From: Declan Murphy <DMurphy@mauriceblackburn.com.au>
Sent: Monday, 7 June 2021 2:47 PM
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Subject: D2021/2: Application by Grahame Kelly [MBC-VIC.FID5758433]

Dear Associate

We refer to the above matter.

Please find attached for filing the CFMMEU's submissions in reply.

We note that there was no order for reply submissions. However, we consider that the attached may be of assistance in advance of tomorrow's hearing.

We confirm that the representatives for the applicant and the Manufacturing Division are copied in, by way of service.

Please let me know if we can assist further.

Kind regards

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IN THE FAIR WORK COMMISSION

Re Application By: Grahame Patrick Kelly

Matter No.: D2021/2

CFMMEU'S SUBMISSIONS IN REPLY

THE M& E DIVISION IS NOT A SEPARATELY IDENTIFIABLE CONSTITUENT PART

1. At [39] of his submissions, the applicant submits that sub-paragraph (c) of the definition of *separately identifiable constituent part* should be construed as covering branches, divisions or parts of the amalgamated organisation that were not branches, division or parts of the organisation de-registered in connection with the amalgamation. There are three principal difficulties with this construction.

2. *Firstly*, sub paragraph (c) does not include the words of limitation that the applicant says form part of the definition. Sub paragraph (c) does not provide in terms that it applies to any branch, division or part of the amalgamated organisation which was not a branch, division or part of the previously de-registered organisation. All sub paragraph (c) says is that it applies to branches, divisions, or parts of the amalgamated organisation not caught by sub paragraphs (a) or (b). However, sub paragraphs (a) (being the whole de-registered organisation) or (b) (being a State or Territory branch of the de-registered organisation), are not an exhaustive list of the administrative units that may have existed in any de-registered organisation and may still be separately identifiable in the amalgamated organisation. For example, if there was a division of a union which participated in amalgamation and has now been de-registered and remains separately identifiable within the amalgamated organisation, that division would not be caught by sub paragraphs (a) or (b) of the definition of *separately identifiable constituent part*. Similarly, if the deregistering union had a part (or Branch) that was not defined by reference to a State or Territory and that part remains separately identifiable under the rules of the amalgamated organisation, then that part would also not be caught by sub paragraphs (a) or (b).

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3. The construction contended for by the applicant necessarily involves reading down the words used in sub paragraph (c). The applicant is driven to this position because, as is obvious, if the words in sub paragraph (c) are given their literal meaning, there would be no need for sub paragraphs (a) or (b). Other than to point to the explanatory memorandum, the applicant does not grapple with why, if sub paragraph (c) should be read down, it should be read down in the way he contends. However, for the reasons which will be explained below the explanatory memorandum does not support the proposition that sub paragraph (c) should be read down as contended for by the applicant.

4. *Secondly*, the difficulty with the applicant's construction is that it requires the definition in sub paragraph (c) to be read in isolation from the definition of *constituent part* and the *object of the Part* in s. 92 of the Act. There is no dispute that each sub paragraph, other than (c), of the definitions of *separately identifiable constituent part* and *constituent part*, refer to an administrative unit of an amalgamated organisation which bears some connection to the de-registered organisation.

5. The connection between the administrative unit(s) and the de-registered organisation is unsurprising given the object contained in s. 92 of the Act; to provide for certain organisations that have taken part in amalgamations to be reconstituted and re-registered. Contrary to the applicant's submissions at [54] and [55], s. 92(a) identifies that the object of the part is to provide for certain organisations that have taken part in amalgamations to be *reconstituted and re-registered.* The reference to 'reconstituted and re-registered' indicates that those are the organisations which have been de-registered as part of the amalgamation scheme. When section 92(b) refers to branches, divisions or parts of organisations of "that kind", it is plainly referring to branches, divisions or parts of organisations which need to be *re*constituted and *re*-registered.

6. The CFMMEU submits that the definition of *separately identifiable constituent part* should be read consistently with the words that immediately surround it and the text of the Act as a whole. The applicant seeks to resist this by relying on Mansfield J's observations in *S v. The Australian Crime Commission* at [52] of his submission. However, Mansfield J expressly recognised that the literal meaning had to be consistent with the context and purpose of the Act as a whole.

7. *Thirdly*, the applicant's construction of the definition in sub paragraph (c) creates an inexplicable lacuna in the definition. At [39] and [45] the applicant submits that the definition in sub paragraph (c) is intended to capture branches, divisions or parts of the amalgamated organisation that were not branches, divisions or parts of the de-registered organisations. However, that means that divisions or other parts of the de-registered organisation that do not answer the description in (a) (being the whole de-registered union) or (b) (being a state branch) but were connected with the amalgamation, are excluded from the definition of *separately identifiable constituent part*; but other administrative units within the amalgamated organisation that had no connection with the amalgamation (such as administrative units of the host), are caught. There is no logical reason why the legislature would create such a lacuna.

