



DECISION

Fair Work (Registered Organisations) Act 2009
s.94(1) RO Act—Withdrawal from amalgamation

Paris Jolly
(D2023/1)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
ACTING COMMISSIONER BISSETT

SYDNEY, 21 JULY 2023

Application for ballot to decide whether the Locomotive Division of the Victorian Branch should withdraw from the Australian Rail, Tram and Bus Industry Union (RTBIU) – interlocutory application by RTBIU for the Commission to dismiss, strike out or not decide certain matters raised in several paragraphs of an amended application – statutory construction – proper construction of s 94A(2)(b) of the RO Act – whether s 94A(2)(b) requires a binary or graduated assessment of the capacity of the new organisation to promote and protect the economic and social interests of its members – interlocutory application granted

Background

[1] Paris Jolly is the Divisional Secretary of the Victorian Branch Locomotive Division (VLD) of the Australian Rail, Tram and Bus Industry Union (RTBIU). By application made on 2 February 2023 and amended on 26 April 2023 (Amended Application), Mr Jolly applies under s 94 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) for a ballot to be held to decide whether the VLD should withdraw from the RTBIU. Mr Jolly has, in accordance with directions made by the Commission, filed a witness statement dated 3 April 2023 in support of his application. The RTBIU opposes the application.

[2] Mr Jolly contends and the RTBIU accepts that the VLD is a ‘constituent part’ in relation to the RTBIU because it is a ‘separately identifiable constituent part’ under paragraph (b) of the definition of ‘separately identifiable constituent part’ in s 93 of the RO Act. He contends, and the RTBIU accepts, that the VLD became part of the RTBIU as a result of an amalgamation under Division 7 of Part IX of the *Industrial Relations Act 1988* (Cth) (IR Act) between the Australian Federated Union of Locomotive Enginememen, the Australian Railways Union, the Australian Tramway and Motor Omnibus Employees’ Association and the National Union of Rail Workers of Australia which took effect on 1 March 1993 (1993 Amalgamation). It is also uncontroversial that the IR Act is a predecessor law as defined in s 93 of the RO Act for the purposes of s 94(1)(a).

[3] Because Mr Jolly’s application is made more than five years after the 1993 Amalgamation, Mr Jolly also asks the Commission to accept the application pursuant to s 94A(1) of the RO Act after the end of the five-year period referred to in s 94(1)(c). He advances two alternative bases in support of his contention that it is ‘appropriate’ to accept the application under s 94A(1).

[4] *First*, he contends that the Commission must accept the application after the five-year period under s 94A(3) having regard to the RTBIU's alleged record of not complying with workplace or safety laws to which the VLD has not contributed. The RTBIU says in response to this contention that the matters particularised in Mr Jolly's witness statement as constituting the alleged record of not complying with workplace or safety laws are not such as to require the acceptance of the application because:

- there was no finding of non-compliance, within the meaning of s 94A(2)(a) of the RO Act, in the matters particularised; and
- the matters particularised do not in any event constitute a 'record' within the meaning of s 94A(2)(a).

[5] *Second*, Mr Jolly says by paragraph 6A of his Amended Application that:

... the Commission should be satisfied that it is appropriate, within the meaning of s 94A(1), to accept the application having regard to:

- (a) the RTBU's record of not complying with workplace or safety laws and the absence of any contribution thereto by the constituent part, which is set out in paragraphs 14 to 19 of the applicant's statement dated 3 April 2023 and paragraphs 34 to 45 of the applicant's outline of submissions dated 3 April 2023 (s.94A(2)(a));
- (b) the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members (s.94A(2)(b)), in relation to which the Applicant relies on:
 - A. the matters which are set out in paragraphs 61 to 85 of the applicant's statement dated 3 April 2023 and paragraphs 62 to 70 of the applicant's outline of submissions dated 3 April 2023; and
 - B. the oppressive, dysfunctional and unlawful behavior of the Victorian Branch of the RTBU which is set out in paragraphs 86 to 222 of the applicant's statement dated 3 April 2023 and paragraphs 67 to 72 of the applicant's outline of submissions dated 3 April 2023, which has affected the capacity of the VLD to promote and protect the economic and social interests of its members while remaining part of the RTBU, such that the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members will be increased when the VLD is freed from exposure to that behavior after the withdrawal; and
 - C. the failure of the National Office of the RTBU to intervene in respect of the above oppressive, dysfunctional and unlawful behavior of the Victorian Branch of the RTBU, and its actions against the interest of the VLD, which is set out in paragraphs 87 to 90, 136, 148, 150, 167, 189, 199 and 205 of the applicant's statement dated 3 April 2023, and
- (c) further and in the event that the Commission has a residual discretion to consider matters other than those in s.94A(2) in relation to what is appropriate under s.94A(1), the Applicant relies on the oppressive, dysfunctional and unlawful behavior of the Victorian Branch of the RTBU which is set out in paragraphs 86 to 222 of the applicant's statement

dated 3 April 2023 and paragraphs 67 to 72 of the applicant's outline of submissions dated 3 April 2023, and which is submitted to be:

- A. a very significant reason for the VLD wishing to withdraw from the RTBU; and
- B. a very strong consideration to satisfy the Commission that it is appropriate to accept the application under s.94A(1)

[6] Without setting out the totality of the matters in Mr Jolly's witness statement cited above, the subject matters canvassed may be summarised as follows:

- paragraphs 61 to 85 are concerned with the structure, operation, independence, and finances of the VLD;
- paragraphs 86 to 222 contain allegations:
 - that there is an imbalance in the membership of the various Victorian Branch Divisions – the Rail Operations Division (4777 members), the VLD (1834 members) and the Tram and Bus Division (1891 members) – and that this imbalance has a significant and unfair effect on the interests of members of the VLD in several respects;
 - that the RTBU's National Office, Victorian Branch and Rail Operation Division have a record of acting contrary to the industrial interests of VLD members with the effect that their actions have:
 - weakened the industrial bargaining position of the VLD;
 - caused a denigration of VLD member conditions;
 - reduced VLD members' work; and
 - led to the reduction of the number of train driver positions in Victoria;
 - that the Victorian Branch is dysfunctional and has engaged in unlawful conduct;
 - that the National Office has failed to intervene in respect of the dysfunction or the unlawful conduct.

[7] These allegations are advanced to further Mr Jolly's contentions as to the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members. In short compass it is contended that after the withdrawal, once unencumbered by the consequences of its exposure to the conduct about which Mr Jolly complains, the VLD's capacity to promote and protect the economic and social interests of its members will be improved.

The strike-out application

[8] On 5 May 2023, the RTBIU applied to the Commission to dismiss, strike out or determine not to decide the matters raised in most of the sub-paragraphs of paragraph 6A of the Amended Application. This decision deals with the RTBIU’s “strike out” application.

[9] The RTBIU contends for the Commission to dismiss, strike out or determine not to decide paragraphs 6A(b)B, C and 6A(c) of the Amended Application on the basis that the impugned paragraphs are:

- not relevant to the consideration required by s 94A(2)(b) of the RO Act;
- incorporate passages from Mr Jolly’s witness statement which are not relevant and should not be admitted into evidence; and/or
- in a form that is vague, embarrassing and does not give the RTBIU fair notice of Mr Jolly’s case.

