DECISION

Fair Work

(Registered Organisations) Act 2009 s.94

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union
(D2021/2)

Registered Organisations

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 14 SEPTEMBER 2021

Application for withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union

1. Background

[1] Mr Grahame Kelly is a member of the Central Council of the Mining and Energy Division (M&E Division) of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and has applied under s.94 of the *Fair Work (Registered Organisations) Act 2009* (RO Act) for a secret ballot to be held to decide whether the M&E Division should withdraw from the CFMMEU (the Application).

[2] The Application and accompanying documents were lodged on 26 March 2021 and comprised:

- a completed Form 2 Application for ballot under Part 3 of Chapter 3 of the RO Act;
- a copy of a resolution of the Central Council of the M&E Division authorising Mr Kelly to make the Application;
- a written outline of the proposal for the M&E Division to withdraw from the CFMMEU (the Outline);
- a copy of the name and rules proposed for the organisation to be registered by the M&E Division once the proposed withdrawal from amalgamation takes effect; and
- a copy of the name and altered rules proposed for the amalgamated organisation, the CFMMEU, once the proposed withdrawal from amalgamation takes effect.

[3] The Application is made on the basis that:

- the CFMMEU is an 'amalgamated organisation' for the purposes of Part 3 of Chapter 3 of the RO Act;
- the M&E Division is a 'constituent part' of the CFMMEU, being a 'separately identifiable constituent part' under paragraph (c) of the definition in s.93(1) of the RO Act; and
- the M&E Division became a constituent part of the CFMMEU as result of the amalgamation of the CFMEU with the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia (TCFUA) on 27 March 2018 (2018 amalgamation).[1]

[4] The CFMMEU opposes the Application.

[5] At a mention hearing on 28 April 2021, it became evident that the basis on which the Application is made raised a threshold issue concerning the proper construction of s.94(1) of the RO Act which required determination before dealing further with the substantive Application.[2]

[6] On 30 April 2021 we issued a Statement and Directions requiring the CFMMEU and any other interested party and the Applicant to file full written submissions and any statements of evidence directed to the threshold issue.

[7] We issued a Background Document on 8 June 2021 which contained, in overview, the competing contentions of the parties and set out the following primary questions, with which the Applicant and the CFMMEU agreed,[3] directed to resolving the threshold issue earlier identified:

- 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.

[8] At the hearing on 8 June 2021, the Australian Council of Trade Unions (ACTU) sought and was granted leave to intervene, and its submissions were directed to the statutory construction issues underlying the second question above.

[9] Before turning to consider the two questions and the statutory framework which underpins them, it is convenient to set out some relevant history of amalgamations involving the organisation now known as the CFMMEU.

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[1] Outline at [7]-[9] and Form 2 at [3]

[2] Transcript 28 April 2021 PN11-PN74

[3] Transcript 8 June 2021 at PN189 (Applicant) and PN366 (CFMMEU)

2. History of amalgamations and the Mining and Energy Division

[10] The relevant history of amalgamations involving the organisation now known as the CFMMEU and the formation of the M&E Division is set out in some detail in the statement[4] of Mr Declan Murphy, Solicitor for the CFMMEU and it is uncontroversial.[5]

[11] The CFMMEU as it is now known was first registered under the name "The Building Workers' Industrial Union of Australia" (BWIU) on 11 September 1962.[6] Since then, there have been a number of amalgamations involving the organisation. These are noted on the organisation's certificate of registration.[7] Each amalgamation involved a change in the name of the organisation.

[12] On 20 September 1991, the BWIU was re-named "The ATAIU and BWIU Amalgamated Organisation". On 10 February 1992, The ATAIU and BWIU Amalgamated Organisation was re-named the "Construction, Forestry and Mining Employees Union". On 28 September 1992, the Construction, Forestry and Mining Employees Union was re-named the "Construction, Forestry, Mining and Energy Union" (CFMEU). On 27 March 2018, the CFMEU was renamed the CFMMEU.

[13] Relevantly, on 6 March 1991, an application was made under s.242 of the *Industrial Relations Act 1988* (IR Act) for approval of an amalgamation between the BWIU and the United Mineworkers Federation of Australia (UMFA). The scheme for amalgamation accompanying the application provided, inter alia, for the following:

- the name of the amalgamated organisation to be the Construction and Mining Employees Union" (CMEU);
- UMFA to be amalgamated and merged with the BWIU;
- the BWIU is to be the vehicle to achieve the amalgamation;
- the industry and eligibility rules of the CMEU will incorporate the existing BWIU Rules and UMFA Rules;
- there shall be a division of the CMEU created called the 'Mining Division'; and
- all persons who are or who become members of the CMEU who are covered by that part of the eligibility rule which was formerly that of UMFA shall be assigned to the Mining Division.[8]

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[4] Exhibit CFMMEU 1

[5] Transcript 8 June 2021 PN220-PN221

[6] Exhibit CFMMEU 1, Annexure DVM-1

[7] Ibid

[8] Exhibit CFMMEU 1, Annexure DVM-4

[14] The scheme for amalgamation was subsequently amended to reflect the amalgamating organisations as "The ATAIU and BWIU Amalgamated Organisation" and UMFA.[9] The amendments replaced "BWIU" with "The ATAIU and BWIU Amalgamated Union" and inserted "Forestry" after "Construction, in the proposed name of the amalgamated organisation.[10]

[15] That amalgamation took effect on 10 February 1992.[11] The UMFA was de-registered on the same day.[12] Alterations to the Rules of the Construction, Forestry and Mining Employees Union also commenced which included widened eligibility (Rule 2(D)), the creation of a restructured Mining Division (Rule 42(iii)(a)) and membership of the Mining Division (Rule 3).[13]

[16] On 6 April 1992[14] an application was made under s.242 of the IR Act for approval of an amalgamation between the Construction, Forestry and Mining Employees Union, the Federated Engine Drivers and Firemen's Association (FEDFA) and the Operative Plasterers and Plaster Workers Federation of Australia (OPPWF).

[17] The scheme for amalgamation accompanying the application included that:

- the name of the amalgamated organisation shall be the Construction, Forestry, Mining and Energy Union (CFMEU);
- FEDFA and OPPWF shall be amalgamated and merged with the Construction, Forestry and Mining Employees Union;
- Construction, Forestry and Mining Employees Union shall be the vehicle to achieve the amalgamation;
- the industry and eligibility rules of the CFMEU will incorporate the rules of the Construction, Forestry and Mining Employees Union and those of FEDFA and OPPWF;
- the CFMEU will consist of four divisions, named:
    - BWIU/Plasterers Division (formerly known as BWIU Division);
    - ATAIU Division;
    - FEDFA Division;
    - UMW Division (formerly known as Mining Division);

[9] Exhibit CFMMEU 1, Annexure DVM-5

[10] Ibid

[11] Exhibit CFMMEU 1, Annexure DVM-6

[12] Exhibit CFMMEU 1, Annexure DVM-8

[13] Exhibit CFMMEU 1, Annexure DVM-9, DVM-10

[14] Exhibit CFMMEU 1, Annexure DVM-13

- all persons who are or become members of the CFMEU and are covered by that part of the eligibility rule which was formally that of the Mining Division shall be assigned to the UMFA Division;

- all persons who are or become members of the CFMEU and are covered by that part of the eligibility rule which was formally that of the FEDFA shall be assigned to the FEDFA Division; and

- subsequent to amalgamation the union's Divisions will be restructured in industry divisions.[15]

