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, 19 OCTOBER 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 – whether it is appropriate to accept application made after the end of the five-year period referred to in s 94(1)(c) of the Fair Work (Registered Organisations) Act 2009 – whether amalgamated organisation has a record of not complying with workplace or safety laws – meaning of 'a record' - whether Locomotive Division will likely have the capacity to promote and protect the economic and social interests of its members – not appropriate to accept the application – application dismissed.

[1] On 21 July 2023, we determined[1] an interlocutory application by the Australian Rail, Tram and Bus Industry Union (RTBIU) by striking out sub-paragraphs 6A(b)B, 6A(b)C and 6A(c) of Mr Jolly's Amended Application filed on 26 April 2023 (July 2023 decision). In this decision we deal with that application. For convenience, we adopt the abbreviations we used in the July 2023 decision. As we noted in the July 2023 decision, because Mr Jolly has applied under s 94 of the RO Act for a ballot to decide whether the VLD should withdraw from the RTBIU at a time which is more than five years after the 1993 Amalgamation, Mr Jolly also applies for the Commission to accept the Amended Application pursuant to s 94A(1) after the end of the five-year period referred to in s 94(1)(c).[2]

[2] We have decided not to accept the Amended Application after the end of the five-year period referred to in s 94(1)(c) of the RO Act as we are not satisfied that it is appropriate to do so. Consequently, the Amended Application is dismissed. Our reasons follow.

Consideration

[3] An application under s 94 of the RO Act for a secret ballot to be held to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation may be made if, relevantly, it is made before a period of five years after the amalgamation occurred has elapsed. Section 94A clothes the Commission with power to accept an application that is made more than five years after the relevant amalgamation if it is satisfied, having regard to particularised matters, that it is appropriate to accept the application. In terms s 94A provides:

94A Accepting applications for ballots more than 5 years after amalgamation

(1) Despite paragraph 94(1)(c), the FWC may accept an application made under section 94 after the end of the period referred to in that paragraph if the FWC is satisfied that, having regard to the matters set out in subsection (2), it is appropriate to accept the application.

(2) The matters are the following:

(a) whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record;

Note: ***Workplace or safety law*** is defined for this Part in subsection 93(1).

(b) the likely capacity, of the organisation that the constituent part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members.

(3) If the FWC considers that an amalgamated organisation has a record of not complying with workplace or safety laws but that the constituent part has not contributed to that record, the FWC must decide that it is appropriate to accept the application.

(4) Submissions in relation to the matters mentioned in subsection (2) may only be made by the following persons:

(a) the applicant or applicants, or any person who could have made an application under subsection 94(3) in relation to the proposed withdrawal;
(b) the amalgamated organisation;
(c) the General Manager.

[4] A workplace or safety law means any of the RO Act, the *Fair Work Act 2009* (Cth) (FW Act), the *Federal Safety Commissioner Act 2022* (Cth), the *Work Health and Safety Act 2011* (Cth) and a State or Territory OHS law (within the meaning of the FW Act).[3]

[5] Mr Jolly contends the Commission must accept the Amended Application under s 94A(3) of the RO Act because the RTBIU has a record of not complying with workplace or safety laws to which the VLD has not contributed. The RTBIU says that the matters on which Mr Jolly relies as constituting the record of not complying with workplace or safety laws are not such as to require the acceptance of the application because there is no finding of non-compliance within the meaning of ss 94A(2)(a) or (3) and, in any event, the matters do not constitute a 'record' within the meaning of those provisions.

[6] Mr Jolly contends in the alternative, that if the requirements of s 94A(3) of the RO Act are not met, the Commission should exercise its discretion under s 94A(1) and find that it is appropriate by accepting the Amended Application. Mr Jolly says that it is appropriate to do so because the VLD will likely have capacity, when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members. The RTBIU contends that it is not appropriate to accept the Amended Application because the absence of a record of the RTBIU not complying with workplace or safety laws weighs against such a conclusion and the VLD as a registered organisation would not likely be able to promote and protect the economic and social interests of its members.

Some constructional issues

[7] Before considering the substance of these contentions in the context of the evidence in this proceeding, it is necessary to say a few things about the parties' contentions concerning the proper construction and application of s 94A of the RO Act.

[8] The first concerns that which is meant by the phrase, 'a record of not complying with workplace or safety laws' in ss 94A(2)(a) and (3). The RTBIU contends that, having regard to the context in which the phrase is used, and in particular the context provided for by subsection (3), a 'record' of not complying must mean a determination made by a court or a tribunal with authority to decide whether the amalgamated organisation had complied with a workplace or safety law. It says that 'record' should not be construed as merely meaning one or more findings of non-compliance. Further, it submits that 'record' connotes some significant number of instances of non-compliance. Mr Jolly contends that the reference to 'a record' in ss 94A(2)(a) and (3) is to an antecedent history of non-compliance with workplace or safety laws. Such a record may be constituted by one or more instances of non-compliance with workplace or safety laws. And, in common parlance, it is legitimate to describe a person who has even one criminal conviction as having a criminal 'record'. Mr Jolly says that 'a record' of not complying with workplace or safety laws within the meaning of ss 94A(2)(a) and (3) is not confined to determinations made by a court or tribunal that has authority or jurisdiction to decide the issue but extends to any instance of non-compliance with workplace or safety laws as found by a court or tribunal. In substance, Mr Jolly says that a record of not complying with workplace or safety laws may be constituted by any such finding by a court or tribunal and is not confined to a finding of a contravention in proceedings concerning a contravention of such laws.

