From:	Tom Roberts <troberts@actu.org.au>
Sent:	Wednesday, 16 June 2021 3:53 PM
To:	Chambers - Ross J
Cc:	'Phillip Pasfield'; Declan Murphy; J Bornstein; Vivienne Wiles; jkruschel@cfmeumd.org; 'Mark Gibian'
Subject:	RE: Application by Kelly - D2021/2
Attachments:	Application by Kelly - ACTU Submissions Demerger Reply.docx

Dear Associate,

We refer to the above matter.

Please find attached the ACTU's Submission in Reply.

Yours faithfully,

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.

From: Phillip Pasfield <Phillip.Pasfield@slatergordon.com.au>
Sent: Monday, 14 June 2021 3:53 PM
To: Chambers - Ross J (Chambers.Ross.j@fwc.gov.au) <Chambers.Ross.j@fwc.gov.au>
Cc: Declan Murphy <DMurphy@mauriceblackburn.com.au>; Josh Bornstein <JBornstein@mauriceblackburn.com.au>; Vivienne Wiles <vwiles@cfmeumd.org>; jkruschel@cfmeumd.org; Tom Roberts <troberts@actu.org.au>
Subject: Application by Kelly - D2021/2

Dear Associate

Please find attached for lodgement the Applicant's Further Written Submissions.

The representatives of the amalgamated organisation, the Manufacturing Division and the ACTU have been copied into this email by way of service.

Regards

Phillip Pasfield
National Practice Group Leader
Industrial and Employment Law

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I respectfully acknowledge the First Nations People as the original inhabitants of the nation and the traditional custodians of the land on which we live, work and learn, and pay respect to the First Nations People and their Elders, past, present and emerging.

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IN THE FAIR WORK COMMISSION

RE Application by: GRAHAME PATRICK KELLY

Matter No: D2021/2

<u>SUBMISSIONS FOR THE ACTU IN REPLY</u>

1. These are submissions on behalf of the ACTU in response to the Applicant's Further Written Submissions ("AFS") dated 14 June 2021. The ACTU responds only to that part of AFS as addresses its submissions, being paragraphs 17 to 35. Much of those submissions repeat matters raised in the Applicant's earlier written submissions which have been adequately addressed by the ACTU in its earlier submissions. These submissions only respond to the extent necessary.

2. AFS[18] and [19] deprecate reference to the consequences of the construction for which he contends by suggesting that the implications of the proper construction of the legislation should not be assumed to be "necessarily negative". For the purposes of statutory construction, the relevant question is not whether the consequences of a particular interpretation are contended to be positive or negative. A court or tribunal is entitled, however, to have regard to whether the consequences are consistent with the statutory scheme and its purposes or whether the consequences of a particular construction are surprising or unlikely to have been intended by the legislature. For the reasons given in the ACTU's submissions, the construction advanced by the applicant is unlikely to be intended by the legislature and is not consistent with the purpose of the provisions.

3. AFS[21] and [22] make clear, as was observed in the ACTU's earlier submissions, that the applicant accepts that the same legal entity continues to exist prior to and following an amalgamation. The applicant's contention is that there is some distinct "artefact" or "manifestation" of what is the same legal entity known as the amalgamated organisation. The applicant's submissions do not explain what the distinct "artefact" or "manifestation" is, nor is it explained how it can be said that an existing part of a registered organisation became part of the same legal entity as a result of an amalgamation. An existing part of the

host organisation does not become part of that same legal entity as a result of an amalgamation.

4. AFS[24] suggests that the ACTU understates the effects of the 2018 amalgamation and refers to the absorption of a "large cohort of members numbering in the thousands", the creation of a new Division in a different industry, changes to governance structures and taking on assets and liabilities. The submission does not assist. First, the submission begs the question as to how many new members or what type of organisational changes are necessary before a new "artefact" or "manifestation" or an organisation emerges. Is 100 new members sufficient, or 1,000 or 10,000? No answer is suggested. Second, changes in the membership and organisational or governance arrangements of an organisation can occur in the absence of an amalgamation through changes to the eligibility or other rules of the organisation. Nothing in the RO Act suggests that some new "artefact" or "manifestation" emerges as a result.

5. AFS[25]-[27] rely on the definition of "amalgamated organisation" and the use of the phrase "amalgamated organisation" in s 94. Neither assist the applicant. The definition of an "amalgamated organisation" refers to "the organisation" of which members of a de-registered organisation become members. That is, it identifies the registered organisation rather than creating or referencing some different manifestation. The reference to an "amalgamated organisation" in s 94(1) similarly identifies the organisation that may be subject of a withdrawal application. The references to "the organisation" in the introductory words to s 94(1) and in s 94(1)(a) further make clear that the purpose of the provision is to refer to the registered organisation that had been subject of an amalgamation within the relevant time period.

6. AFS[33] contends that the example provided at [23] of the ACTU's submission is inutile because, on the applicant's construction, that scenario was already provided for and allowed under the pre-amendment legislation. That is the very point of the example. If the applicant's construction is correct, it has been possible since 1996 for any existing part of an organisation to seek a withdrawal ballot between 2 and 5 years after an amalgamation has occurred. There is nothing in the legislative history that suggests this extreme outcome was intended, particularly given the focus of the legislation on encouraging and facilitating amalgamations.

7. The ACTU's submissions are not, as suggested at AFS[34], a "partisan polemic". The consequences of a particular construction are appropriate to be considered in the task of statutory construction. Furthermore, the applicant speculates that some organisations may be encouraged to amalgamate in the knowledge that they would be able to withdraw from a failed organisation. That submission fails to acknowledge the consequences of the applicant's construction. It would not merely permit an organisation to withdraw, it would permit each and every existing identifiable part of an organisation to seek a withdrawal ballot between 2 and 5 years after any amalgamation. The ACTU persists in its submission that this would represent an unexpected outcome which is difficult to reconcile with the statutory scheme and is likely to discourage amalgamations.

8. Finally, the applicant is correct to say at AFS[35] that some provisions over time have been introduced to permit withdrawal from amalgamations. The only relevant amendments occurred in 1996 and 2020. Those provisions introduced the capacity to seek a withdrawal ballot be conducted only within narrow limits, respectively, by application between 2 and 5 years after an amalgamation (in what is now s 94(1)) or, outside that time constraint, if the Commission is satisfied it is appropriate having regard to the record of the organisation in not complying with workplace or safety laws (in s 94A). Those amendments do not detract from the general purposes of Chapter 3 of the RO Act.

MARK GIBIAN SC

Counsel for the ACTU   Dated: 16 June 2021