[10] Mr Jolly’s contentions in paragraph 6A(c) of the Amended Application were framed on the basis of an understanding that the RTBIU was contending that the Commission has a residual discretion to consider matters other than those in s 94A(2) and (3) of the RO Act in assessing whether it is appropriate to accept the application under s 94A(1). During the hearing before us on 6 June 2023, the position of the RTBIU was clarified, in that it agreed with Mr Jolly’s position that the matters in s 94A(2)(a) and (b) and (3) are the totality of the matters to be considered in determining whether it is appropriate to accept the application.¹ As a consequence Mr Jolly has advised that he no longer relies on many of the paragraphs of his witness statement called up by paragraphs 6A(b)B and C and 6A(c) of the Amended Application. Indeed, because the parties agree that there is no residual discretion in assessing whether it is appropriate to accept the application, the contentions in paragraph 6A(c) of the Amended Application fall away.

[11] In support of the contentions in paragraph 6A(b)B and C of the Amended Application Mr Jolly now only relies on the following paragraphs:

- Paragraphs 206 to 210,² which deal with the proceedings that have been issued by Mr Jolly and another RTBIU member against the branch secretary of the Victorian Branch alleging a failure to perform and observe rules 23(5) and 23(6) of the RTBIU’s rules and using union funds for an improper and invalid use – electioneering. These paragraphs are said to be relevant because they provide an example of the VLD’s capacity to protect the interests of its members because the funds are the funds of the RTBIU, which are subsidised by the members.³
- Paragraphs 212 to 222⁴, save for the cross referencing to now abandoned impugned paragraphs.⁵ These paragraphs deal with allegations about a lack of accountability and proper oversight of the Victorian Branch, the Rail Operations Division and their officials because of the structure of the RTBIU. The paragraphs also set out allegations of ‘a long and significant record’ of the Victorian Branch, the Rail Operations Division and their officials not complying with the RTBIU rules. The paragraphs are said to be relevant because they demonstrate that within the Victorian Branch there are widespread breaches of the rules, relating to

finances and because they put in context what is said against the VLD about alleged unlawfulness⁶ (that it has been operating in breach of the RTBIU's rules in relation to funds it holds).⁷

Consideration

[12] In determining the RTBIU's strike-out application, it is necessary to deal with a matter of statutory construction which arises. The matter concerns the proper construction of s 94A(2)(b) of the RO Act because our assessment of the relevance of the impugned paragraphs of the Amended Application (and of Mr Jolly's witness statement which remain live) is to be informed by that subsection properly construed. It is common ground that s 94A(2)(b) should be construed as requiring a prospective assessment of the capacity of the new organisation to promote and protect the economic and social interests of its members. There is also no dispute that the likely capacity of a proposed organisation may be ascertained by reference to the demonstrated capacity of the constituent part in the past to promote and protect the economic and social interests of its members.⁸ The contest between Mr Jolly and the RTBIU is about whether it is relevant, when considering the matter in s 94A(2)(b), to take into account past events said to have affected the constituent part's capacity for the purpose of assessing whether in the future the proposed organisation will likely have a *better or improved* capacity if the disamalgamation proceeds. The RTBIU contends that s 94A(2)(b) is not concerned with a comparative assessment. The Australian Council of Trade Unions, which intervened in the matter to make submissions concerning the proper construction of s 94A, supports the RTBIU's construction.

[13] As we have noted already, there is no contest that s 94A(2)(b) of the RO Act is forward looking. So much is also clear from the words 'likely capacity, of the organisation ... as and when the withdrawal from amalgamation takes effect'. The word 'likely' in s 94A(2)(b) is concerned with assessing the probability of the organisation having the requisite capacity. In this regard it is concerned with assessing whether the new organisation will probably have or is expected to have the capacity at the relevant future time. The word 'capacity' is concerned with an assessment of the organisation's ability to promote and protect the economic and social interests of its members. In short, will it likely be able to do so? Put another way, s 94A(2)(b) requires the Commission to consider whether the new organisation will probably be able to promote and protect the economic and social interests of its members as and when the withdrawal from amalgamation takes effect.