[18] This amalgamation took effect on 23 September 1992 and the FEDFA and OPPWF were de-registered on that day.[16] Alterations to the Rules of the Construction, Forestry and Mining Employees Union also took effect. There was no alteration to Rule 2(D) noted earlier. Rule 2(E) was included to deal with the FEDFA coverage rule. Rule 42(i) provided that upon amalgamation the UMW Division shall consist of members eligible for membership under Rule 2(D), and that the FEDFA Division shall be those persons eligible for membership under Rule 2(E). Rule 3 of the Mining Division's Rules remained unaltered. Rule 2 of the Rules of the FEDFA Division provided that "every member who is a member of the union by virtue of Rule 2 Sub-rule (E) of the National Rules shall belong to this Division." Rule 42(iii) of the organisation's rules provided that following amalgamation there shall be a restructuring of the Divisions on the following basis:

- Rule 42(iii)(a) provided that a restructured Mining Division shall be created consisting of "all members of the union eligible to be members under Rule 2(D) and all members, including members eligible under Sub-Rules 2(A), (B), (C) and (E) employed in the Mining industry" (amendment underlined); and

- Rule 42(iii)(d) provides that an Energy Division will be created "which will consist of all other members of the Union."[17]

[19] On 23 September 1993, the Rules of the CFMEU were altered to include Rule 42A,[18] which provided for the incremental integration of the FEDFA Division into the CFMEU's other Divisions. Rule 42A(2)(c) provided for the FEDFA Division to be restructured in steps involving "the continued operation of the Divisional Branches of the FEDFA Division with the intent, over time, of the restructuring of said Divisional Branches into the Building Unions Division, UMW Division and the ATAIU Division."

[20] On 5 May 1995, the CFMEU's rules were altered to merge the Mining Division with the Energy Division. It appears that the title of Energy Division and FEDFA Division are sometimes used interchangeably to refer to the same division. The same appears to be true of the Mining Division and UMW Division.

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[15] Exhibit CFMMEU 1, Annexure DVM-12

[16] Exhibit CFMMEU 1, Annexure DVM-13

[17] Exhibit CFMMEU 1, Annexure DVM-15, DMV-16, DMV-17

[18] Exhibit CFMMEU 1, Annexure DVM-18

[21] The rule alterations created a new M&E Division.[19] Rule 42(iii)(a) following alteration provided for the Mining Division's coverage as follows:

> "there shall be created a restructured Mining Division which shall consist of all members of the union eligible to be members under Rule 2(D) and all members, including members eligible under Sub-Rules 2(A), (B), (C) and (E) employed in the Mining, Energy and Exploration industries" (amendment underlined).[20]

[22] Following the alteration, Rule 3 of the Rules of the M&E Division provided:

> "The Division shall consist of an unlimited number of employees, otherwise eligible for membership of the Union who:
>
> (A) are engaged in or in connection with the Coal and Shale Industry;
>
> (B) are engaged in or in connection with the Mining or Exploration Industries;
>
> (C) are engaged as employees or as employees of contractors, in or in connection with the following industries: (a) power generation, co-generation, transmission and distribution; (b) oil; (c) gas; (d) nuclear; and (e) chemical production.
>
> (D) have been elected or appointed as paid officers of the Division or whilst financial members of the Division are elected as representatives of any working class organisation to which the Division is affiliated, or as a working class member of Parliament."[21]

[23] Following the M&E Division's creation there remained an FEDFA Division with coverage limited to Victoria. The FEDFA Division maintained its own divisional Rules.[22]

[24] On 21 August 2003, CFMEU National Secretary John Maitland circulated a memorandum to CFMEU National Executive members titled "FEDFA Division" which relevantly provided that:

- the FEDFA Victorian Divisional Branch reached agreement with the Mining & Energy Division to form the M&E Division Victorian District from 2 January 2001;
- the FEDFA Victorian Divisional Branch reached agreement with the Construction and General Division to form a second Construction & General Divisional Branch in Victoria;
- there was attached a resolution to alter the CFMEU's Rules for National Executive members to vote on, which included a resolution that the Rules of the FEDFA Division of the CFMEU be deleted in their entirety; and
- there was attached a translation agreement signed by senior officers of the FEDFA Division and other bodies within the CFMEU including the M&E Division, which

[19] Exhibit CFMMEU 1, Annexure DVM-19, DMV-20

[20] Exhibit CFMMEU 1, Annexure DVM-20

[21] Exhibit CFMMEU 1, Annexure DVM-21

[22] Exhibit CFMMEU 1, Annexure DVM-22

relevantly provided for the translation of 1214 FEFA Division members to a newly created Divisional District known as the M&E Division Victorian Divisional District, including members employed at powerhouses.[23]

[25] The M&E Division's rules as in effect on 13 August 2001 show that Rule 20 provides for transitional arrangements governing the integration of the members and officers of the former FEDFA Division into the M&E Division.[24] Rule 42A which, as earlier noted, provided for the incremental integration of the FEDFA into the CFMEU's other Divisions, was amended on several occasions before finally being deleted in 2018.

[26] On 26 February 2018, an application was made for the amalgamation of the CFMEU with the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia (TCFUA). The Scheme for Amalgamation accompanying the application provided, inter alia, for the following:

- the name of the amalgamated organisation shall be the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU);
- the CFMEU is the proposed amalgamated organisation;
- the MUA and TCFUA will be merged with the CFMEU;
- the proposed deregistering organisations (the MUA and the TCFUA) will be de-registered;
- a Maritime Union of Australia Division (MUA Division) will be created;
- MUA members would become members of the MUA Division;
- the TCFUA will merge with the Forestry Division of the CFMEU with that Division to be renamed the Manufacturing Division;
- TCFUA members would become members of the Manufacturing Division;
- the structure and rules of the Mining and Energy Division and the Construction and General Division will not be affected by the amalgamation; and
- the rules of the Mining and Energy Division and the Construction and General Division are not altered as part of the amalgamation.[25]

[27] On 27 March 2018, the day fixed for the amalgamation to take effect, the MUA and the TCFUA were de-registered as organisations. [26] The CFMEU became known as the CFMMEU

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[23] Exhibit CFMMEU 1, Annexure DVM-23

[24] Exhibit CFMMEU 1, Annexure DVM-24

[25] Exhibit CFMMEU 1, Annexure DVM-25

[26] Exhibit CFMMEU 1, Annexure DVM-26

through a rules alteration but continued as a registered organisation. Other rules were altered as a consequence of the amalgamation. The following rules were not altered:

- Rule 42(iii)(a) (M&E Division coverage); and
- Rule 2 of the M&E Division Rules.[27]

[28] No changes related to the 2018 amalgamation were made to other M&E Division Rules.[28]

3. Legislative framework and history

[29] Provisions enabling the amalgamation of registered organisation have been a feature of federal industrial relations legislation since first introduced by the *Conciliation and Arbitration Act 1972* (Cth). These provisions have over the years been modified. Significant amendments to the legislative scheme regulating the amalgamation of organisation were made by the *Industrial Relations Legislation Amendment Act 1991* (Cth). At that time, the statutory scheme did not contain provisions allowing for the withdrawal from amalgamations. The current scheme under the RO Act so provides in Part 3 of Chapter 3 of the RO Act and Division 2 of Part 4 of the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations).

[30] A predecessor to Part 3 of Chapter 3 of the RO Act was Part IX Division 7A of the *Workplace Relations Act 1996* (WR Act), as introduced by the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act 1996). Save for the references to the applicable and preceding legislation, s.253ZH of the WR Act ('Object of Division') was in similar terms to s.92 of the RO Act.

[31] Section 92 of the RO Act sets out the object of Part 3 of Chapter 3 and currently provides as follows:

> **92 Object of Part**
>
> The object of this Part is to provide for:
>
> (a) certain organisations that have taken part in amalgamations (either under this Act or the *Workplace Relations Act 1996* as in force before the commencement of this Part) to be reconstituted and re-registered; and
>
> (b) branches, divisions or parts of organisations of that kind to be formed into organisations and registered;
>
> in a way that is fair to the members of the organisations concerned and the creditors of those organisations.

