From: Tom Roberts <troberts@actu.org.au>
Sent: Wednesday, 9 June 2021 2:25 PM
To: Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>
Cc: Declan Murphy <DMurphy@mauriceblackburn.com.au>; J Bornstein <JBornstein@mauriceblackburn.com.au>; Phillip Pasfield <Phillip.Pasfield@slatergordon.com.au>; Vivienne Wiles <vwiles@cfmeumd.org>; jkruschel@cfmeumd.org; 'Mark Gibian' <gibian@hbhiggins.com.au>
Subject: D2021/2

Dear President Ross,

Further to the directions of the Full Bench at yesterday's hearing, we now attach for filing written submissions of the ACTU.

A copy of this submission is also provided to the parties to the proceeding by way of service.

Yours sincerely,

Tom Roberts
Director of Legal, Research & Policy

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We acknowledge the Traditional Owners of country throughout Australia and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past, present and emerging.

IN THE FAIR WORK COMMISSION

RE Application by: GRAHAME PATRICK KELLY

Matter No: D2021/2

OUTLINE OF SUBMISSIONS FOR THE ACTU

Introduction

1. The applicant has applied pursuant to s 94 of the *Fair Work (Registered Organisations) Act* 2009 ("the RO Act") for a secret ballot to be held to decide whether the Mining and Energy Division should withdraw from the Construction, Forestry, Maritime, Mining and Energy Union ("the CFMMEU").
2. By statement and directions made on 30 April 2021, the Commission noted that one of the disputed issues concerns the application of s 94(1) of the RO Act and, in particular, whether the Mining and Energy Division "became part of" the CFMMEU "as a result of" the amalgamation with the MUA and TCFUA in March 2018. The Commission has decided to determine that issue as a preliminary matter.
3. The submissions filed by the applicant and the CFMMEU identified two questions to be determined described in the Background Document prepared by the Commission (at [8]) as follows:
    - *whether the M&E Division is a 'constituent part' of the CFMMEU for the purposes of s.94(1) of the RO Act, and*
    - *whether the M&E Division 'became part of' the CFMMEU 'as a result of' the 2018 amalgamation*
4. The ACTU is a peak council for the purposes of s 6 of the RO Act and intervened in the proceedings for the purpose of making submissions in relation to the questions of statutory construction which arise. The ACTU seeks to be heard with respect to the question of statutory construction underlying the second issue, namely, the circumstances in which a constituent part of an amalgamated organisation "became part of the organisation as a result of an amalgamation" for the purposes of s 94(1) of the RO Act.

5. The ACTU, and its affiliates, have an obvious interest in the proceedings. The issues before the Full Bench concern the interpretation of key provisions of Part 3 of Chapter 3 of the RO Act. The interpretation of s 94(1) advanced by the applicant appears to be novel and to have not been previously contemplated by organisations registered under the RO Act. The consequence of the submission of the applicant would be to cause significant uncertainty in the operations and constitution of organisations that are the subject of amalgamations and has substantial implications for the future application of the provisions of the RO Act dealing with amalgamation and withdrawal from amalgamations.

Section 94(1) – Application for ballots

6. Section 94(1) of the RO Act provides that an application may be made to the Commission for a secret postal ballot to be held to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation. The capacity to make such an application is qualified by the matters identified in s 94(1), namely, the constituent part must have become part of the organisation as a result of an amalgamation under Part 2 of Chapter 3 or a predecessor law and the application must have been made, in effect, between 2 years and 5 years after the amalgamation occurred.

7. In the submission of the ACTU, the correct construction of s 94(1) is as follows:

   (a) The application must be for a secret ballot to be held to decide whether a particular constituent part of an amalgamated organisation should withdraw from the organisation (s 94(1)).

   (b) The particular constituent part to which the application relates must have become part of the amalgamated organisation as a result of an amalgamation under Part 2 of Chapter 3 or a predecessor law (s 94(1)(a)).

   (c) The application must be made no less than 2 years and before 5 years after the amalgamation which resulted in the particular constituent part subject of the application becoming part of the amalgamated organisation (s 94(1)(b) and (c)).

