IN THE FAIR WORK COMMISSION

Matter No.: D2021/2

Re Application By: Grahame Patrick Kelly

APPLICANT'S WRITTEN SUBMISSIONS ON THE SECTION 94(1) ISSUE

A. Introduction

1. On 26 March 2021, Grahame Patrick Kelly (**Kelly**) made an application to the Fair Work Commission (**Commission**) under s.94 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) (**the Application**) for a secret ballot to be held to decide whether the Mining and Energy Division (**the Mining Division**) of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) should withdraw from the CFMMEU.

2. The amalgamated organisation, the CFMMEU, has advised the Commission that it opposes the Application.

3. On 30 April 2021 the Commission issued a document titled Statement and Directions (**the FWC Statement**), in which it indicated that it would decide as a preliminary matter "*whether the M&E Division 'became part of' the CFMMEU 'as a result of' the amalgamation with the MUA and TCFUA in March 2018 (**the s.94(1) issue**).*"

4. The Commission issued directions for the filing of written submissions and statements of evidence in respect of the s.94(1) issue.

5. In accordance with the Commission's directions, the CFMMEU filed a statement of Declan Vincent Murphy dated 19 May 2021 (**Murphy's statement**) and an Outline of Submissions dated 19 May 2021 (**CFMMEU's Outline**).

6. On behalf of Kelly, these written submissions are filed pursuant to the Commission's directions and are made in respect of the s.94(1) issue.

7. These submissions are structured as follows:

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(a) Section B of these submissions addresses the relevant parts of the legislation and relevant legislative history.

(b) Section C of these submissions outlines Kelly's submissions in respect of why the Commission should conclude that:

(i) the Mining Division is a constituent part of the CFMMEU within the meaning of s.94(1) of the RO Act; and

(ii) the Mining Division became a part of the CFMMEU as a result of the 2018 amalgamation between the CFMEU, the Textile, Clothing and Footwear Union of Australia (**the TCFUA**) and The Maritime Union of Australia (**the MUA**).

B. The legislation and relevant legislative history

B.1. The current withdrawal provisions

8. Chapter 3 of the RO Act provides in Part 2 for the amalgamation of organisations and in Part 3 for withdrawal from amalgamations. The present application is brought under Part 3.

9. Withdrawal from amalgamation under Part 3 is initiated by a process of application to the Commission under s.94 of the RO Act for an order that a secret ballot be held to decide whether a section of an amalgamated organisation which is called a "constituent part" and which became part of that organisation as a result of an amalgamation, should withdraw from the amalgamated organisation. It provides:

> *"(1) An application may be made to the FWC for a secret ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:*
>
> *(a) the constituent part became part of the organisation as a result of an amalgamation under Part 2 or a predecessor law; and*
>
> *(b) the amalgamation occurred no less than 2 years prior to the date of the application; and*
>
> *(c) the application is made before the period of 5 years after the amalgamation occurred has elapsed."*

10. Thus, the necessary elements for an application under s.94 are:

    (a) an amalgamated organisation;

    (b) a constituent part of an amalgamated organisation;

    (c) that the constituent part became part of the amalgamated organisation as a result of an amalgamation; and

    (d) that the application is made no less than 2 years and no more than 5 years after the amalgamation.

11. The key terms in s.94 are defined.

12. The term "*amalgamated organisation*" is defined in s.93 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."*

13. The term "*constituent part*" is defined in s.93 as follows:

> *""**constituent part"**, in relation to an amalgamated organisation, means:*
>
> *(a) a separately identifiable constituent part; or*
>
> *(b) a part of the membership of the amalgamated organisation that would have been eligible for membership of:*
>
> *(i) an organisation de-registered under Part 2 in connection with the formation of the amalgamated organisation; or*
>
> *(ii) a State or Territory branch of such a de-registered organisation;*
>
> *if the de-registration had not occurred."*

14. The term "*separately identifiable constituent part*" is defined in s.93 as follows:

> *""**separately identifiable constituent part"**, in relation to an amalgamated organisation, means:*
>
> *(a) if an organisation de-registered under Part 2 in connection with the formation of the amalgamated organisation remains separately*

identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation- that branch, division or part; or

(b) if a State or Territory branch of such a de-registered organisation under its rules as in force immediately before its de- registration remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation-that branch, division or part; or

(c) any branch, division or part of the amalgamated organisation not covered by paragraph (a) or (b) that is separately identifiable under the rules of the organisation."