[27] Exhibit CFMMEU 1, Annexure DVM-27, DVM-28, DVM-29, DMV-30

[28] Ibid

[32] The underlined comma and words in s.92(b) above were added by item 2 of Schedule 1 of the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (RO Amendment Act).

[33] Section 253ZJ(1) of the WR Act was substantially the same as s.94(1) of the RO Act. The significant difference for present purposes is that s.253ZJ(1) only permitted a withdrawal application to be made in relation to an amalgamation that had occurred after 1 February 1991. Section 253ZJ(1) as introduced was as follows:

> **253ZJ Applications to the Court for ballots**
>
> (1) 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 5 years after the amalgamation occurred.

[34] The Explanatory Memorandum for the Bill for the WROLA Act 1996 described the purpose of s.253ZJ(1) as follows:

> Proposed subsection 253ZJ(1) provides for an application to be made to the Federal Court for a secret ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation. An application may be made only if the requirements of paragraphs (1)(a), (b) and (c) are satisfied. The purpose of those requirements is to limit the provisions to amalgamations which occurred after 1 February 1991 when amendments designed to encourage and facilitate amalgamations came into effect, provide a reasonable period for the amalgamation to work, and to specify a period after which the amalgamation cannot be undone.[29]

[35] Section 94(1) of the RO Act provides:

> **94 Application to the FWC for ballots**
>
> (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:

[29] Explanatory Memorandum, Workplace Relations & Other Legislation Amendment Bill 1996 (Cth) at [15.40].

(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.

[36] 'Amalgamated organisation' and 'constituent part' are defined under s.93(1) of the RO Act 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.

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 or a predecessor law 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.

[37] A 'separately identifiable constituent part' is defined as follows:

separately identifiable constituent part, in relation to an amalgamated organisation, means:

(a) if an organisation de-registered under Part 2 or a predecessor law 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.

[38] A 'predecessor law' is, in effect, a previous iteration of the provisions of Part 2 of Chapter 3 of the RO Act, in force at any time after 1 February 1991,[30] and an 'organisation' is defined as 'an organisation registered under this Act'.[31]

[39] Save for the references to the applicable and preceding legislation, the definition of 'constituent part' in s.253ZI(1) of the WR Act was in essentially the same terms as paragraph (b) of the present definition and 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.

[40] At that time there was no definition of 'separately identifiable constituent part' and that phrase did not form part of the definition of 'constituent part'.

[41] The *Workplace Relations and Other Legislation Amendment Act 1997* (WROLA Act 1997) amended the definition of 'constituent part' to include 'a separately identifiable constituent part' and inserted a definition of 'separately identifiable constituent part'. After those amendments, save for the references to the applicable and preceding legislation, the definition of 'constituent part' was in essentially the same terms as the current definition in the RO Act. The definition of 'separately identifiable constituent part' was in essentially the same terms as paragraphs (a) and (b) of the current definition in the RO Act and provided 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.

[42] It seems common ground that the effect of the change to the definition of 'constituent part' to include a 'separately identifiable constituent part' brought about by the WROLA Act 1997 was to extend the category of persons who could make an application for a ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation.[32]

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[30] RO Act, s.93(1)

[31] RO Act, s.6

[32] CFMMEU Submission, 19 May 2021 at [35], Applicant Submission, 2 June 2021 [23]

[43] In 2002, the *Workplace Relations Legislation Amendment (Registration & Accountability Organisation) (Consequential Provisions) 2002* (Cth) repealed the provisions of the WR Act relating to registered organisations, and the *Workplace Relations Amendment (Registration & Accountability Organisations) Act 2002* (Cth) enacted those same provisions as a schedule to the WR Act.

[44] In 2005, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) made further changes to the definition of 'constituent part', although the definition was not materially affected. Section 94 of Schedule 1 of the WR Act provided that applications for withdrawal ballots were to be made to the Australian Industrial Relations Commission and not to the Federal Court.

[45] The *Fair Work (Transitional & Consequential Amendments) Act 2009* (Cth) deleted the entirety of the WR Act other than Schedule 1, which in turn became the RO Act.

[46] The RO Act was amended in December 2020 by the RO Amendment Act and the RO Regulations were amended in March 2021 by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Regulations 2021* (together, the Amendments).

[47] Amongst other matters, the Amendments were directed at enabling a 'constituent part' of an amalgamated organisation, subject to certain limitations, to be the subject of an application to the Commission to hold a ballot of members of the 'constituent part' to decide whether to withdraw from the amalgamated organisation, outside the previous time-limited period of 5 years post-amalgamation.

[48] Relevantly, the RO Amendment Act added paragraph (c) to the definition of 'separately identifiable constituent part'.

[49] The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020 described this amendment as follows:

> '14. In conjunction with the amendments in items 4 - 7 and 10, this item ensures that the withdrawal from amalgamation provisions in Part 3 of Chapter 3 will apply to amalgamations that occurred prior to 1 July 2009, when Part 2 of the Act commenced. Item 11 (definition of ***separately identifiable constituent part***), described below, also ensures that the provisions in Part of Chapter 3 are also available to a branch, division or part of an amalgamated organisation that is separately identifiable under the rules of the organisation.
>
> **Item 11 - subsection 93(1) (at the end of the definition of *separately identifiable constituent part*)**
>
> 15. 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.
>
> 16. 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.'

[50] The RO Amendment Act also amended s.93(2) (as indicated by the underlining below) and inserted new ss.93(3) and (4) as follows:

> (2) For the purposes of this Part, an organisation is taken to have been de-registered under Part 2 or a predecessor law in connection with the formation of an amalgamated organisation if the de-registration occurred in connection with the formation of:
>
> (a) the amalgamated organisation (including that organisation as it existed before any subsequent amalgamation under Part 2 or a predecessor law); or
>
> (b) another organisation that was subsequently de-registered under Part 2 or a predecessor law in connection with the formation of:
>
> (i) the amalgamated organisation; or
>
> (ii) an organisation that, through one or more previous applications of this subsection, is taken to have been de-registered under Part 2 or a predecessor law in connection with the formation of the amalgamated organisation.
>
> (3) For the purposes of subsection (2), a reference to an organisation is taken to include a reference to an organisation within the meaning of a predecessor law.
>
> (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.

[51] The Explanatory Memorandum described the amendments to s.93(2) as follows:

> 'These amendments ensure that earlier de-registrations that occurred in connection with the formation of earlier organisations that were themselves de-registered upon amalgamation where there were successive amalgamations leading to the existing amalgamated organisation are captured through the inclusion of the reference to predecessor law.'[33]

[52] It also seems common ground that the amendments made by the RO Amendment Act broadened the application of the withdrawal from amalgamations scheme under the RO Act.[34] As will be evident later, the parties differ as to the extent to which the scheme was broadened.

[53] This Application is the first application under s.94 of the RO Act following the Amendments.

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[33] Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020 at [20]

[34] CFMMEU Submission, 19 May 2021 at [39]-[40], Applicant Submission, 2 June 2021 at [29]-[30]

[54] Section 100(1) of the RO Act provides:

> **100 Orders for ballots**
>
> (1) The FWC must order that a vote of the constituent members be taken by secret ballot, to decide whether the constituent part of the amalgamated organisation should withdraw from the organisation, if the FWC is satisfied that:
>
> (a) the application for the ballot is validly made under section 94; and
>
> (b) the outline under section 95 relating to the application:
>
> (i) is a fair and accurate representation of the proposal for withdrawal from the organisation; and
>
> (ii) addresses any matters mentioned in paragraph 95(1)(b) or prescribed for the purposes of paragraph 95(1)(c) in a fair and accurate manner; and
>
> (ba) the material required by section 95A complies with the requirements of that section; and
>
> (c) the proposal for withdrawal from the organisation complies with any requirements specified in the regulations.