[14] We do not consider that anything in s 94A(2)(b) or in Part 3 of Chapter 3 of the RO Act suggests that a relative or comparative 'before and after' assessment of capacity is required. Either the new organisation is likely to have the requisite capacity, or it is not likely to have it. Elsewhere in the RO Act, where a comparative assessment of capacity is required, the legislature has made this clear. For example, in determining whether to consent to the alteration of an organisation's eligibility rules in relation to persons who would be eligible to join after the alteration which would result in overlapping coverage with another organisation, the Commission must not consent if, in its opinion, there is another organisation to which the persons could more conveniently belong, and that organisation would 'more effectively' represent those members.⁹

[15] There are no words of qualification in s 94A(2)(b) preceding the word 'capacity' which might suggest that a comparative assessment is required or that we should be concerned with the quality of that capacity as compared to the state of affairs which previously existed. Thus,

an assessment whether the organisation registered following the withdrawal from amalgamation taking effect will likely have a greater or lesser capacity, compared to the present capacity of the constituent part seeking to withdraw, is not required. The assessment which is required is limited to making an evaluative judgment whether the organisation will be likely to be able to promote and protect the economic and social interests of its members. The construction we prefer is consistent with that which is set out at [31]-[32] of the Explanatory Memorandum to the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020*:

31. In determining for the purposes of paragraph 94A(2)(b), whether a constituent part has the capacity to promote and protect the economic and social interests of its members should it withdraw from the amalgamated organisation, the FWC could, for example, have regard to:
 - any statement that describes how the constituent part intends to operate on behalf of its members for their benefit; and
 - any demonstrated [sic] ability of the part to influence, advocate and promote the wellbeing of its members.
32. This is a forward looking consideration that does not require the FWC to assess the relative capacity of the constituent part to relevantly promote and protect its members moving forward, as compared to when it was part of the amalgamated organisation.
(Underlining added)

[16] The remaining impugned paragraphs on which Mr Jolly relies must therefore be relevant either to establishing the likely capacity of the VLD as a registered organisation to promote and protect the economic and social interests of its members or to responding to the RTBIU's contentions about the new organisation's likely capacity.

[17] The RTBIU's contention that the VLD as a registered organisation will not likely have the capacity to represent the economic and social interest of its members is limited to concerns about the finances of the proposed organisation.¹⁰ Specifically, it contends that the VLD has been operating in breach of the RTBIU rules and the money maintained in the VLD bank accounts is not, in accordance with the rules, the property of the VLD.¹¹ Accordingly, the RTBIU says that the VLD as a registered organisation will have less assets than it suggests and for that reason will not be able to promote and protect the economic and social interests of its members.¹² The RTBIU does not otherwise challenge the likely requisite capacity of the VLD as a registered organisation. Apart from the financial position of the proposed organisation, the RTBIU does not say that the proposed organisation will not likely be able to influence, advocate and promote the wellbeing of its members or that the officials of the proposed organisation will not likely be competent or otherwise capable of representing the interests of its members.¹³ Indeed, except to the extent that the assessment of the likely capacity of the proposed organisation is affected by finances, the RTBIU says that we can otherwise be satisfied that the proposed organisation will likely have the requisite capacity.¹⁴

[18] Since Mr Jolly no longer relies on paragraphs 87 to 90, 136, 148, 150, 167, 189, 199 and 205 of his witness statement, and because paragraph 6A(b)C of the Amended Application is entirely grounded in these paragraphs, we propose to strike out that paragraph. It has in effect been withdrawn. The same may be said about the impugned paragraphs of Mr Jolly's witness statement to which reference is made therein. But to the extent that there is a residual complaint

about the National Office of the RTBIU, we do not consider that the conduct identified is relevant to the assessment required by s 94A(2)(b) nor is it responsive to the financial capacity contentions that the RTBIU seek to advance in opposing the acceptance of the late Amended Application.