8. The applicant appears to accept that the literal words in (c) of the definition of separately identifiable constituent part must be read down. The question is whether the Commission would read those words down in the way contended for by the applicant which is inconsistent with the surrounding text and purpose of the Part and creates unintended gaps in the legislation. Alternatively, the Commission could read that sub paragraph in the way contended for by the CFMMEU, which is entirely consistent with the stated purpose of the part and the surrounding text.

9. At [43], the applicant asks why the draftsperson did not include the words of limitation which appear in (a) and (b) of the definition. The answer to that rhetorical question is straightforward. The words were not included because they were not necessary having regard to the ordinary way lists are expressed and catch all expressions are understood. To this end, the applicant's criticisms of the ejusdem generis rule are misplaced. The CFMMEU accepts that the ejusdem generis rule is a tool for construing the ordinary meaning of the words used. Identifying other cases where the text and context of the legislation were such that the ejusdem generis tool did not provide any meaningful assistance does not assist in this case. The task for the Commission is to construe the words in question in accordance with the ordinary principles of statutory construction. This includes using accepted tools such as the ejusdem generis rule.

10. Further, at [43] the applicant submits that the CFMMEU is asking the Commission to read words into the definition of sub paragraph (c). This is not so. The CFMMEU submits that sub paragraph (c) should be read having regard to the text and context in

which it appears. That does not require words to be read in. It simply requires the Commission to construe it consistently with the surrounding words and the subject matter at which the definition is directed.

11. At [42] and [56] the applicant places significant reliance upon the explanatory memorandum. It is well accepted that the task of construction requires giving effect to the will of the legislature expressed in the statue and that the explanatory memorandum cannot be used as a substitute for the text of the legislation.[1]

12. The difficulty for the applicant in relying upon the explanatory memorandum, is that the explanatory memorandum does not support the applicant's construction. The explanatory memorandum suggests that sub paragraph (c) applies to *any* branch, division or part of the amalgamated organisation. As is made clear by [44] and [45] of the applicant's submissions, the applicant does not contend for such a construction.

13. The applicant's position is understandable. If sub paragraph (c) had the meaning suggested by the explanatory memorandum, sub paragraphs (a) and (b) would be completely robbed of any utility. All that would be necessary would be sub paragraph (c). All words in the definition should be given meaning[2] and accordingly, sub paragraph (c) cannot have the breadth suggested by the explanatory memorandum.

THE M&E DIVISION DID NOT BECOME PART OF THE CFMMEU AS A RESULT OF AN AMALGAMATION

14. The applicant's submissions in respect of the proper construction of s. 94 of the Act are to the effect that s. 94 does not refer to or rely upon any established legal principles or concepts. Rather, the applicant contends that an 'amalgamated organisation' is: (a) an 'entity' but apparently not a legal entity; and (b) an entity unrelated to registration and therefore without legal status; and (c) that took on its 'present form' as the CFMMEU in 2018, but where that 'present form' is not the present legal form as a registered organisation with corporate and legal status.[3]

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[1] See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ and *FCT v Consolidated Media Holdings* (2012) 250 CLR 503 at [39] per the Court: "Legislative history and extrinsic materials cannot displace the meaning of the statutory text."

[2] *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 per Gummow J, (Hill and Cooper JJ) agreeing.

[3] See [61]-[63] of the applicant's submissions.

15. It appears that the applicant submits that the phrase "amalgamated organisation" is used to describe an 'entity' unknown to the law, but which relates to the 'present form'[4] of a body corporate at a fixed point in time but without any reference to the legal status of that body corporate.

16. There are numerous difficulties with the applicant's submission.

17. *Firstly*, the term amalgamated organisation is defined in s. 93(1) 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."*
>
> (Emphasis added)

18. The use of the word "the organisation" in the first part of the definition indicates that term is referring to the body corporate which was the host for the amalgamation. The latter part of the definition makes clear that the defined terms does not apply to the de-registered organisations. Of course, the word "organisation" is defined in s. 6 to mean an 'organisation registered under this Act'. By s. 27 an organisation is a body corporate and importantly has perpetual succession.