[55] The 'outline under section 95' and 'material required by section 95A' as referred to in s.100(1), together with certain other documents, must be provided to voters in the ballot before the vote.[35]

[56] The Commission's role under the RO Act in dealing with an application for a secret ballot for withdrawal from an amalgamated organisation is to:

- decide whether the application is validly made under s.94 (ss.94 and 94A);
- review and require any necessary amendments to be made to the prescribed outline of the proposal to withdraw from the amalgamation (s.95);
- review and require any necessary amendments to be made to the prescribed statement of proposed names, and copies of proposed eligibility rules, of the new organisation and the amalgamated organisation after the withdrawal from amalgamation (s.95A);
- review and require any necessary amendments to be made to any 'yes' statement lodged by the applicant and 'no' statement lodged by the amalgamated organisation (ss.96 and 97);
- order a secret ballot of the constituent members if the application is validly made under s.94, the documentation requirements under ss.95 and 95A are met, and the

[35] RO Act, ss.102(2) and (4) and RO Regulations reg.94B(2)

proposal for withdrawal complies with any further requirements in the RO Regulations (s.100(1));

- if the Commission orders a secret ballot, accept undertakings so as to avoid demarcation disputes (s.100(4)); and

- if the Commission orders a secret ballot, make orders for the conduct of the ballot (including dealing with any application for the ballot to be conducted by a 'designated official' rather than the AEC) (ss.100(3) and 102).[36]

[57] In deciding the questions earlier set out, we are in effect determining whether the Application is validly made under s.94.

4. Amalgamations, organisations and 'constituent parts'

[58] As earlier noted, s.94(1) of the RO Act provides that an application to the Commission may be made for a secret ballot to be held, to decide whether a 'constituent part' of an amalgamated organisation should withdraw from the organisation if, relevantly, the constituent part became part of the organisation as a result of an amalgamation under Part 2 or a predecessor law.

[59] The Applicant submits that the M&E Division is a 'constituent part' of the 'amalgamated organisation' the CFMMEU, because it is a 'separately identifiable constituent part' under subparagraph (c) of the definition of 'separately identifiable constituent part' in s.93 of the RO Act.

[60] Broadly, the Applicant submits:

- As a matter of construction, subparagraph (c) of the definition of 'separately identifiable constituent part' covers branches, divisions and parts of the amalgamated organisation that do not correspond to any branch, division or part of an organisation de-registered in connection with the formation of the amalgamated organisation.[37] In other words, the parts covered by subparagraph (c) are not the same as the parts covered by subparagraphs (a) and (b).[38]

- The M&E Division falls under subparagraph (c) of the definition and consequently is a 'constituent part' of the CFMMEU.[39]

- The CFMMEU is the amalgamated organisation and the M&E Division can be said to have become part of the amalgamated organisation as a result of the 2018 amalgamation.[40] The CFMMEU in its present form did not exist before the 2018 amalgamation. As a result of that amalgamation a new division was added and

[36] The Commission can also inquire into ballot irregularities, see RO Act, s.108.

[37] Applicant Submission, 2 June 2021 at [39]

[38] Transcript 8 June 2021 at PN185

[39] Applicant Submission, 2 June 2021 at [57]-[58]

[40] Transcript 8 June 2021 at PN186

changes were made to the governing structure, all of which affected the M&E Division.[41]

- The reference to 'amalgamated organisation' in s.94(1) is to the organisation in the particular form that it has following an amalgamation and is a 'separately recognised artefact' under the RO Act distinct from the registered entity and the legal entity.[42]

- The M&E Division became part of the CFMMEU in its present form as a result of the 2018 amalgamation.[43]

- It follows that the Application is properly made under s.94(1).

[61] The CFMMEU disagrees and in overview submits:

- As a matter of historical fact, the M&E Division was created by an internal reorganisation unconnected with any amalgamation and it does not correspond to all or part of any single organisation de-registered in forming the CFMMEU.[44]

- As a matter of construction, subparagraph (c) of the definition of 'separately identifiable constituent part' must be read down so that any separately identifiable constituent part of an amalgamated organisation, and consequently any 'constituent part' of an amalgamated organisation for the purposes of s.94(1), must correspond to all or part of an organisation de-registered in forming the amalgamated organisation.[45]

- As the M&E Division does not correspond to all or part of any single organisation de-registered in forming the CFMMEU, it is not a 'constituent part' for the purposes of s.94(1) of the RO Act. Consequently, the M&E Division cannot be the subject of an application under s.94(1).[46]

- Further, the M&E Division did not 'become part of' the CFMMEU 'as a result of an amalgamation' within the meaning of s.94(1). Rather, it became part of the CFMMEU as a result of a rule change unconnected with an amalgamation.[47]

- The Applicant's reading, under which, for the purposes of s.94(1), every constituent part of an organisation 'becomes part of' the organisation all over again after each amalgamation, should be rejected as a matter of construction.[48]

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[41] Transcript 8 June 2021 at PN187

[42] Applicant Submission, 2 June 2021 at [71]

[43] Ibid at [60]-[67]

[44] CFMMEU Submission, 19 May 2021 at [58]

[45] Ibid at [48]-[52]

[46] Ibid at [54]-[55]

[47] Ibid at [58]

[48] Ibid at [60]-[66]

- Alternatively, if the M&E Division did become part of the CFMMEU 'as a result of' an amalgamation within the meaning of s.94(1), that amalgamation was in 1992 and the application is out of time.[49]

[62] In summary the ACTU submits:

- 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. It 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).[50]

- Existing constituent parts of that registered organisation do not again become part of that organisation as a result of the amalgamation.[51]

- An existing branch, division or part that is already part of that organisation cannot sensibly be described as having become part of the organisation as a result of the amalgamation.[52]

- The interpretation advanced by the Applicant is inconsistent with the plain language of s.94(1) of the RO Act because:

    - 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.[53]

    - 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 becoming part of the amalgamated organisation, rather than any amalgamation.[54]

    - 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 amalgamation dealt with in s.94(1)(a).[55]

    - The time period runs from the amalgamation that resulted in the particular constituent part becoming part of the amalgamated organisation.[56]

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[49] Ibid at [71]

[50] ACTU Submission, 9 June 2021 at [16]

[51] Ibid

[52] Ibid

[53] Ibid at [19]

[54] Ibid

[55] Ibid at [20]

[56] Ibid

- 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.[57]

- The M&E Division was already a part of that organisation and did not become part of the CFMMEU as a result of 2018 amalgamation.[58]

- A construction of s.94(1) that would result in each and every constituent part of an organisation having capacity to apply for a withdrawal ballot under s.94(1) in the period between 2 years and 5 years following the amalgamation is inconsistent with the purpose and context of the withdrawal from amalgamation provisions of the RO Act.[59]

[63] The answers to the questions earlier set out are largely to be answered by determining the proper construction of various provisions of the RO Act.

(i) Principles of statutory construction

[64] Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the RO Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.

[65] Section 15AA of the *Acts Interpretation Act 1901* requires that a construction that would promote the purpose or object of the RO Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the RO Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the RO Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the RO Act, not to rewrite it, in the light of its purpose.[60]

[66] The plurality in *SZTAL v Minister for Immigration and Border Protection*[61] (Kiefel CJ, Nettle and Gordon JJ) described succinctly the contemporary approach to statutory construction as follows:

> 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. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. 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. Considerations of context and purpose simply recognise that, understood in

[57] Ibid

[58] Ibid at [21]

[59] Ibid at [22]-[24]

[60] See generally, *Sharon Bowker; Annette Coombe; Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The Victorian Branch and Others* [2014] FWCFB 9227.