[19] We now turn to the remaining contested paragraphs of Mr Jolly’s witness statement. At paragraphs 206 to 210 of his statement, Mr Jolly says:

206. In or around the period of 17 to 23 October 2022, during the conduct of the 2022 RTBU Election, members of the Victorian Branch of the Union received in the post at their residential address, a magazine titled “RTBU One Industry, One Union 2022” (the Magazine) which had been authorised by Sharma.
207. The Magazine contains written content from and photos of candidates from Sharma’s election team, Members First, and candidates from the affiliated election team, Trammies United. The Magazine does not include any written content or photos of candidates from the opposing election team TrueChange.
208. On 21 September 2022 Sharma authorised the payment of \$32,890 out of RTBU funds to “Commerce Press” to produce and distribute the Magazine.
209. During a conversation on 17 November 2022 at the Malvern Tram Depot Sharma told me the Magazine was paid for by the Rail Operations Division. However, at the time Sharma authorised the Magazine payment he did not hold any Branch Divisional office in the Union and had no power under the rules to expend Rail Operations Division funds.
210. On 17 February 2023 I and Koc issued proceeding VID87/2023 in the Federal Court of Australia against Sharma for failing to perform and observe rules 23(5) and 23(6) and using union funds for an improper and invalid use, namely electioneering. I and Koc sought orders Sharma repay the funds unlawfully expended plus interest. Attached and marked “PJ-38” are copies of the Statement of Claim and Originating Application filed in that proceeding. The proceeding is yet to be determined.

[20] We do not consider that paragraphs 206 to 210 of Mr Jolly’s witness statement are relevant to any issue we need to determine. These paragraphs do not speak to the likely capacity of the VLD as a registered organisation to represent the economic and social interest of its members. They concern the conduct of Mr Jolly and another in their capacities as RTBIU members (and perhaps also as officials) to take steps to seek compliance with and observance of the RTBIU rules. The paragraphs say little about the likely capacity of the VLD as a registered organisation. In any event, to the extent that the paragraphs are said to be relevant as demonstrating that Mr Jolly is a diligent and competent union official and will continue as such in the new organisation post any withdrawal from amalgamation, neither the competency of Mr Jolly nor any other official of the VLD is put in issue in these proceedings.

[21] At paragraphs 212 to 218 of his statement, Mr Jolly says:

212. There is a lack of accountability and proper oversight of the Victorian Branch, Rail Operations Division and their officials because the structure of the RTBU has enabled officials of the Victorian Branch and Rail Operations Division to remove any real checks and balance on their own conduct.
213. The Rail Operations Division controls the majority vote on the governing bodies of the Victorian Branch and to my knowledge have exercised that vote to repeatedly dismiss or

condone breaches of the RTBU rules and RTBU Financial Policy by officials of the Victorian Branch and Rail Operations Division. I refer to and rely on the matters set out at paragraphs 156 to 166, 1911 to 192, 196, 200 to 203, 206 to 209.

214. While the RTBU Financial Policy sets out a framework for the financial oversight of the RTBU including the Victorian Branch Audit and Compliance Committee whose role is to ensure Branch's funds are properly dealt with in accordance with the rules and RTBU Financial Policy, the Victorian Branch Executive undermined the integrity of the Victorian Branch Audit and Compliance Committee passing a resolution on 16 November 2018 to constitute it as Grigorovitch, Altieri, Galea, Marotta, Koc and Darren Lamont (Lamont), Branch President.
215. This resolution meant the Victorian Branch Audit and Compliance Committee was controlled by officials of the Victorian Branch and Rail Operations Division who are the majority of the members on the committee.
216. Since that time, the Victorian Branch Audit and Compliance Committee failed to oversee the proper management of Victorian Branch finances as shown by numerous and various breaches of the RTBU rules by Grigorovitch, Altieri and Galea in respect of finances as well as the RTBU Financial Policy set out at paragraph 156 to 166, 216 to 219, 1911 to 192, 196, 200 to 203 above.¹⁶
217. Since that time, the Victorian Branch Audit and Compliance Committee also purported to exercise power it does not have and act in a manner inconsistent with the rules of the union by purporting to pass motions which purport to authorise expenditure of union funds, authorise the engagement of Victorian Branch staff and service providers, set the wages of Victorian Branch offices, limit the power of Victorian Branch Divisions and their officials to expend Divisional funds and direct Victorian Branch Divisions and their officials on Divisional expenditure, property management and financial affairs. See attached and marked "PJ-40" a table of these purported motions.
218. None of the purported motions in the table were the subject of Victorian Branch Executive or Victorian Branch Council resolution. Despite the lack of proper authorisation from a governing body, the Victorian Branch acted in reliance of these motions in breach of the RTBU Rules.