B.2. The legislative history of the withdrawal provisions

15. The statutory scheme has allowed for the amalgamation of organisations since the enactment of the *Conciliation and Arbitration Act 1972* (Cth) (**the C & A Act**).[1]

16. The amalgamation scheme has undergone reform over the years. In 1998 the C & A Act was repealed and the *Industrial Relations Act 1988* (Cth) (**IR Act**) was enacted.[2]

17. In 1991 upon the enactment of the *Industrial Relations Legislation Amendment Act* 1991 (Cth) the existing amalgamation scheme under the IR Act was repealed and substantially revised.[3]

18. The amalgamation scheme was next reformed in 1996 when the IR Act was replaced by the *Workplace Relations Act* 1996 (Cth) (**WR Act**).[4] These reforms took effect from 31 December 1996.

19. The WR Act included the first provisions for withdrawal from amalgamations. Those provisions were contained in Division 7A of Part IX of the Act. Those provisions were subject to narrow time limits which required that any application for a ballot had to occur between two and five years from the date of amalgamation.

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1 See sections 158L-158R.
2 See Division 7 of Part IX.
3 See sections 7 of Part IX.
4 See Division 7 of Part IX.

20. Section 253ZJ(1) of the WR Act, the predecessor to s.94 of the RO Act, provided:

> *"An application may be made to the Court for a ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:*
>
> *(a) the constituent part became part of the organisation as a result of an amalgamation under Division 7 after 1 February 1991; and*
>
> *(b) the amalgamation occurred no less than 2 years prior to the date of the application; and*
>
> *(c) the application is made:*
>
> *(i) if the amalgamation occurred before the commencement of this Division – no more than 3 years after that commencement; or*
>
> *(ii) if the amalgamation occurred after the commencement of this Division – no more than 3 years after that commencement; or*
>
> *(iii) if the amalgamation occurred after the commencement of this Division – no more than 5 years after the amalgamation occurred.*

21. Section 253ZJ(1) and s.94 of the RO Act are substantively the same.

22. Section 253ZI(1) of the WR Act defined the term "constituent part". It provided:

> *"**constituent part**, in relation to an amalgamated organisation, means a part of the membership of the amalgamated organisation that would have been eligible for membership of:*
>
> *(a) an organisation de-registered under Division 7 in connection with the formation of the amalgamated organisation; or*
>
> *(b) a State or Territory branch of such an organisation;*
>
> *if the de-registration had not occurred."*

23. The next material development was the enactment of the *Workplace Relations & Other Legislation Amendment Act 1997* (Cth). These amendments broadened the availability of the withdrawal provisions by expanding the definition of "*constituent part*" in s.253ZI(1) to also include a "*separately identifiable constituent part*" which was defined in s.253ZI(1) as follows:

> *"**separately identifiable constituent part**, in relation to an amalgamated organisation means:*
>
> (a) if an organisation de-registered under Division 7 in connection with the formation of the amalgamated organisation remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation--that branch, division or part; or
>
> (b) if a State or Territory branch of such a de-registered organisation under its rules as in force immediately before its de-registration remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation--that branch, division or part."

24. The above definition is substantively identical to paragraphs (a) and (b) of the current definition in s.93 of the RO Act. The key difference between the two definitions is that, as explained below, following the introduction of the *Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamation) Act 2020* (**the Amendment Act**), s.93 now also includes a paragraph (c).