[9] Section 94A(2)(a) and (3) are concerned with the existence of a record of non-compliance by an amalgamated organisation and any contribution to that record by the constituent part. We accept Mr Jolly's submission that an instance of not complying with a workplace or safety law may be constituted by a finding of non-compliance made by a court or tribunal acting within jurisdiction. The legislature chose to deploy the words 'not complying' with the identified laws when describing the content of 'a record', rather than using more narrow words, such as 'contravention' or 'breach' as it has elsewhere in the RO Act — for example, in s 73(2)(c), which is concerned with the Commission fixing a day upon which an amalgamation of organisations under Part 3 of Chapter 2 will take effect. Accordingly, we do not consider that ss 94A(2)(a) and (3) are confined to a consideration of any declarations or determinations of contravention of a workplace or safety law.

[10] The question of whether 'a record of not complying' for the purpose of ss 94A(2)(a) and (3) may be constituted by a single finding of non-compliance, or a very small number of such instances, is more difficult. An analogy with the concept of a criminal record is less than apt. Unlike a criminal record, no 'record' in the literal sense exists in respect of any findings of non-compliance of workplace or safety laws made by any court or tribunal. On one view, 'a record of not complying' connotes ongoing or continuing non-compliance. However, if a plurality of instances of non-compliance is required, it becomes difficult to establish what the benchmark required by the legislature is in any given case. For reasons which we give later, it is not necessary for us to determine this issue in this case.

[11] The second concerns the matters that may be considered in assessing whether it is appropriate to accept an application under s 94A(1) of the RO Act. As stated in the July 2023 decision at [10], Mr Jolly and the RTBIU agree that the matters in ss 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 and that there is no residual discretion involving the consideration of other relevant matters in determining whether it is appropriate to accept the application.

[12] We harbour some doubt as to whether the matters relevant to the assessment are so confined. True it is that s 94A(2) contains an exhaustive list of mandatory considerations but 94A(1) also confers on the Commission a discretion to accept an application which is filed outside of the time prescribed in s 94(1)(c) (subject to s 94A(3)). The mandatory considerations inform the exercise of the discretion, but the power to accept a late application is still only exercisable if the Commission is satisfied that it is appropriate to do so. The requirement that the Commission be 'satisfied' that it is appropriate to do so implies the existence of a discretion indicating that a broader evaluative judgment is to be exercised. The nature of the enquiry is also informed by the use of the word 'appropriate', which in its ordinary meaning used as an adjective connotes something that is suitable, fitting, apt, right or proper in the circumstances. Plainly in assessing whether it is appropriate, account must be taken of the matters in s 94A(2) and appropriate weight must be assigned to the matters. It should also be uncontroversial that the exercise of the discretion should be informed by the statutory context and purpose of the relevant provision(s) in relation to which the discretion arises. On one view, although there are only two mandatory considerations, if these considerations were intended to be the only matters relevant in accepting a late application, the requirement that the Commission be satisfied that it is 'appropriate' would have little work to do.

[13] However, it is again not ultimately necessary to state a definitive view about this issue because the only matters raised by Mr Jolly in support of the acceptance of his application, should s 94A(3) not apply, are those in paragraphs (a) and (b) of s 94(A)(2). We therefore need only determine the matter on the basis advanced by Mr Jolly.

[14] The third concerns Mr Jolly's contention that, although the matters in ss 94A(2)(a) and (b) are considerations that must be taken into account when conducting the evaluative exercise, it is not necessary for both of the matters to be present for the Commission to decide that it is appropriate to accept the Amended Application. Mr Jolly says that the underlined parts of the text of paragraph [33] of the Explanatory Memorandum to the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamation) Bill 2020* (Explanatory Memorandum), reproduced below, provides support for his construction:

> 33. New subsection 94A(3) provides that if the FWC considers that an amalgamated organisation has a record of not complying with workplace or safety laws but the constituent part has not contributed to that record, then the FWC must decide that it is appropriate to accept the application. <u>It is not necessary for both of the matters listed in new subsection 94A(2) to be present for the FWC to determine to accept the application. It is possible for the FWC in the exercise of its discretion, to determine that i[t] is appropriate to accept the application for ballot, when only one of the matters listed in new paragraphs 94A(2)(a) - (b) are present</u>.
>
> (underlining added)

[15] The RTBIU contends that, given the sentence immediately preceding the underlined text, that which follows is directed at s 94A(3) and these observations are not made in respect

of s 94A(2), which are dealt with at [29] to [32] of the Explanatory Memorandum. We do not think this is correct as s 94A(3) is concerned only with the matters in s 94A(2)(a), not s 94A(2)(b), yet the underlined passage provides that the Commission may decide that it is appropriate to accept the application for ballot, when only one of the matters listed in the new paragraphs in ss 94A(2)(a) *and (b)* is present. Moreover, s 94A(3) is concerned with a particular result from the assessment required by s 94A(2)(a), and the explanation in the last sentence of [33] is at odds with the operation of s 94A(3).