19. Importantly, the applicant makes no attempt to justify why the definition of 'organisation' contained in the Act should not be applied to the word used in ss. 93 and 94. It is to be presumed that defined words in a statute have their defined meanings, and that presumption cannot be displaced without good reason.[5] There is no good reason, or contrary intention, demonstrated here to suggest that the definition of 'organisation' in section 6 should not apply to ss. 93 and 94.[6]

20. It must not be forgotten that the grant of perpetual succession means that the entity maintains its legal personality notwithstanding changes to its membership.[7] In the case of the union, which is not de-registered during the amalgamation process, that legal personality is unaffected by the amalgamation.

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[4] See [63] of the applicant's submissions.
[5] See *Qantas Airways Ltd v Chief Commissioner of State Revenue* [2008] NSWSC 1049 per Handley JA.
[6] See *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108 per Mahoney JA
[7] See *Re McJannet; Ex Parte Minister for Employment Training & Industrial Relations (Qld)* (1995) 184 CLR 620 at 660 per Toohey, McHugh and Gummow JJ.

21. This explains why s. 94(1) uses the words "the organisation" and the "amalgamated organisation". The use of the phrase "amalgamated organisation" in the chapeau of s 94(1) ensures that the section is directed to the idea of an administrative unit withdrawing from not just any organisation, but an organisation which has undergone an amalgamation. Then the use of the word organisation in the last part of the chapeau and in sub paragraph (1)(a) identifies the legal question: how did the administrative unit became part of the legal personality.

22. Tellingly, the definition of "amalgamated organisation" refers to the existing legal personality which the members from the de-registering organisation joined. The definition does not refer to any new entity created upon the amalgamation. If as the applicant contends s. 94 was directed at some non-legal entity, then the definition in s. 93 would have established that entity and not referred to the existing defined expression 'organisation'. That failure to do so is fatal to the applicant's case.

23. *Secondly,* contrary to the applicant's submissions at [68] to [70], s. 93(4) of the Act is against the applicant. Section 93(4) provides as follows:

> *(4) For the purposes of this Part, a reference to a* ***constituent part*** *becoming part of an* ***amalgamated organisation*** *includes a reference to a* ***constituent part*** *becoming part of that* ***organisation*** *as it existed before any subsequent* ***amalgamation*** *under Part 2 or a* ***predecessor law****.*

24. Section 93(4) clarifies that if a constituent part of an amalgamated organisation became part of that organisation by reference to a previous amalgamation, the fact of a subsequent amalgamation, does not mean that the constituent part did not join the amalgamated organisation as a result of an amalgamation. That provision would be entirely unnecessary if the applicant's contention was right. The applicant's contention is, in essence, that upon every amalgamation, no matter how big or how small, each and every administrative unit of the host organisation is taken to have become a part of the *amalgamated organisation* on and from that most recent amalgamation. Section 93(4) would be wholly unnecessary if that contention was right. The fact that s. 93(4) is included, counts decisively against the applicant's contention.

25. *Thirdly,* at [73], the applicant complains that the CFMMEU's contentions about the purpose of Part 2 and Part 3 of Chapter 3 have no foundation. This ignores the legislative history and the observations of the Full Court in *AMMA v. CFMMEU* at

[135].[8] It is also inconsistent with the applicant's concession that s. 253ZJ of the WR Act is substantially the same as s. 94 of the Act.[9] The fact that the terms of s 94 and s 92 remain substantially the same as their antecedent provisions s 253ZJ and s 253ZH of the WR Act respectively,[10] suggests that despite some minor relaxations the fundamental purpose of the scheme has remained consistent since it was first introduced.

26. Further, in so far as the applicant in [73] relies upon the progressive easing of the conveniently belong test and the entrance of new unions into the industrial landscape, that does not assist him. Unlike the provisions for a new registrant, s. 95A(4) and (5) of the Act expressly requires the Commission to ensure that once a union leaves an amalgamation, the eligibility of the amalgamated organisation and the new union are to the extent possible, not overlapping. That is to be contrasted with the applicant's submission on competitive unionism. That strongly counts in favour of a contention that the legislature was permitting the re-establishment of the status quo which existed prior to amalgamation.

27. More telling, s. 92 indicates that the purpose of Part 3 of Chapter 3 is to permit the reconstitution and re-registration of unions (or parts of them). The notion of re-constitution and re-registration is plainly directed at unions that previously existed but no longer do. It is not concerned with the establishment of organisations which have never been seen before. That function is served by Part 2 of Chapter 2 of the Act.

CONCLUSION

28. For those reasons and the reasons set out in the CFMMEU's primary submissions, the application should be refused.

CW Dowling

CA Massy

7 June 2021

[8] See discussion at [28] of CFMMEU submissions dated 19 May 2021.
[9] See [19] to [21] of the applicant's submissions.
[10] See [31] of the CFMMEU submissions dated 19 May 2021.