25. In 2002 upon the enactment of the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth) the relevant provisions were moved into Schedule 1B to the WR Act.

26. In 2005, the withdrawal scheme was again reformed with the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The definition of "*constituent part*" was not materially changed. Section 94 was amended to provide that applications were to be made to the Commission instead of the Federal Court.

27. In 2009, the RO Act was enacted and incorporated the provisions of Schedule 1 of the WR Act. No material changes were made to the withdrawal provisions at this time.

28. Critical to the construction of Part 3 as it now stands, are the amendments made to it by the Amendment Act[5] which came into effect on 16 December 2020.

29. The Amendment Act significantly broadened the application of the scheme.

30. Significantly for the present application, there was an amendment of the definition of "*a separately identifiable constituent part*" by the addition of paragraph (c). That in turn

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5 Act No. 131/2020.

expanded the definition of "*constituent part"* and in consequence, the scope of operation of s.94.

31. The terms of paragraph (c) stand in contrast to the terms of paragraphs (a) and (b). Paragraphs (a) and (b) identify parts of the amalgamated organisation that had previously been an organisation which was deregistered in connection with an amalgamation or a branch of such a deregistered organisation. Each expressly states the need for a connection to a deregistered organisation. Paragraph (c) does not and the reason for that is explained in paragraphs 15-16 of the *Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamation) Bill 2020* (***Explanatory Memorandum***) which states in relation to paragraph (c):

> *"This item adds to the definition of* ***separately identifiable constituent part****, new paragraph (c) which is, any branch, division or part of the amalgamated organisation not covered by existing paragraphs (a) and (b) that is separately identifiable under the rules of the organisation.*
>
> *The effect of this amendment is to provide that the withdrawal provisions set out in Part 3 of Chapter 3 apply to any branch, division or part of an amalgamated organisation that is separately identifiable under the rules of the organisation. This means that the ability to withdraw from an amalgamation is not limited by the pre-requisite of de-registration in connection with the formation of the amalgamated organisation."* [6] (Underlining added)

C. The Mining Division is a constituent part of the CFMMEU as a result of the 2018 amalgamation

32. The determination of the s.94(1) issue involves an exercise of statutory construction.

33. In order to determine *the s.94(1) issue*, the Commission should consider the following questions:

    (a) Is the Mining Division a constituent part of the CFMMEU within the meaning of s.94(1) of the RO Act? (**Question 1**); and

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6 [15]-[16].

(b) Did the Mining Division become a part of the CFMMEU as a result of the 2018 amalgamation between the CFMEU, the TCFUA and the MUA? (**Question 2**)

34. For the reasons set out below, the Commission should answer the above questions in the positive.

C.1. The principles of statutory construction

35. The applicable principles of statutory construction are well settled. In *Advantaged Care Pty Ltd v Health Services Union* [7] the Full Bench (Ross J, Hatcher VP and Lee C) cited the following summary from *SZTAL v Minister for Immigration and Border Protection* [2017] (2017) 262 CLR 362 (per Kiefel CJ, Nettle and Gordon JJ) at [14]:

> "*The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose (Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 381-382 [69]-[71]; Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 at 46-47 [47]). Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense (CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408). <u>This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction</u>. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*" (Underlining added)

C.2. The Mining Division is a constituent part of the CFMMEU (Question 1)

36. As has been seen above, "*constituent part*" is defined in s.93 and it includes a "*separately identifiable constituent part*". The latter term is also defined in s.93 and it is its meaning that is required to be addressed as part of the *s.94(1) issue.*

37. It is submitted by Kelly that the Mining Division falls within paragraph (c) of the definition of "*separately identifiable constituent part*" in s.93.

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7 [2021] FWCFB 453 at [24].

38. In contention between Kelly and the CFMMEU is the question of what type of organisational entity or unit within the amalgamated organisation, falls within the scope of paragraph (c).