[16] Section 94A(2)(a) and (b) are not jurisdictional pre-requisites to the exercise of the power but are rather mandatory matters to be considered. The matters in s 94A(2)(a) are introduced by the conjunction 'whether', inviting an enquiry to be conducted, and a finding or conclusion to be made, in respect of the matters which follow and informs the exercise of the discretion. Similarly, the matter in s 94A(2)(b) calls for an assessment not about an existing state of affairs but as to the likely future capacity of a constituent part of an amalgamated organisation operating as a registered organisation to promote and protect the economic and social interests of its members. And in every case, there will be an answer to both ss 94A(2)(a) and (b). Section 94A(3) compels the Commission to accept a late application when a particular answer is given to the enquiry under s 94A(2)(a) — that the amalgamated organisation has a record of not complying with workplace or safety laws but the constituent part has not contributed to that record. Where s 94A(3) does not apply, it will be necessary for the Commission to make an evaluative judgment as to whether the conclusions it has reached with respect to the prescribed matters render it appropriate to accept the application.

[17] The final matter concerns whether a finding that the RTBIU does not have a record of non-compliance within the meaning of s 94A(2)(a) means it simply falls to the conclusion reached with respect to s 94A(2)(b) to determine whether it is appropriate to accept the Amended Application. The consideration identified in s 94A(2)(a) is whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record. As we have already explained, the consideration requires an enquiry about the matters identified. When complete, the enquiry will have disclosed either no record, or the existence of a record of non-compliance to which the constituent part contributed in a small or significant way (or somewhere in between), or not at all. Contrary to Mr Jolly's contention,[4] we consider that a finding that the RTBIU does not have a record of non-compliance would be a consideration that must be weighed in the assessment of whether it is appropriate to accept the Amended Application. It does not weigh neutrally or have no work to do. It is the answer to the enquiry posed by s 94A(2)(a) which must be considered. Were it otherwise, the mandatory considerations in ss 94A(2)(a) and (b) would be differently expressed.

Whether the RTBIU has a record of not complying with workplace or safety laws to which the VLD has not contributed: s 94A(3)

[18] The principal basis upon which Mr Jolly relies to support acceptance of the Amended Application under s 94A(1) of the RO Act is his contention that s 94A(3) requires the Commission to accept his Amended Application after the five-year period in s 94(1)(c) because the RTBIU has a record of not complying with workplace or safety laws to which the VLD has not contributed. The 'record' on which Mr Jolly relies comprises two matters. It is not in dispute that if either of the matters is an instance of relevant non-compliance by the RTBIU constituting a record, the VLD has not contributed to that record.

[19] The two matters are recorded in decisions of the Commission in *Downer EDI Rail Pty Ltd v Australian Rail, Tram and Bus Industry Union*[5] (*Downer*) and *Queensland Rail Transit Authority T/A Queensland Rail v Australian Rail, Tram and Bus Industry Union*[6] (*Qld Rail*). Each decision concerns a determination of an application under s 418 of the FW Act.

[20] In *Downer*, Deputy President Colman made orders directed to the RTBIU requiring that it not organise industrial action involving specified employees[7] and in so doing, the Deputy President made factual findings that as at 16 May 2017:

- industrial action was being organised by the RTBIU's officeholder, Mr Evans and hence by the RTBIU;[8]
- unprotected industrial action was being threatened by the RTBIU;[9] and
- the industrial action that was being organised and threatened would not be protected industrial action for the purposes of Part 3-3 of the FW Act and there was no contrary contention.[10]

[21] The industrial action being organised and threatened related to attendance for work and work performed by employees of Downer engaged in 'shunting' which entails moving rolling stock to and from the main rail line, and into and out of maintenance sheds.[11] The *Downer EDI Rail Newport Facility Enterprise Agreement 2016-2020* (Downer EDI Agreement) applied to the employment of these employees[12] and although not recorded in the decision, that agreement had not passed its nominal expiry date of 30 June 2020 at the time the industrial action was being organised and threatened.

[22] In *Qld Rail*, Deputy President Bull determined an application made by the Queensland Rail Transit Authority (Queensland Rail) under s 418 of the FW Act by making orders directed to the RTBIU requiring it to stop organising and not organise any industrial action.[13] In determining the application, the Deputy President made factual findings that on 29 September 2018:

- unprotected industrial action was happening, threatened and probable;[14] and
- industrial action was being organised by the RTBIU through its officials and delegates employed by Queensland Rail.[15]

[23] The *Queensland Rail Traincrew Enterprise Agreement 2017* (QR Agreement) applied to the relevant employees involved in the industrial action in their employment with Queensland Rail,[16] and although not recorded in the decision, that agreement had not passed its nominal expiry date of 30 August 2020 at the relevant time.

[24] Mr Jolly contends the decisions in *Downer* and *Qld Rail* taken together, or individually, constitute a record of the RTBIU not complying with workplace or safety laws within the meaning of s 94A(3) (and s 94A(2)(a)). He says that in *Downer*, as the Deputy President's finding was that the RTBIU, through its official, was organising and threatening industrial action, and because the nominal expiry date of the Downer EDI Agreement had not yet passed at the time the decision was made, the conduct necessarily constituted non-compliance with s 417 of the FW Act. Similarly, in *Qld Rail*, Mr Jolly submits that the finding that on 29 September 2018 unprotected industrial action was happening, threatened and probable, which

was being organised by the RTBIU, together with the fact that the QR Agreement had not passed its nominal expiry date, also constituted non-compliance with s 417 of the FW Act.