[22] These paragraphs complain about internal mechanisms established in the RTBIU and the effectiveness of these mechanisms in providing oversight of the Victorian Branch and its officials, particularly as it concerns compliance with the RTBIU's rules. In substance, these are complaints about the governance of the RTBIU. Mr Jolly contends that the non-compliance affects the financial affairs of the Victorian Branch, which are subsidised by contributions from the Branch Divisions including the VLD. He says that the VLD's affairs have been detrimentally affected by the alleged breaches of the rules by Branch officials and that provides a basis for the submission that the VLD will, after withdrawal, be able to promote and protect the economic and social interests of its members because it will be free of those detrimental impositions. He also contends that the VLD's finances will be enhanced once freed from the alleged interferences by the Victorian Branch and that this answers the objection by the RTBIU as to the VLD's likely financial capacity.

[23] Self-evidently the contentions in paragraph 6A(b)B of the Amended Application sought to be framed by reference to paragraphs 212-218 of Mr Jolly's witness statement involve a relative comparison between the VLD's current capacity to promote and protect the economic and social interests of its members and the likelihood of that capacity improving if the VLD is

registered after the withdrawal from amalgamation takes effect. As we have earlier explained s 94A(2)(b) of the RO Act does not require such a comparison be made. Further, the reference to the impact of the conduct about which complaint is made on the financial capacity of the VLD does not engage with the RTBIU's contentions about the VLD's likely financial capacity as and when it is registered as an organisation under the RO Act to promote and protect the economic and social interests of its members.

[24] As we earlier noted, the RTBIU's contention that the proposed new organisation will not likely have the requisite capacity is limited to concerns about the finances of the proposed organisation. In this regard it contends that:

- the funds described at paragraph 82 of Mr Jolly's witness statement are not the property of the VLD as these funds:
 - were derived from subscriptions paid directly to the VLD contrary to the RTBIU's rules – specifically rules 11(1) and 21(4); or
 - represent subscriptions which have been paid to the VLD contrary to the requirements of the Victorian Branch Executive resolution of 8 February 2017;
- the real property described at paragraph 79 of Mr Jolly's witness statement cannot, by reason of Rule 21(12) of the RTBIU's rules, be sold without a ballot of eligible members of the VLD where at least 70% of those eligible voters vote in favour of the sale of the real property. The RTBIU says that the VLD has previously unsuccessfully sought such approval;
- the VLD has around 1730 financial members, which, having regard to the ordinary annual subscriptions of those members, is insufficient to generate sufficient income to enable the VLD to adequately promote and protect the economic and social interests of its members in circumstances where it has no other cash resources, and it has a demonstrated capacity of being unable to realise its real property.

[25] The impugned paragraphs of Mr Jolly's witness statement raise allegations about the effectiveness of the internal governance mechanisms of the RTBIU and their impact on the VLD's finances. But these allegations do not respond to the RTBIU's limited contentions about the VLD's likely capacity as the proposed new organisation to promote and protect the economic and social interests of its members. And although Mr Jolly submits that the VLD will be able to promote and protect the economic and social interests of its members because it will be free of those detrimental impositions, and the VLD's finances will be enhanced, once freed from interference by the Victorian Branch, he does not contend, and his witness statement does not say, that the 'detrimental impositions' or the 'interference' have the effect that the VLD does not currently have the financial capacity to promote and protect the economic and social interests of its members. Indeed, Mr Jolly's witness statement does not identify or even assert *any* detrimental effects upon the VLD's current 'capacity'. Taken at their highest, the allegations seek to establish no more than that the VLD will in the future, if freed from the interference about which Mr Jolly complains, be better able to promote and protect the economic and social interests of its members because its financial position will be enhanced.