39. Kelly submits that (as outlined in paragraph 31 above), in contradistinction to paragraphs (a) and (b), paragraph (c) intends to and does cover branches, divisions or parts of the amalgamated organisation that were not branches, divisions or parts of an organisation deregistered in connection with the formation of the amalgamated organisation. That construction takes account and gives effect to:

    (a) the exclusion of (a) and (b) which is explicitly expressed in paragraph (c); and

    (b) the absence in paragraph (c) of the explicit requirement in (a) and (b) for a connection to a deregistered organisation.

40. Further, it takes account of the way the object of each paragraph is described. In (a), the object is an organisation deregistered under Part 2; in (b), the object is a State or Territory branch of a deregistered organisation; and in (c), significantly, the object is a branch, division or part of the amalgamated organisation.

41. Thus, Kelly's construction relies on the text of the different parts of the definition read in context. It is a construction which is confirmed by the Explanatory Memorandum as extracted at paragraph 31 above.[8]

42. The CFMMEU's submissions offer no close examination of the text of the definition. Instead they contend that despite the absence in paragraph (c) of any reference to a deregistered organisation, as appears in (a) and (b), nonetheless (c) only applies to a branch, division or part of such a deregistered organisation. It offers no reason for ignoring the absence of the reference or why the legislature did not include the reference consistently with the terms of (a) and (b). It is submitted that this is a fatal flaw in the CFMMEU's submission. It ignores what appears to be a deliberate differentiation by the legislature between paragraphs (a) and (b) on the one hand and (c) on the other. It is a

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8 *Acts Interpretation Act 1901*(Cth), s.15AB and see also the discussion in *ABCC v CFMEU (Bay Street Case)* (2018) 260 FCR 564 at 579 [51].

deliberate differentiation which is confirmed by the clear statement in the Explanatory Memorandum referred to above.

43. To try to avoid the problems referred to in the preceding paragraph, at [51] of the CFMMEU's Outline it is submitted that the reference in paragraph (c) to paragraphs (a) and (b), indicates that (c) is meant to apply to other "units" of deregistered organisations that are not covered by (a) and (b). That submission must fail because it cannot overcome the deliberate difference of wording in (c). Had it been intended to operate as CFMMEU contends, one would have expected the draftsperson to frame (c) consistently with (a) and (b); it would have been simple and obvious to include after the words "*any branch, division or part*" the same phrase as appears in (b), namely, "*of such a de-registered organisation under its rules as in force immediately before its de-registration* (which) *remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation*". Those words are not in (c) and the CFMMEU is effectively asking the Commission to read them in, which is impermissible.[9]

44. Then at [52] of the CFMMEU's Outline, it is said that unless (c) is read *ejusdem generis* with (a) and (b), that is, by limiting its application to entities which were part of the deregistered organisation, it would cover all the entities already covered by (a) and (b) and thus render them otiose. This submission fails for two reasons.

45. Firstly, it proceeds on an erroneous understanding of the construction which Kelly advances for paragraph (c) of the definition. Kelly submits that the expressed exclusion of (a) and (b) means that (c) covers branches, division or parts of the amalgamated organisation that were not branches, division or parts of the deregistered organisation. On this basis, (a) and (b) retain their function in relation to branches, division or parts of the deregistered organisation and (c) covers those branches, division or parts of the deregistered organisation that are not covered by (a) and (b). The present application is a case in point which demonstrates the utility of the differentiation reflected in the three paragraphs of the definition.

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9 *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [38] per French CJ, Crennan and Bell JJ.