[61] (2017) 262 CLR 362

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.'[62] (Footnotes omitted)

[67] Also in *SZTAL*, Gageler J observed:

37. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".

38. The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".

39. Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation" "is in that respect a particular statutory reflection of a general systemic principle".[63] (Footnotes omitted)

[68] The appropriate approach to the construction of s.94(1) of the RO Act is to read the words of the definition into the substantive provisions and then construe those provisions, in context and bearing in mind the statutory purpose. As McHugh J said in *Allianz Australia Insurance Limited v GSF Australia Pty Ltd*:[64]

'Except in rare cases, definitions are not intended to enact substantive rules of law. Their function is to aid the construction of those substantive enactments that contain the defined term or terms. Moreover, the meaning of the definition depends on the context and object of the substantive enactment. As I pointed out in *Kelly v The Queen*:[65]

"[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. … [O]nce … the definition applies, … the only proper … course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment. …[T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies."

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[62] Ibid at [14]

[63] Ibid at [37]-[39]

[64] (2005) 221 CLR 568 at [12]–[13]

[65] (2004) 218 CLR 216 at [103]

> In this case, therefore, the definition of "injury" is to be read into and applied in respect of s.69(1) of the Act. When that is done, the sub-section, with that term defined, must be construed in the context in which it appears and in light of the objects of that Part and the Act as a whole.'

(ii) 'Constituent part'

[69] As earlier noted, the Applicant submits that the M&E Division is a 'constituent part' of the CFMMEU, falling within the scope of subparagraph (c) of the definition of a 'separately identifiable constituent part' in s.93(1).

[70] Each of the terms 'constituent part' and 'separately identifiable constituent part' are defined under s.93(1) the RO Act and have earlier been set out.

[71] The CFMMEU submits that the purpose of Part 3 of Chapter 3 of the RO Act, as is evident from the object in s.92 of the RO Act, is to undo an amalgamation which led to the de-registration of an organisation and to re-register that organisation or constituent part of that organisation.[66]

[72] Having regard to this purpose, the CFMMEU submits that subparagraph (c) of the definition of 'separately identifiable constituent part' should be read in accordance with the *ejusdem generis* rule, such that subparagraph (c) means any administrative unit bearing the necessary relationship with the de-registered organisation. The CFMMEU submits that subparagraph (c) should be construed as extending the notion in subparagraph (b) of an administrative unit to a separately identifiable administrative unit of the de-registered organisation that was not a state branch, but which was something less than the 'organisation' under subparagraph (a).[67]

[73] The CFMMEU submits this construction is preferable for three reasons:

1. The purpose of Part 3, the text of s.94, the text of the definition of 'constituent part' and the text of subparagraphs (a) and (b) of the definition of 'separately identifiable constituent part' are all referrable to the notion of the 'constituent part' having a relationship with the de-registered organisation.[68]

2. The text of subparagraph (c) in the definition of 'separately identifiable constituent part' expressly refers to the definitions in subparagraphs (a) and (b), indicating that (c) is meant to catch units of the type described in (a) or (b), but not otherwise caught by those provisions.[69]

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[66] CFMMEU Submission, 19 May 2021 at [42]

[67] Ibid at [48]

[68] Ibid at [50]

[69] Ibid at [51]

3. If subparagraph (c) is not read consistent with the *ejusdem generis* rule, then there would be no reason to include subparagraphs (a), (b) or the introductory words to (c).[70]

[74] The CFMMEU submits that the M&E Division represents an administrative unit covering members which no previous registered organisation was, on its own, eligible to cover, and it has no previous existence as a registered organisation which has since been de-registered or as an administrative unit of such an organisation. On that basis, the CFMMEU submits that the M&E Division does not bear the necessary relationship to a de-registered organisation and is therefore not a 'separately identifiable constituent part'.[71]

[75] The CFMMEU submits that the Applicant's preferred construction should be rejected for the following reasons:

1. It is incorrect because:

    a. subparagraph (c) does not in terms apply only to any branch, division or part that was not connected with a de-registered organisation; and

    b. subparagraphs (a) and (b) are not exhaustive lists of the administrative units that may have existed in any de-registered organisation.[72]

2. It requires subparagraph (c) to be read in isolation from the definition of 'constituent part' and the object in s.92 of the RO Act, each of which point to a connection between the administrative unit(s) and the de-registered organisation:

    a. the object of Part 3 is to provide for certain organisations that have taken part in amalgamations to be reconstituted and re-registered, suggesting that Part 3 concerns de-registered organisations, and

    b. the reference in s.92(b) to branches, divisions or parts of organisations of 'that kind' plainly refers to branches, divisions or parts of organisations that need to be reconstituted and re-registered.[73]

3. It creates a lacuna in the definition so that administrative units of a de-registered organisation which do not answer the descriptions in (a) or (b), but were connected with an amalgamation, are excluded while other administrative units within the amalgamated organisation without a connection to a relevant de-registered organisation are included.[74]

[76] The Applicant submits that in contradistinction to subparagraphs (a) and (b), subparagraph (c) intends to, and does cover, branches, divisions or parts of the amalgamated

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[70] Ibid at [52]

[71] Ibid at [54]

[72] CFMMEU Submission in reply, 7 June 2021 at [2]

[73] Ibid at [4]

[74] Ibid at [7]

organisation that were *not* branches, divisions or parts of an organisation de-registered in connection with the formation of the amalgamated organisation.[75] The Applicant submits this construction takes account of and gives effect to:

- the exclusion of subparagraphs (a) and (b) which is explicitly expressed in subparagraph (c), and

- the absence in subparagraph (c) of the explicit requirement in subparagraphs (a) and (b) for a connection to a de-registered organisation.[76]

[77] The Applicant submits that this construction considers the way the object of each paragraph is described, namely that in subparagraph (a), the object is an organisation de-registered under Part 2; in subparagraph (b), the object is a State or Territory branch of a de-registered organisation; and in subparagraph (c), the object is a branch, division or part of the amalgamated organisation.[77]

[78] The Applicant rejects the CFMMEU's interpretation of subparagraph (c), arguing that:

1. It fails to explain why the legislature did not include references to a de-registered organisation in subparagraph (c), consistent with those in subparagraphs (a) and (b).[78]

2. It misconstrues the Applicant's interpretation: on the Applicant's interpretation of subparagraph (c), the exclusion of subparagraphs (a) and (b) means that subparagraph (c) covers branches, divisions or parts of the amalgamated organisation that were *not* branches, divisions or parts of the de-registered organisation. On that basis subparagraphs (a) and (b) retain their function in relation to branches, divisions and parts of a de-registered organisation, whilst subparagraph (c) covers those branches, divisions or parts of the amalgamated organisation that are not covered by subparagraph (a) and (b) and were not branches, divisions or parts of the de-registered organisation.[79]

3. There is 'no room' for the application of the *ejusdem generis* maxim.[80]

[79] The Applicant further submits that the CFMMEU's contention as to the object of Part 3 of Chapter 3 of the RO Act should be rejected because:

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[75] Applicant Submission, 2 June 2021 at [39]

[76] Ibid

[77] Ibid at [40]

[78] Ibid at [42]

[79] Ibid at [45]; At the 6th line of [45] of the Applicant's 2 June 2021 submissions he says '(c) covers those branches, division or parts of the deregistered organisation that are not covered by (a) and (b)'. However reading the paragraph as a whole and taking into account [31] and [39] of those submissions, it appears the Applicant intended this to read '(c) covers those branches, divisions or parts of the amalgamated organisation that are not covered by (a) and (b)'.

