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

BETWEEN:

AUSTRALIAN EDUCATION UNION
Applicant

AND:

GENERAL MANAGER OF FAIR WORK AUSTRALIA, TIM LEE
First Respondent

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PRESIDENT OF AUSTRALIAN PRINCIPALS FEDERATION, FRED WUBBELING
Second Respondent

AUSTRALIAN PRINCIPALS FEDERATION
Third Respondent

APPLICANT'S REPLY

PART I: CERTIFICATION

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

20

PART II: ARGUMENT

A. The statutory interpretation question

Applicable principles of statutory interpretation

2. The second and third respondents (the **APF respondents**) submit[1] that it was not necessary for the Full Federal Court (the **Full Court**) to have recourse to rules of construction about retrospective legislation, because the Full Court considered that the statutory intention behind s 26A was sufficiently clear. The APF respondents support that submission by reference to *Bawn Pty Ltd v Metropolitan Meat Industry Board.*[2]

3. First, it was necessary to have recourse to those rules of construction in order to appreciate both the legislative intention that was relevant, and the degree to which that

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1 APF respondents' submissions, paragraph 12.

2 (1971) 92 WN (NSW) 823 at 842 (Mason JA).

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intention had to be manifested. The failure to identify and apply those rules led the Full Court to look for the wrong kind of intention – that is, an intention to exclude the APF rather than include the APF – and ultimately to construe s 26A as if it were any other piece of legislation. That approach to statutory construction should not be allowed to stand uncorrected.

4. Furthermore, the approach manifested in *Bawn* and relied on by the APF respondents (and, to some extent, by the learned trial judge[3]) should not be approved. It has the potential to deprive the common law presumption of a meaningful operation, and to place insufficient responsibility on the legislature to make clear whether a statute is intended retrospectively to disturb concluded litigation. This is likely to be productive of uncertainty and injustice. Pearce and Geddes[4] have observed that *Bawn* is one of a number of decisions which:

> ... must be regarded as being at the outer reaches of the effect of a validating Act, particularly as no specific mention was made in the legislation of pending proceedings, let alone those that had been heard and determined. It would seem desirable for validating Acts to make clear their application to both past and current legal proceedings.

5. The continuing influence of decisions such as *Bawn* on the interpretation of retrospective validating legislation further illustrates why the present application raises a question of public importance that it would be timely for the High Court to consider.

Section 26A as part of a "legislative regime"

6. The APF respondents rely, as the Full Court did, on the fact that s 26A was accompanied by other amendments dealing with the "purging" of persons whose eligibility to be members has ceased – specifically, the insertion of s 171A in, and an amendment to s 230(2)(b) of, the FWRO Act.[5]

7. However, that circumstance says nothing about the degree of retrospective operation that s 26A was intended to have. Section 171A operates in future as a legislative "purging rule". The amendment to s 230(2) was consequential on the insertion of s 171A. Those provisions make it no more likely that Parliament intended to disturb retrospectively the result in *Lawler* as between the AEU and the APF.

8. The interpretation of s 26A contended for by the AEU would involve no interference with the policy behind the amendments relied on by the APF. The APF would still be

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3 *Australian Education Union v Lee* [2010] FCA 374; (2010) 196 IR 90 at [60] (North J).

4 D C Pearce and R Geddes, *Statutory Interpretation in Australia* (7th edn, 2011) at [10.14].

5 APF respondents' submissions, paragraph 14.

free to apply for registration and to argue that it has the benefit of s 171A in that application.

"Purportedly registered"

9. The APF respondents contend[6] that, because there was once an entry for the APF on the register, the APF was once "purportedly registered". However, that submission overlooks the effect of the writ of certiorari on the APF's registration under the WR Act.

   9.1 The writ compelled the decision-maker to treat the registration as never having existed, so that the decision-maker was required to treat the register as never having contained an entry for the APF.

   9.2 Thus it is not possible to maintain that there was once an entry for the APF, and it could not be said that the APF was once "purportedly registered".

10. By contrast, other associations without a "purging rule" were exposed to a claim that their registration was affected by jurisdictional error, and thus that they were only "purportedly registered". However, in the absence of a judicial determination to that effect, there remained entries for those associations in the register. It is those other associations, and not the APF, that were "purportedly registered".