[25] Section 417 of the FW Act is a civil remedy provision which relevantly provides that an employer, employee, or employee organisation covered by an enterprise agreement, or an officer of such organisation must not organise or engage in industrial action from the day the enterprise agreement is approved by the Commission until its nominal expiry date has passed.

[26] 'Industrial action' is defined in ss 12 and 19 of the FW Act. Industrial action will be 'protected industrial action' if it meets the definition in ss 12 and 408. Sections 409-411 describe the various forms of protected industrial action (employee claim action, employee response action and employer response action) and the conditions which must be met for the particular form of industrial action to be protected. Each form may only be organised or engaged in for a proposed enterprise agreement. Each must also meet the particular common requirements in s 413. One common requirement is that the person organising or engaging in the industrial action must not contravene s 417 by organising or engaging in the industrial action.[17]

[27] Both *Downer* and *Qld Rail* concerned industrial action involving employees. Industrial action of that kind may not be protected industrial action for many reasons, including, if the industrial action is being organised or engaged in:

- to support or advance claims other than in relation to a proposed enterprise agreement;[18]
- to support or advance claims in relation to a proposed enterprise agreement which include claims about matters that include non-permitted matters;[19]
- is not authorised by a protected action ballot;[20]
- to support or advance claims to include unlawful terms in the proposed enterprise agreement;[21] or
- without meeting the notice requirements.[22]

[28] Organising or taking industrial action will also not be protected if:

- it relates to a significant extent to a demarcation dispute or contravenes a Commission order which relates to a significant extent to a demarcation dispute;[23] or
- a bargaining representative of an employee who will be covered by the proposed enterprise agreement is engaging in pattern bargaining in relation to the agreement.[24]

[29] Protected industrial action attracts the immunity from suit for which s 415 of the FW Act provides. But organising, threatening or taking industrial action which is not protected is not rendered unlawful nor is it proscribed *per se* by the FW Act. More is required. For example:

- industrial action organised or taken during the nominal life of an enterprise agreement is prohibited by s 417;
- industrial action organised or taken in contravention of an order made under ss 418, 419 or 420 is prohibited by s 421; and

- industrial action as a form of adverse action taken by one person against another because of a specified reason or attribute, or as an iteration of "any action" taken with the intent to coerce the other person, or a third person to exercise or refrain from exercising particular rights or to employ or not employ a particular person or allocate or not allocate duties to a particular person is proscribed by various provisions in Part 3-1.

[30] The jurisdictional fact which conditions the requirement for the Commission to make an order under s 418 of the FW Act is that it *appears* to the Commission that industrial action by one or more employees or employers that is not, or would not be, protected industrial action is happening, or is threatened, impending or probable, or is being organised. That is, the jurisdictional fact is the holding of an opinion that the prescribed state of affairs exists, not whether that state of affairs truly exists.[25] No opinion is required to be formed that there has been a contravention of the FW Act or any other Act. Applications for orders under s 418 are heard on an urgent basis, having regard to the requirements in s 420 that such applications either be heard within two days where practicable[26] or that an interim order be made within that timeframe until the application can be determined,[27] unless it is contrary to the public interest to do so.[28] Such applications are therefore usually determined on the basis of limited evidence and do not permit detailed consideration by the Commission.[29] Accordingly, one would not expect a decision which determines an application made pursuant to s 418 to contain a definitive finding that an organisation has not complied with the FW Act or any other law.[30]

[31] In both *Downer* and *Qld Rail*, the Commission found that the industrial action being organised by the RTBIU was not protected industrial action. In neither case did the Commission find the industrial action being organised by the RTBIU was not protected because it contravened s 417 of the FW Act. In *Downer*, the Deputy President noted, in finding that the industrial action that was being organised and threatened would not be protected industrial action, that there was no contention to the contrary.[31]

[32] In *Qld Rail*, the Deputy President concluded that 'the industrial action of employees is linked to the earlier dispute with the [RTBIU] concerning the dismissal of two [RTBIU] members'[32] and later, that '[in] the absence of any evidence to the contrary… unprotected industrial action is being organised by the [RTBIU] through its officials and delegates employed by Queensland Rail…'.[33] In his decision the Deputy President refers to 'protected industrial action' or 'unprotected industrial action' on ten occasions. On six occasions, the reference relates to a submission or allegation made. On one occasion it is found in an extract of s 418 and on another in an extract from a decision to which the Deputy President referred. The two other occasions are as set out above. It is palpably clear that the reason it appeared to the Deputy President that the industrial action that was being organised was or would not be protected industrial action was that the industrial action related to a dispute about the dismissal of two employees. Therefore, the industrial action was not being organised to support or advance claims for a proposed enterprise agreement (s 409(1)(a)) but for an extraneous purpose and so could not be protected industrial action.