8. In particular, an amalgamation does not, on the proper construction of s 94(1), result in all existing constituent parts of an organisation being potentially subject of an application for a withdrawal ballot in the period between 2 years and 5 years after the amalgamation. The only constituent parts capable of being subject of an application under s 94(1) in that time

period are those parts that became part of the organisation as a result of the particular amalgamation.

Supporting Contentions

9. The ACTU refers to three matters in support of the interpretation of s 94(1) of the RO Act set out above.

(i) "Amalgamated organisation"

10. Firstly, the applicant contends that any constituent part of an organisation is able to be subject of an application under s 94(1) in the period between 2 and 5 years after an amalgamation. The essential premise of that construction is that an entirely new organisation necessarily comes into existence as a result of each amalgamation. Whilst it was clarified that the applicant accepts that the same legal entity continues to exist, he submits that a new "artefact" or "manifestation" of the organisation comes into existence which is the "amalgamated organisation".

11. The interpretation cannot be reconciled with the relevant provisions of the RO Act and the definition of an "amalgamated organisation" in s 93(1). That definition is as follows:

> ***amalgamated organisation****, in relation to an amalgamation, means the organisation of which members of a de-registered organisation became members under paragraph 73(3)(d) of Part 2, or an equivalent provision of a predecessor law, but does not include any such organisation that was subsequently de-registered under Part 2 or a predecessor law.*

12. The definition of "amalgamated organisation" refers back to an organisation which members of a de-registered organisation become members under s 73(3)(d). The same definition appears in s 35(1). Applying the definition in s 6, the reference to an organisation is a reference to an "organisation" registered under the Act.

13. To understand the reference to s 73(3)(d), it is necessary to refer to the "scheme" required to be established in connection with an amalgamation. Section 40(1) requires there to be a scheme for every proposed amalgamation. Section 40(2) sets out the matters that must be contained in a scheme. Relevantly, s 40(2)(a)(i) and(ii) present two alternatives. The scheme can specify that proposed amalgamated organisation is one of the existing organisations or that the proposed amalgamated organisation is an association proposed to be registered.

That is, one of the alternatives is not to register a new organisation, but rather that the amalgamated organisation will be one of the existing organisations (colloquially, the "host" organisation).

14. Section 73 then sets out the actions to be taken after the ballot for an amalgamation and s 73(3) sets out what is to occur on amalgamation day. Section 73(3)(a) indicates that a new organisation is registered only if the proposed amalgamated organisation is not already registered. Section 73(3)(b) contemplates changes being made to the rules of an existing organisation that is the proposed amalgamated organisation. In accordance with s 73(3)(d), members of a de-registered organisation become members of the proposed amalgamated organisation by force of the section. If the proposed amalgamated organisation is an existing registered organisation, the members simply become members of that organisation and not any new organisation.

15. There is no dispute that in 2018 the MUA and the TCFUA were deregistered and the members of those organisations became members of an existing organisation, the CFMEU, which had a name change to the CFMMEU: Murphy at [42]-[43]. The applicant's submissions are wrong to say (at [63]) that the amalgamated organisation did not exist prior to 2018. Consistent with the scheme created in accordance with s 40, the amalgamated organisation is the CFMEU and no new entity was created or registered. All that occurred was that the existing and continuing organisation was renamed and certain internal organisational changes occurred.

16. The definition of an "amalgamated organisation" does not refer to a distinct "artefact" or a different "manifestation" of the organisation to which the members of de-registered organisations become members. The definition simply serves to identify the organisation that may be subject of an application under s 94(1). That organisation can be (and, in the case of the 2018 amalgamation, was) an existing registered organisation as contemplated by ss 40(2)(a)(i) and 73(3)(b). Existing constituent parts of that registered organisation do not again become part of that organisation as a result of the amalgamation. An existing branch, division or part is already part of that organisation and cannot sensibly be described as having become part of the organisation as a result of the amalgamation.

