87 At least in cases which are still pending in the judicial system, it will be important to consider whether or to what extent the impugned law amounts to a legislative direction about how specific litigation should be decided. That is, as one author has written[126], a balance must be struck between the recognition that the Parliament may change the law in a way that has an effect on pending proceedings (a proposition that has been described as "the changed law rule"[127]) and the recognition that the Parliament cannot direct the courts as to the conclusions they should reach in the exercise of their jurisdiction (a proposition that has been described as "the direction principle"[128]). But again no decision is called for in this case about how such a balance should be struck in respect of legislation that affects pending litigation.

The question in this case

88 Attention in this case can and should be confined to the narrower and more particular question presented by the applicant: did s 26A purport to dissolve or reverse the judgment which the AEU had obtained when the Full

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125 See, for example, *State of Pennsylvania v Wheeling & Belmont Bridge Co* 54 US 518 (1852); *State of Pennsylvania v Wheeling & Belmont Bridge Co* 59 US 421 at 431-432 (1856); *Miller v French* 530 US 327 (2000).

126 Gerangelos, "The Separation of Powers and Legislative Interference in Pending Cases", (2008) 30 *Sydney Law Review* 61 at 89-90. See also Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations*, (2009) at 7-8, 170-174, 206-215.

127 Young, "Congressional Regulation of Federal Courts' Jurisdiction and Processes: *United States v Klein* Revisited", (1981) *Wisconsin Law Review* 1189 at 1238-1244.

128 Gerangelos, "The Separation of Powers and Legislative Interference in Pending Cases", (2008) 30 *Sydney Law Review* 61 at 67. See also the Comment on Dr Gerangelos's article by Sir Anthony Mason: (2008) 30 *Sydney Law Review* 95.

Court directed the issue of a writ of certiorari to quash not only the decision to grant the APF's application for registration but also the registration itself?

89 Once it is understood that the judgment which the AEU obtained was about the lawfulness of the decision to register the APF according to the law as it stood at the time of the Full Court's judgment, it is evident that s 26A effected no alteration to, let alone dissolution or reversal of, that judgment.

90 Section 26A did alter the law governing which organisations have the status of a registered organisation under the Act. The section altered the law by providing, in effect, that the organisations with which it dealt were to be treated as having had the status of registered organisation from the time when the organisation in question was first purportedly entered on the register. But neither as a matter of form nor as a matter of substance did s 26A alter the decision the Full Court of the Federal Court had reached in the *Lawler* matter. Section 26A did not alter or in any way affect the *orders* which the Full Court had made. In particular, and contrary to the submission of the AEU, s 26A did not dissolve or reverse those orders. Section 26A did not dissolve or reverse those orders because in no sense was s 26A a legislative adjudication of any right or question of law which had been in issue in the *Lawler* matter.

91 The AEU placed a deal of reliance on this Court's decision in *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* ("the *Second Engine-Drivers Case*")[129]. But that decision does not assist the AEU. In the *Second Engine-Drivers Case*, this Court considered the construction and operation of legislation which could have been construed as directly undoing the conclusion it had reached at an earlier stage of the same litigation between the same parties. In its earlier decision in 1911, this Court had decided[130], on a case stated by the President of the Commonwealth Court of Conciliation and Arbitration, that the claimant association ("the FEDFA") was not an association that could be a registered organisation under the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"). It followed[131] that the Arbitration Court had no jurisdiction to entertain the

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129 (1913) 16 CLR 245; [1913] HCA 71.

130 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 413 per Griffith CJ, 423-424 per Barton J, 450-451 per Isaacs J; [1911] HCA 31.

131 (1911) 12 CLR 398 at 413-414 per Griffith CJ, 423-424 per Barton J, 451 per Isaacs J.

FEDFA's claim. The High Court answered the questions reserved in the case stated and remitted the claim to the Arbitration Court[132].

92 After this Court's 1911 decision, the 1904 Act was amended to widen the class of organisation that could be registered, with the effect that the FEDFA became a registrable organisation. Section 4 of the amending Act provided[133] that "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 organization as effectually as if this Act had been in force at the date of the registration". The FEDFA sought to prosecute the proceedings that it had brought in the Arbitration Court and in which the President had stated a case for the opinion of this Court. The President again stated a case asking whether the Arbitration Court had power to make an award at the instance of the FEDFA in the proceedings that the FEDFA had brought. The determinative question was identified[134] in this Court as being whether the Act amending the 1904 Act (to enlarge the classes of registrable organisations) operated retrospectively and, if so, to what extent.