[80] Ibid at [49]

- general statements in a statute as to purpose or object are not determinative and the object of a statute should be gleaned from an analysis of the entire statute;[81]

- the CFMMEU's reading of the words 'of that kind' in s.92 of the RO Act is restrictive and the words should be read as a reference to an organisation that took part in an amalgamation;[82] and

- the CFMMEU's interpretation is at odds with the Explanatory Memorandum, which, in its discussion of s.94(1) makes clear that it is not necessary for a separately identifiable constituent part to have been part of a now de-registered organisation that entered into the amalgamation to form the amalgamated organisation.[83]

[80] For the reasons which follow, we have concluded that the M&E Division is a 'constituent part' of an amalgamated organisation for the purposes of s.94(1) of the RO Act.

[81] The relevant part of the definition of 'constituent part' in s.93(1) engaged for the purpose of this Application is a constituent part that is 'a separately identifiable constituent part'. As we earlier noted the definition of 'a separately identifiable constituent part' was amended by the RO Amendment Act to expand its meaning by including 'any branch, division or part of the amalgamated organisation not covered by subparagraph (a) or (b) that is separately identifiable under the rules of the organisation.'

[82] Subparagraph (a) is concerned with an organisation de-registered in connection with the formation of the amalgamated organisation which remains separately identifiable as a branch, division or part of the amalgamated organisation under its rules. In such a case the relevant branch, division or part of the amalgamated organisation will be a separately identifiable constituent part.

[83] Subparagraph (b) is concerned with a State or Territory branch under the rules of an organisation de-registered in connection with the formation of the amalgamated organisation which remains separately identifiable as a branch, division or part under the rules of the amalgamated organisation. In such a case the relevant branch, division or part of the amalgamated organisation will be a separately identifiable constituent part.

[84] Subparagraph (c) is not on its face confined by a particular earlier association with an organisation de-registered in connection with the formation of the amalgamated organisation. Instead, it contemplates that any branch, division or part of the amalgamated organisation which is not covered by subparagraph (a) or (b) but is separately identifiable under the rules of the organisation will be a separately identifiable constituent part.

[85] The reference to "branch, division or part" in subparagraph (c) is to an administrative unit that is part of the amalgamated organisation and separately identifiable under the rules. Such a unit is not covered by subparagraph (a) or (b) if it was not previously "an organisation de-registered under Part 2 or a predecessor law in connection with the formation of the

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[81] Ibid at [51]

[82] Ibid at [55]

[83] Ibid at [56]

amalgamated organisation" or "a State or Territory branch" of an organisation de-registered under Part 2 or a predecessor law in connection with the formation of the amalgamated organisation under that organisation's rules as in force immediately before its deregistration.

[86] In our view the absence in subparagraph (c) of a requirement for a particular connection with an organisation de-registered in connection with the formation of the amalgamated organisation, does not mean that a branch, division or part of an amalgamated organisation that is separately identifiable under the rules of the organisation but which has some connection other than those identified in subparagraphs (a) and (b) is excluded from its scope and therefore from the definition of 'separately identifiable constituent part'. If an administrative unit of an amalgamated organisation is separately identifiable under the rules of the organisation as a branch, division or part of that organisation then it is caught by subparagraph (c) if it is not otherwise caught by subparagraphs (a) and (c).

[87] We reject the CFMMEU's contention that subparagraph (c) of the definition of 'separately identifiable constituent part' should be read consistent with the '*ejusdem generis* rule', namely "any administrative unit bearing the necessary relationship with the de-registered organisation". The CFMMEU contends that subparagraph (c) should be construed as extending the notion in subparagraph (b) of an administrative unit to a separately identifiable administrative unit of the de-registered organisation that was not a State or Territory branch, but which was something less than the 'organisation' in subparagraph (a). It contends that if a division, branch (which was not State or Territory branch) or part of a de-registered organisation is 'still' separately identifiable under the rules of the amalgamated organisation that administrative unit will answer the description of a separately identifiable constituent part.[84]

[88] For the reasons we have earlier given, subparagraph (c) plainly captures an administrative unit of the kind describe by the CFMMEU. However, for the reasons which follow we do not consider that the scope of subparagraph (c) should be read as limited only to separately identifiable administrative units of an amalgamated organisation not described in subparagraphs (a) or (b) which have a relevant connection with a de-registered organisation involved in the amalgamation.

[89] *First*, it can be accepted that resort to the '*ejusdem generis* rule' may be appropriate where it is evident that faced with a long list of things with which a provision is intended to deal, the parliament chose not to spell out all of those things and instead, having set out the main or specific things within a broader category, then depending on the context and purpose, any general words might be read down to encompass only things which fall within the particular category. But here, the parliament was plainly not faced with a long list of alternatives. The CFMMEU's preferred construction could readily be accommodated by a drafting of subparagraph (c) along the following lines: "any other branch, division or part 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".

[90] *Second*, the use in subparagraph (c) of the verb "is" before the phrase "separately identifiable under the rules of the (amalgamated) organisation" stands in contrast to the use of

[84] CFMMEU Submission, 19 May 2021 at [48]

the verb "remains" (which is synonymous with continues to exist) before the same phrase in subparagraphs (a) or (b). This suggests that subparagraphs (a) or (b) are concerned with something that existed as part of a de-registered organisation in connection with the formation of the amalgamated organisation that remains or continues to exist as a branch, division or part of the amalgamated organisation under its rules.

[91] *Third*, the CFMMEU contends that a connection between an administrative unit and the de-registered organisation is necessary for the administrative unit to fall with paragraph (c) is supported by the object in s.92 of the RO Act – to provide for certain organisations that have taken part in amalgamations to be reconstituted and re-registered. It says that 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.[85] We consider the underlying premise of this contention to be wrong. It supposes that reference to "certain organisations that have taken part in amalgamations" means only those that have been de-registered in connection with an amalgamation. A host organisation as well as a de-registered organisation are both apt to be described as organisations that have taken part in amalgamations. The reference to 'reconstituted' which is synonymous with reconstructed or transformed, is apt to describe the alteration of an amalgamated organisation's rules following a withdrawal in accordance with s.95A and 110A of the RO Act. Section 92(b) provides that it is an object of the Part to provides for "branches, divisions or parts of organisations of that kind to be formed into organisations and registered". The phrase "organisations of that kind" is a reference to organisations that have taken part in amalgamations, which would include an organisation that was the host organisation not de-registered in connection with an amalgamation.

[92] *Fourth*, the construction of subparagraph (c) which we prefer is consistent with the Explanatory Memorandum the relevant portions of which have earlier been extracted.

[93] *Fifth*, although the construction we prefer has the result that any branch, division or part of an amalgamated organisation which is or remains separately identifiable under the rules of that organisation will be a "constituent part' within the meaning of s.93(1) of the RO Act and so might be thought to destroy the need for subparagraphs (a) and (b), that is not reason enough to read down subparagraph (c) in the manner contended by the CFMMEU. The provision is definitional only. Definitions in a statute do not generally enact a substantive rule of law or create a particular right. It is enacted to aid the construction of those substantive provisions of the RO Act containing the defined term. Thus, not every branch, division or part of an amalgamated organisation which falls within the definition of "separately identifiable constituent part" will be able to be the subject of an application under s.94(1) because of the further limitations in that section already discussed.

[94] The answer to the first question is: the M&E Division is a 'constituent part' of the CFMMEU for the purposes of s.94(1) of the RO Act.

[95] It is convenient to deal here with the Applicant's contention that subparagraphs (a), (b) and (c) should be construed as identifying those parts of an amalgamated organisation that are

[85] CFMMEU Submission in reply, 7 June 2021 at [5]

identifiable under the rules of the amalgamated organisation and which can apply under s.94 of the RO Act, and which were previously identifiable under the organisations which joined in the amalgamation—which in this case were the CFMEU, the MUA and the TCFUA.[86] The Applicant says that this way the construction of the definition of 'separately identifiable constituent part' for which he contends is linked to the operation of s.94. He points to the general rule of construction that one reads a definition into the primary provision in order to construe the substantive provision and he says that identification of the M&E Division as a separately identifiable constituent part is premised on it having become part of the amalgamated organisation (CFMMEU) as part of the 2018 amalgamation. Section 94(1) proceeds on the premise set up by the definition, the definition having been "read into" s.94.[87]

[96] We accept that the definitions in s.93 of the phrases 'separately identifiable constituent part' and 'constituent part' are "read into" s.94 because of its reference to 'constituent part', but we reject the contention that subparagraphs (a), (b) and (c) should be construed as identifying those parts of an amalgamated organisation in relation to which an application under s.94 of the RO Act may be made.