46. Secondly, the *ejusdem generis* maxim is not applicable to the definition. The resort to such maxims has been criticised. In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* Gummow and Hayne JJ wrote:

> "*Counsel for the Minister, in oral argument, invoked the maxim expressum facit cessare tacitum (when there is express mention of certain things, then anything not mentioned is excluded), and its affinity with the above statement will be apparent. But, whilst "rules" or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose.''*[10]

47. To similar effect is that statement of Dixon J in *Cody v J H Nelson Pty Ltd*:

> "[i]t is wrong to use the rule for an *ejusdem-generis* construction as a piece of abstract or mechanical reasoning. It must be applied not *simpliciter* but *secundum quid*. It should be used as a guide in a process of interpretation which takes into account the whole instrument and the subject matter."[11]

48. Finally, in *Vella v Minister Immigration and Border Control* Buchanan, Flick and Wigney JJ stated:

> "*The reading down of general words by application of the ejusdem generis rule is rarely justified and depends on the entire statutory context. In Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113, Spigelman CJ (with whom Handley and Hodgson JJA relevantly agreed) said, of the ejusdem generis rule (at [127]):*
>
> > *The process of reading down general words in a statute is a frequently recurring issue in statutory interpretation. (See, for example, the authorities I referred to in R v Young (1999) 46 NSWLR 681 at 689 [23]-[29].) Application of the ejusdem generis rule is a specific example of this process. The application of this rule, in substance, gives the immediate verbal context determinative weight in the process of construing general words. <u>In my opinion, this is rarely justified. Whether or not general words ought [to] be read down is to be determined by the whole of the relevant context, including other provisions of the statute and the scope and purpose of the statute</u>.*
> > (Emphasis added.)"[12]

49. It is submitted on behalf of Kelly that when the definition of *separately identifiable constituent part* is construed by reference to established principles of statutory

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10 [2006] HCA 50; (2006) 228 CLR 566 at [54].

11 [1947] HCA 17; (1947) 74 CLR 629 at 649.

12 (2015) 230 FCR 61 at 77 [63].

construction, there is no room for the application of the *ejusdem generis* maxim. The application of those principles support the construction advanced by Kelly above.

50. At [42] of the CFMMEU's Outline, in aid of its proposed construction of paragraph (c) of the definition of *separately identifiable constituent part*, CFMMEU proffers a submission as to the object of Part 3 as recorded in s.92. The submission should be ejected for the following reasons.

51. First, it is well established that general statements in a statute as to its purpose or object need to be treated with caution and should be understood by reference to other provisions contained in the legislation.[13] A general statement of purpose can be qualified by one of the operative provisions in the statute.[14] In other words, the object of the statute is to be gleaned from an analysis of the entire statute.

52. In *S v Australian Crime Commission*[15] Mansfield J made the following observation in respect of an objects clause "*…such a clause cannot cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is clear*".

53. Second, the CFMMEU's construction of s.92 is at odds with the plain and ordinary meaning of the words and therefore wrong.

54. Section 92 is quite straight forward as a general statement of object for a Part that is dealing with withdrawal from amalgamation; in order to have a withdrawal from amalgamation there must first have been an amalgamation and then there may be provision for parts of the entity created by the amalgamation, namely, the amalgamated organisation, to withdraw from it.

55. Paragraph (a) of s.92 refers to organisations that have taken part in amalgamations and paragraph (b) refers to branches, divisions or parts of organisations "of that kind", meaning, organisations that have taken part in amalgamations. The phrase "of that kind" should not be read in the restrictive manner favoured by the CFMMEU. It should simply

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13 *IW v City of Perth* (1997) 191 CLR 1 at 12 (per Brennan CJ and McHugh J).

14 *Victims Compensation Fund Corporation v Brown* [2003] HCA 54; (2003) 201 ALR 260. Also see *MyEnvironment Inc v VicForests* [2013] VSCA 356; (2013) 42 VR 456 [2]-[18] (per Warren CJ), [148]-[155] (per Tate JA).

15 (2005) 144 FCR 431, [22].

be read as a reference to an organisation that took part in an amalgamation. That is the plain meaning of the words and one that is consistent with the definition of *separately identifiable constituent part* in s.93, which in turn informs the operation of s.94.