[33] Though it is true in each case that the industrial action being organised was or would be taken while the applicable enterprise agreement had not passed its nominal expiry date, as we have noted, there was no finding made that the industrial action was or would be unprotected for that reason. To the contrary, the fact that industrial action was not protected was not

contested in *Downer*, and in *Qld Rail* the industrial action was found to be unprotected because the reason it was being organised was unconnected with supporting or advancing claims in relation to a proposed enterprise agreement. In *Downer* the threats of industrial action made by the RTBIU official were made in connection with a demand by the official for Downer to retract the dismissal of two employees who had been dismissed for safety-related reasons.[34] This established the extraneous purpose underpinning the RTBIU official's threat and organisation of industrial action, and provided a sufficient foundation for the Deputy President's conclusion that the industrial action would not be protected. And, in these circumstances, it was unsurprising that the RTBIU did not contest that the industrial action was not or would not be protected.

[34] In neither case is a finding recorded that the RTBIU did not or was not complying with s 417 of the FW Act or any other workplace or safety law. We reject Mr Jolly's contention that, as the industrial action was being organised while the relevant enterprise agreements had not passed their nominal expiry dates, a finding that the industrial action was not protected because it contravened s 417 may be inferred. As we have explained, no such findings were made. To now infer such a contravention would in our view involve this Full Bench making its own finding without having heard any evidence concerning the matters the subject of the two decisions. That course is not reasonably available. Further, on any view of what constitutes 'a record of not complying' under ss 94A(2)(a) or (3), it must involve some pre-existing finding of non-compliance rather than the making of new findings by the Commission when it considers whether to accept an out-of-time application.

[35] It is possible that a member of the Commission may, in the course of dealing with an application under s 418 of the FW Act, form the opinion or make a finding that particular industrial action being organised is not protected industrial action, because organising that action while an applicable enterprise agreement has not passed its nominal expiry date contravenes (or appears to contravene) s 417. However, in *Downer* and *Qld Rail* no such finding was made, nor is it evident in the reasons that such an opinion was formed. Accordingly, this is not the occasion to determine whether such a finding or formation of such an opinion, if it occurred, may form part of an amalgamated organisation's 'record' of not complying with workplace or safety laws.

[36] Neither *Downer* nor *Qld Rail* form part of a record of the RTBIU not complying with workplace or safety laws. As no other matter is alleged or identified as constituting a relevant record, it follows that the RTBIU does not have a record of not complying with workplace or safety laws. Accordingly, s 94A(3) of the RO Act is not engaged.

Section 94A(2)(a)

[37] For the reasons set out above, the RTBIU does not have a record of not complying with workplace or safety laws. The questions of whether and to what extent the VLD contributed to the 'record' therefore do not arise.

The likely capacity of the VTDU to promote and protect the economic and social interests of its members: s 94A(2)(b)

[38] The name proposed for the organisation to be registered, if the VLD is allowed to withdraw from the RTBIU, is the Victorian Train Drivers' Union (VTDU). Mr Jolly contends that when the withdrawal takes effect, the VTDU would function effectively as a registered organisation and would continue to promote and protect the economic and social interests of its members as the VLD has historically done. To make good this contention, Mr Jolly relies on the following matters:

- As at 3 April 2013 the VLD had a total of 1,834 members.[35]
- The VLD controls its own finances and property with a high level of autonomy and independence from the rest of the RTBIU.[36]
- Although the VLD is not a separate reporting unit under the RO Act, it nevertheless prepares an annual report on its financial and asset position.[37]
- For the financial year ended 31 December 2021 the VLD had a net asset value of $9,038,282.59 and a surplus of $233,263.91.[38]
- The VLD controls the following real property interests:
    - Level 1 and Level 14/222 Kings Way, South Melbourne VIC 3205 which as at 31 December 2020, the most recent valuation, have a combined estimated value of $3,750,000; and
    - Level 6/1 Elizabeth Street, Melbourne VIC 3000 which as at 31 December 2020, the most recent valuation, has an estimated value of $1,600,000).[39]
- The VLD does not hold any property, assets or liabilities in common with the remainder of the RTBIU except for some taxes and premiums paid in respect of insurance policies.[40]
- The VLD has in practice operated with a high level of autonomy and independence from the remainder of the RTBIU, and industrially VLD members are almost exclusively represented and assisted by the VLD.[41]
- The VLD effectively operates as a separate and independent entity within the RTBIU including that it:
    - conducts business from its own premises which is completely separate from the rest of the RTBIU;
    - employs sufficient staff and has sufficient officials to maintain and conduct all of the business of the VLD;
    - has a VLD membership portal for VLD members only that is separate from the rest of the RTBIU and which the VLD controls, administers and manages;
    - has a VLD server, email system, remote access system, telephone and communications system and electronic document management system separate from the rest of the RTBIU that the VLD controls, administers and manages;
    - has a VLD website, Facebook account and twitter account separate from the rest of the RTBIU that the VLD controls, administers and manages;
    - has its own paid subscription services separate from the remainder of the RTBIU which it controls, administers and manages including to Workplace Express, legal databases, a membership communication system for SMS and emails, and a membership payment system;