[97] As we have already pointed out s.93 of the RO Act is definitional. Definitions in statutes do not generally enact a substantive rule of law or create a particular right, rather they aid in understanding the meaning of defined words, terms or phrases used elsewhere in the statute. The definition of 'separately identifiable constituent part' informs the meaning given to the phrase 'constituent part' – also defined in s.93 but the other limitations which appear in s.94 (and relevantly s.94(1)(a)) do not inform the definition. They act as a further barrier or condition precedent related to a 'constituent part' of an amalgamated organisation in order that an application for a secret ballot may be made in relation to the constituent part. Thus, an application may only be made under s.94(1) if, *inter alia*, a 'constituent part' of an amalgamated organisation became part of the amalgamated organisation as a result of an amalgamation under Part 2 or a predecessor law. The definitions of 'constituent part' and 'separately identifiable constituent part' do not have the effect of determining that every administrative unit of an amalgamated organisation falling within the definitions may by the subject of an application under s.94(1).

(iii) 'Amalgamated organisation'

[98] Before answering the second question, it is necessary to say something about the meaning of "amalgamated organisation".

[99] An application under s.94(1) of the RO Act is for a secret ballot to be held to decide whether a constituent part of "an amalgamated organisation" should withdraw from "the organisation", if, *inter alia*, the constituent part became "part of the organisation" as "a result of an amalgamation" under Part 2 of the RO Act or a predecessor law. This raises for consideration the meaning of "amalgamated organisation".

[100] As we earlier note, the Applicant contends that an "amalgamated organisation" is a separately recognised artefact under the RO Act which is not to be conflated with the legal

[86] Applicant Submission in reply, 14 June 2021 at [13]

[87] Ibid at [14]-[15]

entity that is the host organisation in a proposed amalgamation.[88] The Applicant says that there is a distinction in the RO Act, made clear by the definition of "amalgamated organisation" in s.93(1), between the concept of registration of an organisation and the concept of an amalgamated organisation.[89] In the instant case that separately recognised artefact is the CFMMEU which is the product of the 2018 amalgamation. The CFMMEU did not exist as an amalgamated organisation within the meaning of the RO Act until after the 2018 amalgamation took effect. Before that time there were three separate organisations - the CFMEU, the MUA and the TCFUA.[90]

[101] Section 93(1) of the RO Act contains the applicable definition of "amalgamated organisation" 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."

[102] Paragraph 73(3)(d) of the RO Act provides that on amalgamation day the persons who, immediately before that day, were members of a proposed de-registering organisation become, by force of this section and without payment of entrance fee, members of the proposed amalgamated organisation.

[103] Section 35 of the RO Act defines the various phrases used in paragraph 73(3)(d) as follows:

> "amalgamation day", in relation to a completed amalgamation, means the day fixed under subsection 73(2) in relation to the amalgamation.
>
> "proposed de-registering organisation", in relation to a proposed amalgamation, means an organisation that is to be de-registered under this Part.
>
> "proposed amalgamated organisation", in relation to a proposed amalgamation, means the organisation or proposed organisation of which members of the proposed de-registering organisations are proposed to become members under this Part.

[104] "Proposed amalgamation" is also defined in s.35 as follows:

> "proposed amalgamation' means the proposed carrying out of arrangements in relation to 2 or more organisations under which:
>
> (a) an organisation is, or 2 or more organisations are, to be de-registered under this Part; and
>
> (b) members of the organisation or organisations to be de-registered are to become members of another organisation (whether existing or proposed)."

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[88] Applicant Submission, 2 June 2021 at [71]

[89] Ibid at [62]

[90] Ibid at [63]

[105] For present purposes the amalgamation day fixed under s.73(2) of the RO Act was 27 March 2018.

[106] The procedure for the amalgamation of organisations established by Part 2 of Chapter 3 of the RO Act requires that there is to be a scheme for every proposed amalgamation and that the scheme must contain, inter alia, a general statement of the nature of the amalgamation identifying the existing organisations concerned and indicating, if one of the existing organisations is the proposed amalgamated organisation then that fact.

[107] The scheme for the proposed amalgamation between the CFMEU, the MUA and TCFUA identified the CFMEU as the proposed amalgamated organisation and provided that the MUA and the TCFUA would merge with the CFMEU and that the MUA and the TCFUA are the proposed de-registering organisations which upon the amalgamation would be de-registered. That scheme, once approved by the relevant ballots, took effect in accordance with s.73 of the RO Act.

[108] Section 73(3) of the RO Act sets out certain things that must be done and that will happen on the amalgamation day. In relation to the 2018 amalgamation, paragraph 73(3)(a), which is concerned with registering an association which is not registered but is the proposed amalgamated organisation, was not engaged because the CFMEU was already registered. Pursuant to paragraph 73(3)(b) the proposed alteration of the rules of the existing organisation concerned in the amalgamation, which was the CFMEU, took effect on the amalgamation day. The alteration to the rules included a change to the name of the existing organisation to the "Construction, Forestry, Maritime, Mining and Energy Union", the incorporation of the eligibility rules of the MUA and the TCFUA into the eligibility rules of the existing organisation, the formation of the MUA Division and the merger of the TCFUA into the existing manufacturing division. No alterations were made to the rules or structure of the existing M&E or the Construction and General Divisions were made. Pursuant to paragraph 73(3)(c), the Commission de-registered the MUA and the TCFUA on the amalgamation day. Persons who were members of the MUA or the TCFUA immediately before the amalgamation day, became members of the proposed amalgamated organisation on the amalgamation day pursuant to paragraph 73(3)(d).

[109] It will be seen from the provisions described above that the scheme of the RO Act concerning amalgamations is that, in short compass, a proposed amalgamated organisation becomes the amalgamated organisation on the amalgamation day fixed by the Commission. It is that organisation with which the definition in s.93(1) relevantly engages. In an appropriate case it will engage with an organisation of which members of a de-registered organisation became members under a provision equivalent to paragraph 73(3)(d) of Part 2 of a predecessor law. The reference in the definition of "amalgamated organisation" to "the organisation" of which members of a de-registered organisation became members under paragraph 73(3)(d), is a reference, in this case, to the "proposed amalgamated organisation". This is clear from paragraph 73(3)(d).

[110] As is evident from s.40 of the RO Act, a proposed amalgamated organisation may be either an existing organisation or an association that is proposed to be registered. In the case of the latter, paragraph 73(3)(a) facilitates the registration of a proposed amalgamated organisation that is not already registered on amalgamation day. When members of the proposed de-

registering organisations (the MUA and the TCFUA) became members of the proposed amalgamated organisation (CFMEU) on 27 March 2018 pursuant to paragraph 73(3)(d), that organisation is the amalgamated organisation as defined in s.93(1) of the RO Act. At the same time, the rule alterations took effect and the proposed de-registering organisations were de-registered.