56. Third, the CFMMEU's construction ignores and is at odds with the Explanatory Memorandum which makes it clear that under s.94(1) it is no longer necessary for the separately identifiable constituent part to have been a part of the organisations that entered into the amalgamation to form the amalgamated organisation and were then de-registered. The CFMMEU's construction is untenable in light of the Explanatory Memorandum.

57. The facts upon which Kelly relies in order to make out the basis for application of paragraph (c) of the definition of *separately identifiable constituent part*, are not in contention:

(a) The CFMMEU is an amalgamated organisation as defined in s.93.

(b) The Mining Division existed as a Division of the CFMEU immediately preceding its amalgamation on 27 March 2018 with the MUA and the TCFUA (**2018 Amalgamation**).

(c) It existed in the same form as a Division of the CFMMEU immediately after the 2018 Amalgamation and has continued in that form until the present time.[16]

(d) The Mining Division is not a successor to any organisation deregistered under Part 2 in connection with the 2018 Amalgamation.

(e) The Mining Division is not a successor to any State or Territory branch of an organisation deregistered under Part 2 in connection with the 2018 Amalgamation.

(f) The only organisations that were deregistered in connection with the 2018 Amalgamation were the MUA and the TCFUA.

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16 Murphy's statement at [44] and exhibits DVM-27, DVM-28, DVM-29 and DVM-30.

58. It is submitted that having regard to the facts in the preceding paragraph and applying the construction of paragraph (c) as proposed by Kelly, the Mining Division is a *separately identifiable constituent part* as defined in s.93.

59. Whilst not necessary for the purposes of the case being advanced by Kelly, it is submitted that [53] and [54] of the CFMMEU's Outline are unhelpful because the observations of Lee J in *Gilchrist v Australian Municipal, Administrative, Clerical & Services Union*[17] address a situation that is not in issue in this matter. The Mining Division is not claiming to be relying on paragraphs (a) and (b) of the definition of *separately identifiable constituent part* in s.93 and it is those paragraphs that Lee J was addressing.

C.3. The Mining Division became a part of the CFMMEU as a result of the 2018 amalgamation between the CFMEU, the TCFUA and the MUA (Question 2)

60. The answer to this issue once again calls for an exercise of statutory construction, this time of s.94.

61. The starting point for the exercise is to recognise that the section operates in relation to an entity called an "amalgamated organisation". That term is defined in s.93 and the definition is set out in paragraph 12 above.

62. There can be no doubt that the CFMMEU is an amalgamated organisation after the 2018 Amalgamation. The submissions at [60]-[63] of the CFMMEU's Outline are misdirected because the definition of "amalgamated organisation" is distinct and unrelated to registration; registration is a non-issue in this case. It may be assumed that the legislature well understood how Part 2 worked and what effect an amalgamation had on the "host' union. The definition of "amalgamated organisation" must be read in that context.

63. The amalgamated organisation is the CFMMEU. The CFMMEU took on its present form as a result of the 2018 amalgamation. Prior to the 2018 Amalgamation the amalgamated organisation did not yet exist. Prior to the amalgamation there were three separate organisations, namely the CFMEU, the TCFUA and the MUA.

64. Following an amalgamation, the amalgamated union may take on a different structure and indeed, in the present case by way of example, in the 2018 Amalgamation the

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17 [2001] FCA 644.

amalgamated union did change its structure by creating a new Division for the MUA and expanded the scope of the Manufacturing Division to incorporate the members of the TCFUA. There were also consequential changes to the structures of the union's governing bodies. The position of existing constituent parts of the CFMEU were affected by the creation of the CFMMEU in the 2018 Amalgamation.

65. For all of these reasons it is no misuse of language to refer to those types of constituent parts becoming part of the amalgamated organisation formed in the 2018 Amalgamation.

66. And for completeness, it is completely untenable to suggest as in [60] of the CFMMEU's Outline, that the reference to "organisation" in s.94(1)(a) is other than a reference to the amalgamated organisation referred to in the chapeau of s.94(1). It ignores the linkage of "amalgamated organisation" and "organisation" in the chapeau. And it makes no sense in the context of the provision.