- conducts, or engages external service providers to conduct, all training of VLD employees and officials including union governance, financial management training, right of entry and professional development;
- controls, administers and manages all real property attached to the VLD including payment of rates, participation in owners' corporations and procurement and engagement of real estate agents and maintenance services to manage such real property;
- controls, administers and manages all property used by the VLD to conduct its business;
- controls, administers and manages its own records, both electronic and hard copy, separately from the rest of the RTBIU, including general member records, member financial records, VLD general records and VLD financial records;
- controls, administers and manages its finances including by controlling, administering and managing its own Xero financial management system account and its own bank account which comprises the VLD Fund;
- controls, administers and manages VLD membership subscriptions;
- performs payroll functions for VLD officials and employees including payment of wages, superannuation and other entitlements, reimbursement requests and time sheets;
- pays its own GST;
- engages its own accountants and bookkeepers;
- controls, administers and manages its own financial records;
- prepares its own financial reports and budgets;
- controls, administers and manages all of the functions related to the running of the VLD including procurement and engagement of all service providers separately from the rest of the RTBIU, other than for insurances and the Victorian Branch membership system;
- controls, administers and manages all vehicles attached to the VLD including car registration, maintenance and servicing, cleaning, valuations, petrol and car parking; and
- administers and processes all membership functions and services including:
  - membership applications, rejoins, resignations, suspensions, membership record updates, queries and disputes, legal referrals for members;
  - membership subscription payments (although a small portion of members pay subscription fees to the Victorian Branch directly, which then processes and remits those fees to the VLD);
  - membership quarterly subscription statements;
  - provision of membership cards, new membership packs, forms, diaries and merchandise; and
  - membership communications.[42]

[39] Mr Jolly gave evidence that the VLD has consistently generated sufficient income to operate in surplus.[43] Its financial performance over the past three years is summarised in the table below:

Year	Membership Income	Other Income	Expenses	Surplus
2022	$2,009,180.61	$180,169.44	$1,545,067.97	$644,282.08
2021	$1,907,382.18	$182,841.02	$1,658,157.55	$432,065.65
2020	$1,890,624.39	$128,548.71	$1,598,754.49	$420,418.61

[40] As we noted in the July 2023 decision, 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.[44] The RTBIU contends that the VLD has been operating in breach of the RTBIU rules and the money maintained in its bank accounts is not, in accordance with the rules, the property of the VLD. The industrial capacity of the VLD as a registered organisation to promote and protect the economic and social interests of its members after the withdrawal from amalgamation takes effect is not put in issue by the RTBIU. Apart from the financial position of the proposed organisation, the RTBIU does not contend 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.[45] 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.[46]

[41] Vikrant Sharma is the Branch Secretary of the Victorian Branch of the RTBIU (Branch) and a member of the RTBIU's National Council and National Executive.[47] Mr Sharma gave evidence that:

- on 8 February 2017, the Branch Executive passed a resolution creating a shared account into which subscriptions of VLD members were to be deposited;[48]
- the signatories to this account were to be the Branch Secretary, Assistant Branch Secretary and certain VLD officials;[49]
- since the creation of the shared account, the VLD has from time-to-time transferred amounts from the shared account to its general account;[50]
- there has been no resolution of the Branch Executive authorising these transfers;[51]
- those transfers were not authorised in writing by the nominated Branch officials;[52] and
- in May or June of 2022, despite requesting Marc Marotta, then the VLD secretary, to make Mr Sharma a signatory, the VLD has not made the Branch Secretary a signatory.[53]

[42] Mr Sharma's evidence was that he had caused to be extracted from the information contained in the Xero accounting software used by the Branch, details of transactions in the shared account, which revealed that since the 8 February 2017 resolution, the following amounts have been paid into the shared account by VLD members:[54]

YEAR	AMOUNT
2017	$1,005,648.59
2018	$1,857,398.74
2019	$2,105,657.62

2020	$1,768,144.20
2021	$1,827,178.71
2022	$1,901,908.76
2023 (to June 30)	$970,115.76

[43] He said the information also revealed the following amounts have been transferred to the VLD general account:[55]

YEAR	**AMOUNT**
2017	$852,100.00
2018	$1,846,194.04
2019	$1,825,897.34
2020	$1,340,000.41
2021	$2,162,796.69
2022	$2,051,335.38
2023 (to June 30)	$886,553.33

[44] According to Mr Sharma:

- the total amount paid into the shared account since 8 February 2017 is $11,436,052.38;
- the total amount paid into the shared account since 1 January 2020 is $6,467,347.43;
- the total amount transferred from the shared account to the VLD general account since 8 February 2017 is $10,964,877.19; and
- the total amount transferred to the VLD general account since 1 January 2020 is $6,440,685.81.[56]

[45] Rule 11(1) of the RTBIU rules provides that all members' subscriptions be paid to the Branch Secretary and form part of the Branch Fund. Rule 21(4)(ii) provides that the Branch Fund shall be comprised of all subscriptions received by the Branch. Rule 23(3) provides that all disbursements from the Branch Fund shall be authorised by certain Branch officials. Rule 23(4) provides that the Branch Fund shall not be dealt with, except upon a resolution of the Branch Executive. Rule 21(12) provides that the VLD, may only dispose of any real property forming part of the Branch Divisional Fund of the VLD with the approval (obtained in advance of any disposal) of at least 70% of eligible voters of the membership of the VLD who vote in a ballot.

[46] The import of all of this, according to the RTBIU, is that the 8 February 2017 resolution was not consistent with the RTBIU rules. And, each of the subsequent transfers out of that account have not complied with the RTBIU rules because they were not authorised in accordance with those rules. Consequently, the RTBIU contends, $10,964,877.19 has been paid into the shared account and then transferred to the VLD in breach of the RTBIU rules from 8 February 2017 to 30 June 2023.