93 It was conceded[135] in argument in the *Second Engine-Drivers Case* that s 4 of the amending Act had, as Barton J put it[136], "validate[d] the registration [of the FEDFA] *ab initio*". The Court divided about whether s 4 had the further effect of validating the purported exercise of jurisdiction by the Arbitration Court which the High Court had held, in its 1911 decision, the Arbitration Court did not have because the FEDFA was not then a registrable organisation. A statutory majority of this Court (Griffith CJ and Barton J, Isaacs and Higgins JJ dissenting) concluded, again to use the words of Barton J[137], that s 4 did not go so far as to "annul or affect the decision of this Court as to the nullity of the plaint [in the Arbitration Court] and the absence of jurisdiction" of that Court. Both Griffith CJ and Barton J rested their decisions on notions of interpreting a "retrospective" statute so as to give it no "greater retrospective effect than is

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132 See *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), s 31(2)-(3).

133 *Commonwealth Conciliation and Arbitration Act* 1911 (Cth), s 4.

134 (1913) 16 CLR 245 at 258 per Griffith CJ, 265 per Barton J, 272, 277 per Isaacs J; see also at 279 per Higgins J.

135 (1913) 16 CLR 245 at 269; see also at 251.

136 (1913) 16 CLR 245 at 271.

137 (1913) 16 CLR 245 at 271; see also at 259-260 per Griffith CJ.

expressed in or necessarily implied from its terms"[138] and the need to construe a statute so as not to "alter rights already ascertained by judicial authority"[139]. By contrast, Isaacs J[140] and Higgins J[141] would have given s 4 of the amending Act a wider operation and, therefore, dealt with the respondents' arguments that s 4 was a purported exercise by the Parliament of the judicial power of the Commonwealth. The Court had been referred in argument to numerous United States materials, including the writings of Cooley[142]. Higgins J said[143] that there had been:

> "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 cause. 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."

94 Two points of present relevance may be made by reference to the reasons in the *Second Engine-Drivers Case*. First, there is no little difficulty presented by the use of the words "retrospective" and "retroactive" in relation to legislation. It is always necessary to identify more precisely the operation of the statute that is in question. In *Chang v Laidley Shire Council*[144], Hayne, Heydon and Crennan JJ observed:

> "'Retrospectivity' is a word that is not always used with a constant meaning[145]. It is, therefore, important to identify the statutory provisions

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138 (1913) 16 CLR 245 at 269 per Barton J; see also at 259 per Griffith CJ.

139 (1913) 16 CLR 245 at 271 per Barton J; see also at 259-260 per Griffith CJ.

140 (1913) 16 CLR 245 at 276-277.

141 (1913) 16 CLR 245 at 280-281.

142 (1913) 16 CLR 245 at 251.

143 (1913) 16 CLR 245 at 282; see also at 278 per Isaacs J.

144 (2007) 234 CLR 1 at 32-33 [111]; [2007] HCA 37.

145 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57] per McHugh and Gummow JJ; [1998] HCA 20; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 92 [114] per Gummow, Hayne and Crennan JJ; [2006] HCA 44; *Coleman v The Shell Company of Australia Ltd* (1943) 45 SR (NSW) 27 at 30 per Jordan CJ.

which are said to be being given 'retrospective' effect and to identify precisely the respect or respects in which they are being given that effect."

95 Second, the central question in the *Second Engine-Drivers Case* was whether s 4 of the amending Act applied to undo a decision that had been made in litigation that was still pending in the courts. This Court held, by statutory majority, that it did not. As Griffith CJ said[146], "it is … impossible to construe [the amending Act] as a declaration that the law as declared by this Court in June 1911 was not the law at that time".

96 Similarly, s 26A of the *Fair Work (Registered Organisations) Act* does not have such an operation. It does not purport to declare what the law *was* at the time of the decision of the Full Court in the *Lawler* matter. On the contrary, s 26A assumes that the *Lawler* matter was correctly decided. And as has already been pointed out, s 26A did not intersect with any litigation that was pending in the judicial system at the time it came into operation.

97 The AEU is right to observe that, because s 26A altered the law as it did, the APF has now and since the time at which it was purportedly registered as a registered organisation had the status of a registered organisation. The AEU is also right to observe that the effect of that law is to deny to the AEU whatever was the advantage it gained from succeeding in obtaining the issue of writs of certiorari in the *Lawler* matter. But s 26A is not, on either account, an impermissible interference with judicial power. Section 26A should be given effect according to its terms.

98 Special leave to appeal should be granted but the appeal dismissed. The parties agreed that there should be no order for costs.

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146 (1913) 16 CLR 245 at 260.