[26] At paragraphs 219 to 220 of his witness statement, Mr Jolly says:

219. The Victorian Branch, Rail Operations Division and their officials have a long and significant record of not complying with the rules of the RTBU. I refer to and rely on the matters set out at paragraphs 156 to 166, 1911 to 192, 196, 200 to 203 and 206 to 209 above as well as:
- (a) In breach of rule 21(4), 23(3), 23 (4) and 54(x), the financial affairs of the Victorian Branch have, to my knowledge, always been conducted through an account held by the Rail Operations Division instead of through a Victorian Branch Fund;
 - (b) In breach of rule 23(8), the financial affairs of the four Branch Divisions that are collectively known as the Rail Operations Division have, to my knowledge, always been conducted through an account held by the Rail Operations Division collectively instead of through a Branch Divisional Fund for each Branch Division;
 - (c) In breach of rule 21(8), the funds of the Branch Divisions that are collectively known as the Rail Operations Division have, to my knowledge, always been managed and controlled by the Victorian Branch Secretary instead of the Branch Divisional Committees of the Branch Divisions that are collectively known as the Rail Operations Division;
 - (d) In breach of rule 23(5), the transfer and or/disbursement of the funds of the Branch Divisions that are collectively known as the Rail Operations Division have, to my knowledge, always been authorised by the Victorian Branch Secretary alone instead of by two Branch Divisional office bearers;
 - (e) In breach of rule 23(6), the funds of the Branch Divisions that are collectively known as the Rail Operations Division have, to my knowledge, have often been disbursed or dealt with by the Victorian Branch Secretary without a resolution of the Branch Divisional Committee of those Branch Divisions;
 - (f) In breach of rule 78(4), the Victorian Branch Executive purported to appoint Sharma as Victorian Branch Secretary when that is a power vested expressly in the Victorian Branch Council;
 - (g) In breach of rule 43(6), the Victorian Branch Secretary has a record of not providing an agenda and notice of a meeting of the Victorian Branch Executive to each member of the Victorian Branch Executive at least seven days prior to the date of the meeting or including items for discussion in agendas for Victorian Branch Executive meetings;
 - (h) In breach of rule 54(xiii) and (xiv), Grigorovitch and Sharma have a record of not preparing or causing to be prepared all documents for Victorian Branch Council and Victorian Branch Executive meetings including accurate minutes and not preparing or causing to be prepared, regular financial statements for the Victorian Branch Executive; and
 - (i) In breach of rule 157(4), the Victorian Branch Council has a record of not meeting at least once every two years.
220. To my knowledge, no action has been taken by any part of the union to address these breaches of the union's rules.

[27] These paragraphs also complain of purported breaches of the RTBIU rules by the Victorian Branch, the Rail Operations Division and various officials. Mr Jolly contends that these paragraphs establish that the conduct about which complaint is made has affected the capacity of the VLD to promote and protect the economic and social interests of its members while remaining part of the RTBIU. Consequently, the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members will, according to Mr Jolly, be increased once the VLD is freed from exposure to that behaviour after the withdrawal. As with the earlier paragraphs the contentions which underpin paragraphs 219-220 involve a relative comparison between the VLD's current capacity to promote and protect the economic and social interests of its members and the likelihood of that capacity improving if the VLD is registered after the withdrawal from amalgamation takes effect. Such a comparison is not required by s 94A(2)(b) of the RO Act. Moreover, Mr Jolly does not say in his witness statement that the conduct about which he complains has had any detrimental effect upon the VLD's capacity to promote and protect the economic and social interests of its members. To the extent that the paragraphs purport to deal with the use of funds by the Victorian Branch, these are not responsive to the RTBIU's contentions about the VLD's likely capacity as the proposed new organisation to promote and protect the economic and social interests of its members as earlier set out.