[47] Section 320 of the RO Act operates to validate, after the end of four years from the doing of an act, *inter alia*, certain acts of a collective body of an organisation, its branches or officers

thereof, purporting to exercise power conferred by or under the organisation's rules. In effect, after four years, and subject to any court order for which s 321 provides, an impugned act is taken to have been done in compliance with the rules of the organisation or branch.

[48] The RTBIU contends that even if s 320 of the RO Act has the effect of validating the 8 February 2017 resolution, the subsequent transfers out of the shared account into the VLD account without the authorisation of the Branch Executive, or of the necessary Branch officers were not consistent with the RTBIU rules. Further, even if s 320 validates the individual transactions which occurred more than four years ago, the evidence summarised above, is that the sum of $6,440,685.81 has been transferred to the VLD since 1 January 2020, which the RTBIU says is in breach of its rules, and at least some of those transfers took place after the period when validation under s 320 would operate.

[49] The RTBIU contends that, when regard is had to the quantum of funds it says was wrongfully transferred and the requirements of rule 21(12) as to the disposal of any VLD property, the wrongful transfer cannot easily be remedied, or remedied at all, by the sale of existing real property. The RTBIU contends that the effect of this is that we cannot be satisfied, when the Federal Court undertakes the exercise of apportioning the assets of the RTBIU and the new organisation under s 109(1)(b) of the RO Act, that the new organisation will have the cash reserves or assets that Mr Jolly contends.

[50] In summary, the RTBIU contends that the VTDU is not likely to have capacity to promote and protect the economic and social interests of its members because:

- the VLD's funds have been paid to it in breach of RTBIU rules;
- disposal of real property is constrained by rule 21(12); and
- the number of members that the VTDU will have will not generate sufficient income to enable the proposed organisation to adequately promote and protect the economic and social interests of its members, taking into account the absence of a cash reserve because those funds are Branch funds and the constraint on real property disposal under the RTBIU rules.

[51] These proceedings are not the appropriate vehicle to determine the veracity of claims concerning a breach of the RTBIU rules in connection with the receipt and disbursement of membership subscriptions. Extant proceedings in the Federal Court will resolve those issues. Similarly, we do not consider that it is appropriate in an application to accept an application under s 94A of the RO Act, for the Commission to speculate about what the Federal Court might do under s 109(1)(b) to apportion the assets and liabilities of the RTBIU between the RTBIU and the VLD. It seems both parties agree.[57] In any event, the RTBIU's contentions as to the VLD's membership subscription funds assume that because funds from these members were collected and disbursed contrary to the RTBIU rules, the funds would thereby naturally be apportioned to the RTBIU and not the VLD. We consider that to be a 'stretch' given the origins of the disputed funds.

[52] As to the prospect of disposing of property to release funds for use in the operation of the VTDU, we note that an equivalent to rule 21(12) is not found in the proposed rules of the VTDU and, because the assessment under s 94A(2)(b) is forward-looking, existing constraints on property disposal are not relevant. The VTDU will not be so constrained.

[53] If the Amended Application is accepted and the withdrawal ballot succeeds, all members of the VLD will become members of the VTDU when registered under s 110 of the RO Act by operation of s 111. We consider in that event it is likely the members of the VTDU will continue to pay their membership subscription and that the VTDU will likely have an equivalent or similar income stream (noting that it will be relieved of the burden of paying the 14.5% capitation fee presently payable to the RTBIU's national office) and expenditure obligations to the VLD as disclosed in the table set out at [39].

[54] We accept that proposed rules of the VTDU will provide it with the ability to generate additional income from members by increasing subscription rates and creating membership levies (proposed rules 18(1) and 28(1)). If it became necessary, the VTDU could, like any other organisation, generate additional funds. Moreover, given its likely income stream and property asset base, we consider it is likely, were it necessary so to do, that the VTDU would be able to obtain both short and long-term funding relief through a loan, mortgage or overdraft facility from a financial institution.

[55] For these reasons we are not persuaded that the financial position of the VTDU will likely be such as to impede in any material way its capacity to promote and protect the economic and social interests of its members. Its financial position will likely be sufficiently robust to enable it to promote and protect the economic and social interests of its members. And as is evident from Mr Jolly's evidence, in all other respects, the VLD has been able to do so to date. There is no suggestion (other than the financial capacity concern raised by the RTBIU) that the VTDU will not likely be able to continue to do so. We are therefore satisfied the VTDU will likely have sufficient capacity to enable it to promote and protect the economic and social interests of its members.

Is it appropriate to accept the Amended Application taking into account the matters in s 94A(2)(a) and (b)?

[56] As we have concluded that s 94A(3) of the RO Act is not enlivened, we are not compelled to conclude that it is appropriate to accept the application. We consider the absence of a record of non-compliance is a positive factor reflecting well on the way in which the RTBIU as an organisation conducts its industrial affairs. The absence of a record is also a matter we consider weighs forcefully against a conclusion that it is appropriate to accept the Amended Application. We agree with the RTBIU that, in these circumstances, merely having the likely capacity as a registered organisation to promote and protect the economic and social interests of its members is not by itself sufficient to render it appropriate to accept Mr Jolly's application. In the instant case, although weighing in favour of the VLD, it is not a sufficiently weighty consideration to outweigh the absence of any record of non-compliance. As earlier stated, no other relevant consideration was advanced.