99 HEYDON J. The circumstances of this application are set out in the other judgments.

The construction of the relevant legislation

100 The application concerns the *Fair Work (Registered Organisations) Act* 2009 (Cth) ("the Act"). The first issue relates to the construction of s 26A[147]. The issue turns on the following words in s 26A(a): "an association was purportedly registered as an organisation under this Act before the commencement of this section". The applicant contends that those words apply to one class of associations only – those "purportedly registered" immediately before the section commenced on 1 July 2009. On that approach, s 26A did not apply to the Australian Principals Federation. It had ceased to be registered on 18 July 2008 pursuant to the orders of the Full Court of the Federal Court of Australia in *Australian Education Union v Lawler*[148]. The applicant contends that the statutory words do not apply to a second class of associations – those which, though they were at some time "purportedly registered", had had their "registration" terminated before 1 July 2009. The second and third respondents correctly submitted that both classes are within the words "purportedly registered … before" 1 July 2009. There are three primary reasons why this is so.

101 First, it would be anomalous if the revalidating function of s 26A were limited to the former class of association and not the latter class of association. Associations in both classes were liable to have rules which were deficient in permitting particular kinds of prohibited person to be members. Associations in both classes were vulnerable to deregistration on that ground. It would have been entirely fortuitous whether deregistration proceedings were completed against a particular association before s 26A came into force or not. The applicant's construction would validate the registration of an association vulnerable to deregistration though not yet deregistered, but not the registration of a like association which had already been deregistered. That is an unreasonable construction.

102 Secondly, the applicant's construction depends on reading "before" as meaning "immediately before", or as meaning "at". There is no reason to do this.

103 Thirdly, the second and third respondents' construction of "before" as having a meaning wider than "immediately before" is matched and supported by the words "at any time" in s 26A(b). Those latter words contemplate an examination of states of affairs at moments in time earlier than 1 July 2009.

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147 See above at [59].

148 (2008) 169 FCR 327.

104 It is now necessary to turn to several particular arguments advanced by the applicant.

105 To the extent that the second and third respondents' construction is wider than the applicant's construction, the retrospective operation of s 26A is wider rather than narrower in scope. The applicant submitted that clear words were necessary to achieve that outcome. Let it be assumed that that submission is correct. The applicant engaged in an exercise that litigants in its position commonly engage in – proposing various forms of words that were not used but which were allegedly clearer than those which were used. It is not necessary to pursue the details of these proposals. The best cannot here be made the enemy of the good. The clearest cannot be made the enemy of the sufficiently clear. The language of s 26A is sufficiently clear to support the second and third respondents' construction.

106 The applicant submitted that the construction it advocated should be preferred because it produced a fairer outcome than that advocated by the second and third respondents. Its specific submission was that the latter construction:

> "would involve substantial unfairness to the [applicant].
>
> 1. The [applicant] pursued its rights to finality before the Full Federal Court in *Lawler* and obtained a judgment in its favour, against which the [Australian Principals Federation] did not seek to appeal. That benefit of the judgment would be lost, and the resources expended in obtaining it wasted.
>
> 2. The [applicant] then expended further resources challenging an application by the [Australian Principals Federation] to amend its rules, which remained pending when s 26A was enacted, and was subsequently withdrawn by the [Australian Principals Federation]. Those resources would also be wasted.
>
> 3. The [applicant] 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 [Australian Principals Federation] abide the outcome of concluded litigation and pursue registration on the basis that it is currently unregistered."

107 The second and third respondents replied as follows:

"Considerations of fairness, to the extent relevant, necessarily involve consideration of the objects and purpose of the legislation as well as the balancing of the consequences for all parties affected by the legislation. The purpose reflects the policy assessment that the non-compliance does not justify such a severe consequence. Each of the applicant and the third respondent has expended money and used resources. Alleged unfairness to a party should also be measured against its subject matter[149], including in this case the broader public purpose of the legislation: see also s 5(4) of the … Act."

108 Section 5 of the Act provides:

"(1) It is Parliament's intention in enacting this Act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.

(2) Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if 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.

(3) The standards set out in this Act:

(a) ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(b) encourage members to participate in the affairs of organisations to which they belong; and

(c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and

(d) provide for the democratic functioning and control of organisations; and

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149 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 642 per Dawson J; [1991] HCA 32.

(e) facilitate the registration of a diverse range of employer and employee organisations.

(4) It is also Parliament's intention in enacting this Act to assist 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."

109 The second and third respondents' submission in relation to unfairness is correct. The applicant's submission treats the process of construing the Act to avoid unfair outcomes as one concerned with the applicant's private "rights". It also treats that process as one concerned with the applicant's private powers – the powers to exercise those rights. This is inappropriate. The Act did not give the applicant any private rights and it is not concerned with private rights which the applicant may derive from some other source. The Act promotes the public purposes listed in s 5. The applicant's victory in *Lawler's* case vindicated the public interest in ensuring that the law was complied with. The applicant appears to regard its interests in monopolising industrial relations activity as important. It seems to fear that those interests may be damaged if its construction of s 26A is rejected. But those considerations are not significant in determining which construction is correct.