The explanatory memorandum

11. The APF respondents submit[7] that the AEU is inviting the Court to "read down" s 26A by reference to the revised explanatory memorandum. That is not the AEU's submission. As set out in paragraphs 21-26 of its principal submissions, the AEU contends that the language used in s 26A, read in light of the applicable principles of statutory construction, does not apply to the APF.

12. At best for the APF respondents, it might be argued that s 26A is ambiguous. In that case, the revised explanatory memorandum tends to confirm that s 26A was intended to apply to associations other than the APF.

B. The constitutional question

Previous cases

13. Contrary to the APF respondents' submissions[8] at [49]-[50], *Chu Kheng Lim*[9] did not decide the question presently before the Court. In that case, the plaintiffs' applications

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6 APF respondents' submissions, paragraph 25.

7 APF respondents' submissions, paragraphs 28.

8 APF respondents' submissions, paragraphs 49-50.

for release from custody had not been determined by the Federal Court when the relevant legislation was enacted: the applications were scheduled to be heard two days after the enactment of the relevant legislation; and were then adjourned *sine die*.[10] The specific question of law posed by the case stated was:

> (1) Are ss. 54L, 54N or 54R of the *Migration Act* 1958 (Cth), as amended, invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia?[11]
>
> (Emphasis added.)

14. The case stated therefore concerned the validity of s 54N with respect to pending proceedings. The effect of s 54N(2) on an order already made by a court in concluded litigation releasing a person from custody would have been a different question.

15. Likewise, *Polyukhovich v The Commonwealth*[12] involved legislation that created retrospective criminal offences, again a very different question. The principle articulated by Deane J, and on which the APF respondents rely, that "both the legislature and the judicature may … each settle questions of rights and liabilities under the civil law"[13] is, of course, unexceptionable. However, Deane J said that the legislature and the judicature may do so "within the limits of their respective functions under the doctrine of the separation of powers".[14] The passage on which the APF respondents rely therefore begs the very question raised in the present case: is it beyond the limits of Parliament's functions under that doctrine to change retrospectively the result of concluded litigation as between the parties in suit?

16. In the present case, the decision of the Full Federal Court in *Lawler* on the validity of the decision to register the APF was one that was uniquely susceptible to judicial determination. Section 26A, if construed as the APF contends, would retrospectively make valid what the Full Court had determined to be invalid. Moreover, it would do so in circumstances where the justiciable controversy between the AEU and the APF about validity had been finally determined by the Full Federal Court. It would, to that extent, usurp or interfere with the judicial power of the Commonwealth, and should be held to be invalid.

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9 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1.

10 (1992) 176 CLR 1 at 16 (Brennan, Deane and Dawson JJ).

11 (1992) 176 CLR 1 at 14 (Brennan, Deane and Dawson JJ).

12 (1991) 172 CLR 501 cited in the APF respondents' submissions, paragraph 52.

13 (1991) 172 CLR 501 at 608 (Deane J).

14 Ibid.

Severance

17. The APF respondents apparently submit that, if s 26A impermissibly interferes with the exercise of the judicial power of the Commonwealth, it does so only to the extent that it declares that "the registration [of the APF] is taken, for all purposes ... to have always been valid"; and severing those words would leave s 26A to operate prospectively through the words "the registration [of the APF] is taken, for all purposes, to be valid".[15]

18. The first reply to the submission is that to allow s 26A to operate prospectively would also interfere with the judicial power of the Commonwealth, by undoing the effect of the writ of certiorari issued by the Full Court in *Lawler*: see paragraphs 62-64 of the AEU's principal submissions.

19. The second reply to the submission is that, if the prospective part of s 26A is unobjectionable, allowing that part to operate while the retrospective part is severed would give s 26A a different operation on the things falling under it than the Parliament intended. It is sufficiently plain that the Parliament intended to validate the registration of particular associations in a comprehensive manner – both for the past and for the future; to sever the retrospective aspect of s 26A would give s 26A an operation that would be different from the operation intended by the Parliament; and it would fragment what was intended by the Parliament to be a single proposition.[16]

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15 APF respondents' submissions, paragraph 62.

16 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 370 (Dixon J).