[57] As earlier stated, contrary to Mr Jolly's contention, our finding that s 94A(3) of the RO Act does not arise because there is no record of non-compliance does not mean that we consider the application having regard only to s 94A(2)(b). The requirement to take into account whether the RTBIU has a record of non-compliance means taking into account and ascribing appropriate weight to the fact that the RTBIU has no such record. There is clearly no requirement to determine that it is appropriate to accept an application where only the finding made under s

94A(2)(b) weighs in favour of the applicant. Mr Jolly has not advanced any persuasive reason why, in the face of a finding that the RTBIU had no record of non-complying, we should nonetheless conclude that his application should be accepted. We are not satisfied that it is appropriate to do so.

Conclusion

[58] The RTBIU does not have a record of not complying with workplace or safety laws. Section 94A(3) of the RO Act is not engaged. The VTDU will likely have sufficient capacity to enable it to promote and protect the economic and social interests of its members. However, the absence of a relevant record and other conduct or reason to support the VLD seeking to withdraw from the amalgamated organisation after the expiration of the period in s 94(1)(c) weigh against a conclusion that it is appropriate to accept the Amended Application. Taken together these matters outweigh the consideration that the VTDU will likely have sufficient capacity to enable it to promote and protect the economic and social interests of its members. The Amended Application is not accepted under s 94A and, as it was not made within the time prescribed in s 94(1)(c), it will be dismissed.

Order

[59] We order:

1. Paris Jolly's application under s 94A of the *Fair Work (Registered Organisations) Act 2009* (Cth) for the Commission to accept his s 94 application made on 2 February 2023 and amended on 26 April 2023 after the end of the five-year period referred to in s 94(1)(c) is refused.

2. The application in matter D2023/1 for a ballot to decide whether the Locomotive Division of the Victorian Branch should withdraw from the Australian Rail, Tram and Bus Industry Union is dismissed.

PRESIDENT

Appearances:

H Borenstein KC with *Y Bakri*, counsel, for Paris Jolly.

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

Hearing details:

2023.

Melbourne:
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[1] *Re Paris Jolly* [2023] FWCFB 117 at [33].

[2] Ibid at [3]; Amended Application at [5].

[3] *Fair Work (Registered Organisations) Act 2009* (Cth) s 93 (definition of 'workplace or safety law').

[4] Transcript, 11 September 2023 at PNs 1004-1009.

[5] [2017] FWC 2725.

[6] [2018] FWC 6116.

[7] [2017] FWC 2725.

[8] Ibid at [22].

[9] Ibid at [24].

[10] Ibid at [25].

[11] Ibid at [4], [9]-[13], [20].

[12] Ibid at [4].

[13] [2018] FWC 6116.

[14] Ibid at [40]-[41].

[15] Ibid at [67].

[16] Ibid at [2].

[17] *Fair Work Act 2009* s 413(6).

[18] Ibid ss 409(1)(a) 172 (1).

[19] Ibid.

[20] Ibid s 409(2).

[21] Ibid s 409(3).

[22] Ibid ss 409(6), 413(4), 414.

[23] Ibid s 409(5).

[24] Ibid s 409(4).

[25] *Maritime Union of Australia v Patrick Stevedores Holdings Pty Limited* [2013] FWCFB 7736 at [6], citing *Secretary, Department of Education, Employment & Workplace Relations v Holmes* [2008] FCA 105 at [16]; *Application by Grahame Patrick Kelly* [2023] FWCFB 33 at [22].

[26] *Fair Work Act 2009* (Cth) s 420(1).

[27] Ibid s 420(2).

[28] Ibid s 420(3).

[29] See *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26, 166 FCR 108, 171 IR 84 at [21] per Gray and North JJ.

[30] *Application by Grahame Patrick Kelly* [2023] FWCFB 33 at [22].

[31] [2017] FWC 2725 at [25].

[32] [2018] FWC 6116 at [61].

[33] Ibid at [67].

[34] [2017] FWC 2725 at [9]-[10], [17]-[18].

[35] Witness statement of Paris Jolly, 3 April 2023 (Exhibit A) at [61].

[36] Ibid at [43], [48]-[53].

[37] Ibid at [76]-[77].

[38] Ibid at [76].

[39] Ibid at [79] and Annexure PJ-7.

[40] Ibid at [63] and Outline of Proposed Withdrawal at [33].

[41] Ibid at [65].

[42] Ibid at [62(a)]-[62(m)] and [64].

[43] Second witness statement of Paris Jolly, 6 September 2023 (Exhibit B) at [17].

[44] *Re Paris Jolly* [2023] FWCFB 117 at [17].

[45] Transcript, 6 June 2023 at PNs 42-45.

[46] Ibid PNs 91-98.

[47] Witness statement of Vikrant Sharma, 16 August 2023 (Exhibit D) at [1].

[48] Ibid at [30] and annexure VS-2.

[49] Ibid annexure VS-2.

[50] Ibid at [44].

[51] Ibid at [47].

[52] Ibid at [46].

[53] Ibid at [45].

[54] Ibid at [43].

[55] Ibid at [44].

[56] Ibid at [48].

[57] Transcript, 11 September 2023 at PN1215.