[111] Relevantly, for present purposes the definition of "amalgamated organisation" describes no more than the CFMEU, an organisation already registered of which persons who were members of the MUA or the TCFUA immediately before 27 March 2018, became members on that day. The rule alterations which were effected at the same time resulted in the name of the CFMEU being altered. Thus, all that occurred was that an existing and continuing organisation which was the proposed amalgamated organisation – the CFMEU – was renamed the CFMMEU, certain eligibility rule and organisational structural changes were made and it became the amalgamated organisation. We therefore reject the contention that the definition of an "amalgamated organisation" refers to a distinct "artefact". It is, in the instant case a reference to an existing organisation now known as the CFMMEU of which former members of the MUA and the TCFUA became members on 27 March 2018. Except in the case of a newly registered organisation coming into being on amalgamation day, in essence, for present purposes the purpose of the definition of "amalgamated organisation" is to provide a distinction between the registered organisation that was the host organisation and the same organisation after an amalgamation has taken effect having an expanded membership comprising the additional members formerly members of the de-registered organisations involved in the amalgamation.

(iv) 'became part of the (amalgamated) organisation as a result of an amalgamation'

[112] As we have earlier noted, the Applicant relies only on the 2018 amalgamation as the relevant amalgamation for the purposes of s.94 of the RO Act. The Applicant's contention that the M&E Division became part of the CFMMEU hangs in part on his contention that an "amalgamated organisation" is a separately recognised artefact under the RO Act which is not to be conflated with the legal entity that is the host organisation in a proposed amalgamation; that in the case of the 2018 amalgamation it is a separately recognised artefact, the CFMMEU, which is the product of that amalgamation; and that the CFMMEU did not exist as an amalgamated organisation within the meaning of the RO Act until after the 2018 amalgamation took effect, before which there were three separate organisations - the CFMEU, the MUA and the TCFUA.[91] Save that it must be accepted that there was not an organisation known as the CFMMEU before the 2018 amalgamation, for the reasons already given we reject the Applicant's contentions.

[113] For completeness, the Applicant also contends that in the 2018 amalgamation the amalgamated organisation changed its structure by creating a new Division for the MUA and expanding the scope of the Manufacturing Division to incorporate the members of the TCFUA. There were also consequential changes to the structures of the organisation's governing bodies.[92] The position of existing constituent parts of the CFMEU were affected by the creation of the CFMMEU in the amalgamation. Consequently, the Applicant contends that it is no

[91] Applicant Submission, 2 June 2021 at [71] and [63]

[92] Ibid at [64]

misuse of language of s.94(1) to refer to those types of constituent parts (of the CFMEU) becoming part of the amalgamated organisation formed in the 2018 amalgamation.[93]

[114] We reject the Applicant's contention for the following reasons.

[115] As should be clear from our earlier discussion, s.94(1) of the RO Act facilitates an application 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 of a constituent part of an amalgamated organisation to be the subject of an application for a ballot is qualified by the matters identified in s.94(1)(a)-(c). These qualifications are that the constituent part must have become part of the amalgamated organisation "as a result" of an amalgamation under Part 2 of Chapter 3 or a predecessor law and the application must be in relation to an amalgamation which occurred not less than 2 years prior and before the expiration of 5 years, subject to the capacity for the Commission to accept an application in relation to an amalgamation occurring after the expiration of the latter period under s.94A.

[116] It seems clear that reference in s.94(1)(a) of the RO Act to "an amalgamation" is to a particular amalgamation. That is, the amalgamation resulting in the constituent part the subject of the application becoming part of the amalgamated organisation. So much is acknowledged by the Applicant, who contends that the M&E Division became part of the amalgamated organisation, the CFMMEU, as a result of the 2018 amalgamation. Similarly, the references in s.94(1)(b) and (c) to "the amalgamation" is to the particular amalgamation with which s.94(1)(a) is concerned.

[117] The time periods in ss.94(1)(b) and (c) are to be reckoned by reference to the particular amalgamation which resulted in the constituent part becoming part of the amalgamated organisation.

[118] Under the construction for which the Applicant contends any subsequent amalgamation would have the effect of the constituent part which was a part of the host organisation becoming part of the amalgamated organisation as a result of the most recent amalgamation.

[119] The Applicant's construction appears to us to be inconsistent with the ordinary meaning of the phrase "as a result of" the particular amalgamation, which connotes the constituent part becoming part of the amalgamated organisation "because or as a consequence of" the particular amalgamation and not merely to continue to exist unaltered in an organisation of which it was already a part.

[120] The relevant issue requiring determination is whether the M&E Division became part of the CFMMEU as a result of the 2018 amalgamation. Our earlier dissertation of the history of amalgamations involving the organisation now known as the CFMMEU shows that the M&E Division in its current iteration has been a part of the organisation now known as the CFMMEU since 5 May 1995. The 2018 amalgamation was underpinned by a scheme for amalgamation which relevantly provided that:

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[93] Ibid at [65]

- the name of the amalgamated organisation shall be the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU);
- the CFMEU is the proposed amalgamated organisation;
- the MUA and TCFUA will be merged with the CFMEU;
- the proposed deregistering organisations (the MUA and the TCFUA) will be de-registered;
- a Maritime Union of Australia Division (MUA Division) will be created;
- MUA members would become members of the MUA Division;
- the TCFUA will merge with the Forestry Division of the CFMEU with that Division to be renamed the Manufacturing Division;
- TCFUA members would become members of the Manufacturing Division;
- the structure and rules of the Mining and Energy Division and the Construction and General Division will not be affected by the amalgamation; and
- the rules of the Mining and Energy Division and the Construction and General Division are not altered as part of the amalgamation.[94]

[121] Moreover, on 27 March 2018, the MUA and the TCFUA were de-registered as organisations, the CFMEU became known as the CFMMEU through a rules alteration and continued as a registered organisation, and other rules were altered. However, there was no alteration to the structure or constitution of the M&E Division as it existed when the organisation was known as the CFMEU and before members of the MUA and the TCFU were admitted as members of the CFMMEU. Specifically, there was no alteration to rule 42(iii)(a) which sets out the coverage of the M&E Division or to rule 2 of the M&E Division's Rules. Indeed, there were no changes made to the M&E Division's Rules related to the amalgamation. We do not accept that merely because existing constituent parts of the CFMEU were affected by the 2018 amalgamation, in the sense that there were changes to the constitution of the organisation as a whole and to the voting influence of existing constituent parts in decision making bodies of the organisation by reason of the sum of the whole becoming larger, those constituent parts which were already part of the host organisation became part of the amalgamated organisation "as a result of" that amalgamation.

[122] It is clear that the M&E Division existed in its current form as part of the CFMEU before the amalgamation and now continues to exist, unaltered, after the amalgamation as part of the renamed CFMMEU which is the amalgamated organisation. It did not become part of that organisation "as a result of" the 2018 amalgamation.

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[94] Exhibit CFMMEU 1, Annexure DVM-25

[123] For these reasons the answer to the second question is: the M&E Division did not become part of the CFMMEU as a result of the 2018 amalgamation.

5. Conclusion

[124] For the foregoing reasons we answer the questions posed as follows:

- The M&E Division is a 'constituent part' of the CFMMEU for the purposes of s.94(1) of the RO Act; and

- The M&E Division did not become part of the CFMMEU as a result of the 2018 amalgamation for the purposes of 94(1)(a).

[125] As the M&E Division did not become part of the CFMMEU as a result of the 2018 amalgamation and because it is only the 2018 amalgamation on which the Applicant relies, we are not satisfied, having regard to s.94(1)(a) of the RO Act, the Application for a ballot is validly made under s.94 and the Application must therefore be dismissed.

6. Order

[126] The Application is dismissed.

PRESIDENT

Appearances:

H Borenstein QC and *Y Bakri* of Counsel for the Applicant
C Dowling SC and *C Massy* of Counsel for the CFMMEU
M Gibian SC of Counsel for the ACTU

Hearing details:

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Written submissions:

Applicant, 2 June 2021 and 6 June 2021
CFMMEU, 19 May 2021, 7 June 2021 and 14 June 2021
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