17. Other provisions are inconsistent with the view that a reference to the "amalgamated organisation" is a reference to a distinct "artefact" or "manifestation" of a registered

organisation rather than simply the legal entity. For example, s 74 provides that assets and liability of a de-registered organisation become assets and liability of the amalgamated organisation, s 79 provides for the continuation of proceedings substituting the amalgamated organisation for a de-registered organisation and ss 82-85 deal with certifications in relation to land and other assets. All of those provisions suggest that the reference to an amalgamated organisation is to identify a legal entity.

18. Still other provisions acknowledge that the amalgamated organisation is the same organisation that existed prior to amalgamation and, indeed, exists after withdrawal of a constituent part. For example, s 93(1) defines a "proceeding to which this Part applies" to mean a proceeding to which an amalgamated organisation was a party immediately before the amalgamation day. Section 94A(2)(a) and (3) require consideration of the "record" of the amalgamated organisation with respect to compliance with workplace or safety laws. Section 112, 113A and 118 all continue to refer to the "amalgamated organisation" even after a constituent part has withdrawn from the organisation. All these provisions indicate that the term "amalgamated organisation" simply identifies the registered organisation which may be subject of a withdrawal application and does not refer a different "manifestation" of the organisation.

(ii) The amalgamation

19. Secondly, the interpretation advanced by the applicant is inconsistent with the plain language of s 94(1) of the RO Act. The reference to "the" constituent part in s 94(1)(a) makes clear that it is the particular constituent part of the amalgamated organisation subject of the application which must have become part of the organisation as a result of an amalgamation. The reference to "an" amalgamation in s 94(1)(a) therefore refers to a particular amalgamation, namely, the amalgamation which resulted in the constituent part subject of the application to become part of the amalgamated organisation, rather than any amalgamation.

20. The reference to "the" amalgamation having occurred no less than 2 years prior to and before 5 years after the application in s 94(1)(b) and (c) refers back to the particular amalgamated dealt with in s 94(1)(a). As such, the time period runs from the amalgamation that resulted in the particular constituent part becoming part of the amalgamated

organisation. It is only the particular constituent parts which became part of an organisation as a result of an amalgamation that can be subject of a withdrawal application in the period between 2 years and 5 years after that amalgamation occurred.

21. The relevant question posed in this matter is whether the Mining and Energy Division became part of the CFMMEU as a result of the amalgamation that occurred in March 2018. What occurred in 2018 was that the MUA and the TCFUA were deregistered and the members of those organisations became members of the CFMEU which was renamed as the CFMMEU: Murphy at [42]-[43]. The Mining and Energy Division was already a part of that organisation and did not become part of the CFMMEU as a result of that amalgamation.

(iii) Purpose and consequences

22. Thirdly, in construing the relevant statutory provisions it is relevant to have regard to the purpose and context of those provisions in approaching the question of construction. Whilst the language which has actually been employed in the text of legislation is the surest guide to legislative intention, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47]. It is also relevant to have regard to the consequences of a particular construction: *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [48].

23. A different interpretation of s 94(1) to that proposed by the ACTU would have serious ramifications for any organisations which have amalgamated or contemplate doing so. The consequence of the applicant's construction is that any amalgamation, however large or small, would result in each and every constituent part of an organisation being potentially subject of an application for a withdrawal ballot under s 94(1) in the period between 2 years and 5 years following the amalgamation. For example, if a large union with 100,000 members amalgamated with a small union with 100 members, each constituent part of the large union would potentially be subject of a s 94(1) application even though no change had occurred to the rules, membership or operation of that constituent part.

24. That cannot have been the intention of the provisions. That construction would introduce very considerable uncertainty in the operation and constitution of organisations that are

involved in amalgamations. That fact is likely to operate as a disincentive for organisations to participate in amalgamations. That would be contrary to the purpose of Chapter 3 of the RO Act of facilitating and encouraging amalgamations. That purpose is evident from the 1991 amendments which form the basis of the current provisions and from the object stated in s 92 itself. Whilst the RO Act includes provisions for withdrawal from amalgamations, withdrawal is only possible in strictly limited circumstances, namely, between 2 years and 5 years after the amalgamation which resulted in a constituent part becoming part of the organisation (s 94(1)) or outside that timeframe if justified by the matters in s 94A.

MARK GIBIAN SC

Counsel for the ACTU — Dated: 9 June 2021