67. The CFMMEU submits that the Mining Division did not become a part of the CFMMEU as a result of an amalgamation, and it was created out of an administrative rule change, unconnected with an amalgamation.[18] This submission unhelpfully conflates two separate issues and is liable to lead the Commission into error if accepted. It is uncontroversial that the Division first came into existence by an administrative rule change that preceded and was unconnected with an amalgamation. However, it does not follow from this that the Mining Division did not became a part of the amalgamated organisation, the CFMMEU as a result of the 2018 Amalgamation. Indeed, it is the very kind of situation which paragraph (c) of the definition of *separately identifiable constituent part* was designed to capture.

68. The CFMMEU submits that Kelly's construction would make s.93(4) unnecessary and that this counts against his construction.[19] However this submission of the CFMMEU fails for lack of proper analysis of the provision in context.

69. It is firstly necessary to note that s.93(4) was introduced in the Amendment Act together with the changes to the definition of *separately identifiable constituent part* in s.93. Its effect is to clarify and facilitate the treatment of branches, divisions or parts under

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18 CFMMEU's Outline, [58].

19 CFMMEU's Outline, [64].

paragraph (c) for the purposes of s.94(1). It confirms the construction of paragraph (c) advanced by Kelly because it countenances a constituent part becoming part of an organisation before the latter becomes the amalgamated organisation.

70. Thus, contrary to the submission at [64] of the CFMMEU's Outline, s.93(4) serves the purpose of facilitating and removing any doubts about how paragraph (c) of the definition is to be dealt with in s.94(1).

71. The CFMMEU submits that Kelly's position on "becoming a part of the amalgamated organisation" is not consistent with the ordinary meaning of the words used because Mining Division has been "*part of the legal entity that is the CFMMEU since 1995*".[20] Again, this submission suffers from the vice of conflating the legal entity of the "host organisation" in a proposed amalgamation with the concept of an "*amalgamated organisation*", which is a separately recognised artefact under the RO Act. The CFMMEU's Submission should be rejected. The submission made by Kelly is entirely consistent with the ordinary meaning of the words used.

72. The CFMMEU submits that on Kelly's construction, upon any amalgamation each administrative unit of an organisation, no matter how large or small, would be able to apply to withdraw and obtain separate registration and that this is contrary to the text of the provision, inconsistent with the stated purpose of Part 3 and inconsistent with the legislative history.[21] This submission should be rejected. Insofar as this submission relates to the text of the provision and the purpose of Part 3 Kelly relies on the submissions set out above. Furthermore, insofar as the CFMMEU expresses concern about the size of a potential constituent part seeking withdrawal, it is to be noted that neither paragraph (a) nor (b) of the definition of *separately identifiable constituent part* posits any size limit in relation to the parts to which they apply. Size is not relevant in the statutory scheme for withdrawal from amalgamation.

73. With regard to the legislative purpose of Chapter 3, there is no objects section for Chapter 3. The submission at [66] of the CFMMEU's Outline is an inference without a proper foundation. It pays no attention to the fact that Chapter 3 contains Part 2 and Part 3. It

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20 CFMMEU's Outline, [65].

21 CFMMEU's Outline, [66].

fails to pay any attention to the progressive easing of the legislative regime for withdrawal from amalgamations (of which the Amendment Act is the most recent example), and so far as the asserted object of rationalising the number of unions, it does not have regard to the progressive easing of the "conveniently belong" test which allowed an easier path for registration of new unions as part of the policy of competitive unionism. The submission is untenable and should be rejected.

D. Disposition

74. For the reasons set out above, the Commission ought to conclude that:

(a) the Mining Division is a constituent part of the CFMMEU within the meaning of s.94(1) of the RO Act; and

(b) the Mining Division became a part of the CFMMEU as a result of the 2018 amalgamation between the CFMEU, the TCFUA and the MUA.

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H BORENSTEIN

Y BAKRI

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