110 The applicant also relied on the language of the Revised Explanatory Memorandum[150]. That language is at best ambiguous. It does not support the applicant's construction. Indeed, it points against that construction to some extent. It said that s 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" (emphasis added)[151].

111 The applicant contended that the Full Federal Court did not apply the principles of statutory construction correctly[152]. The arguments advanced did not show that charge to be correct. Even if the charge were correct, it would not matter. For the reasons given above, the Full Court's conclusion was correct.

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150 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 128-129 [792]-[795].

151 Australia, Senate, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Revised Explanatory Memorandum at 129 [794].

152 *Australian Education Union v Lee* (2010) 189 FCR 259 at 265 [17]-[20].

112 Finally, the applicant argued that s 26A applied only where an "association was purportedly registered". It argued that the Australian Principals Federation was not, when s 26A commenced, either "registered" or "purportedly registered". It contended that *Lawler's* case, in granting certiorari to quash its registration, rendered that registration void ab initio; that is, caused it never to have been registered at all. On that argument, where an association was purportedly registered but that purported registration had not been quashed by certiorari before s 26A commenced, s 26A applied. But s 26A did not apply where the purported registration of an association had been quashed by certiorari before s 26A commenced. Since the Australian Principals Federation fell into that latter category, s 26A did not apply to it.

113 The fate of the argument depends on whether "purported registration" refers to the steps, valid or not, which the Australian Principals Federation took to effect registration and which it and the relevant judicial and administrative officials contemplated as constituting valid registration. Those steps comprised an application under s 18 of Sched 1B to the *Workplace Relations Act* 1996 (Cth), its grant under s 19 by Ross VP, and in consequence apparent registration by the Industrial Registrar conformably with s 26 after the Federation's particulars were entered in the register of organisations pursuant to s 13(1)[153]. Contrary to the applicant's submission, the better construction of "purported registration" is that it refers to the steps as a matter of historical fact, not to their legal consequences. The effect of certiorari was only to deprive those steps of consequences in law. It was not to treat them as if they had never happened as a matter of historical fact. Certiorari does no more than quash the legal consequences of conduct[154]. Hence the Australian Principals Federation had been "purportedly registered as an organisation".

Validity of s 26A of the Act

114 The applicant submitted that on the construction advanced by the second and third respondents, s 26A dissolved or reversed the Full Court's orders in *Lawler's* case. For the purposes of deciding the present controversy, it is sufficient to note the third order: "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)."[155]

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153 *Australian Education Union v Lawler* (2008) 169 FCR 327 at 351 [97].

154 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159; [1996] HCA 44.

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

115 The validating operation of the tailpiece to s 26A rests on two conditions. The first condition is that the Australian Principals Federation had been "purportedly registered". That meant that steps to register it had been taken and followed up by what was thought (erroneously) to be valid registration. That condition was satisfied. As discussed above, even though the "registration" was not valid, the Full Court's grant of certiorari had not quashed the steps comprised in the purported registration. The second condition is that that purported registration was invalid for the reason stated in s 26A. That condition was satisfied because of the Full Court's reasoning and orders in *Lawler's* case, but it would have been satisfied even without that reasoning having been stated and those orders having been made.

116 The ground of decision in *Lawler's* case was that the rules of the Australian Principals Federation did not have the effect of terminating the membership of persons who had ceased to be employed as principals or assistant principals. Section 26A proceeds on the basis that both the reasoning that led to order 3 and order 3 itself were correct. Section 26A does not seek, expressly or by implication, to overrule the reasoning or to set aside that order. Section 26A cannot be said to have dissolved or reversed order 3. It left order 3, which reflected the law as it stood when *Lawler's* case was decided, unaffected. Section 26A simply created a new legal regime by reference to a particular group of acts – the steps that effected the "purported registration".

117 The applicant also submitted that s 26A restored the registration which order 3 quashed. Again, s 26A accepts that the purported registration of the Australian Principals Federation was ineffective. It simply attaches to the steps comprised in that purported but ineffective registration all the attributes of a valid registration. Section 26A exemplifies the type of legislation which was upheld in *R v Humby; Ex parte Rooney*[156] and cases which have followed it. The applicant did not submit that those cases should be overruled. The United States authorities and writings that the applicant directly or indirectly relied on are distinguishable. The authorities relate to statutes reopening final judgments entered before enactment[157]. Section 26A does not do this.

Orders

118 Special leave should be granted but the appeal should be dismissed.

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156 (1973) 129 CLR 231; [1973] HCA 63.

157 See *Miller v French* 530 US 327 at 343-344 (2000).