[28] At paragraphs 221 to 222 Mr Jolly says:

221. The Victorian Branch, Rail Operations Division and their officials have [a] record of not complying with the RTBU Financial Policy. ~~I refer to and rely on the matters set out at paragraphs 191 to 197 and 200 to 203 above.~~¹⁸

222. To my knowledge, no action has been taken by any part of the union to address these breaches of the RTBU Financial Policy.

[29] Paragraphs 221 to 222 also purport to deal with the use of funds by the Victorian Branch, but, as with the earlier paragraphs, these are also not responsive to the RTBIU's contentions about the VLD's likely capacity as the proposed new organisation to promote and protect the economic and social interests of its members as earlier set out. They are garnered in support of a contention about the VLD's likely capacity in the future as compared to its current capacity (although, again, Mr Jolly's witness statement does not identify or even assert any current effect on the VLD's capacity).

[30] So much of paragraph 6A(b)B of the Amended Application as relies on paragraphs 86-205 of Mr Jolly's witness statement may be struck out because Mr Jolly no longer relies on those paragraphs. As for the remainder, for the reasons given above, we agree with the RTBIU that paragraph 6A(b)B of the Amended Application should be struck out because the matters alleged therein are not relevant to the consideration under s 94A(2)(b) of the RO Act.

[31] It follows from the foregoing that paragraphs 6A(b)B and C are to be struck out from the Amended Application and we will not determine the veracity of the allegations contained therein. Paragraph 6A(c) of the Amended Application has, since the clarification of the RTBIU's position on the matters relevant to the assessment whether it is appropriate to accept Mr Jolly's Amended Application under s 94A(1), in effect been withdrawn. But for the avoidance of doubt, we will strike out that paragraph.

[32] It is unnecessary for us to deal with the RTBIU's complaint that paragraphs 6A(b)(B), (C) and 6A(c) of the Amended Application do not properly or adequately particularise the

claims of unlawfulness, oppression and dysfunction and do not give fair notice to the RTBIU of Mr Jolly's case.

Order

[33] We order that sub-paragraphs 6A(b)B and C, and 6A(c), of the applicant's amended application for a ballot under Part 3 of Chapter 3 of the RO Act dated 26 April 2023 be struck out.



PRESIDENT

Appearances:

H Borenstein KC with Y Bakri of counsel for Mr Paris Jolly

C Dowling SC with C Massy of counsel for the Australian Rail, Tram and Bus Industry Union

S Kemppi for the Australian Council of Trade Unions

Hearing details:

Tuesday 6 June 2023

Melbourne

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¹ Transcript (6 June 2023) PN173-PN186.

² Ibid PN242-PN248.

³ Ibid PN248-PN270.

⁴ Ibid PN273-PN277.

⁵ Ibid PN281-PN284.

⁶ Ibid PN278-PN280.

⁷ Applicant's Submissions 2 June 2023 at [38].

⁸ Ibid at [37]; Transcript (6 June 2023) PN370-371.

⁹ See, eg, *Fair Work (Registered Organisations) Act 2009* (Cth) s 158(4).

¹⁰ Transcript (6 June 2023) PN39.

¹¹ Ibid PN40.

¹² Ibid PN40-PN41.

¹³ Ibid PN42-PN45.

¹⁴ Ibid PN91-PN92.

¹⁵ Mr Jolly no longer relies on these cross-referenced paragraphs.

¹⁶ Mr Jolly no longer relies on these cross-referenced paragraphs.

¹⁷ Mr Jolly no longer relies on these cross-referenced paragraphs

¹⁸ Mr Jolly no longer relies on these cross-referenced paragraphs