IN FAIR WORK COMMISSION

Matter No: D2022/10

Application by Graham Patrick Kelly, withdrawal from amalgamated organisation

CFMMEU OUTLINE OF SUBMISSIONS IN REPLY

PROPER CONSTRUCTION OF SECTION 94A

1. At [16] to [28], of the applicant's submissions the applicant makes submissions about the proper construction of s. 94A of the Act. Those submissions are to the effect that the matters identified in s. 94A(2) are the only matters the Commission may take into account when considering whether it is appropriate to allow the application out of time. The difficulty with these submissions is that there is no warrant for reading s. 94A(2) as the exclusive list of matters to be considered. Section 94A(1) directs attention to those matters, but does not, in terms, limit the consideration of other matters.

2. If the applicant's submissions were correct, if an application was made pursuant to s. 94A by a constituent part of an amalgamated organisation which did not have a record of non-compliance with the relevant laws, all the Commission would be permitted to consider would be the matter identified in s. 94A(2)(b). That would almost completely defeat the purpose of s. 94(3). As was identified by the explanatory memorandum when s. 94 was first introduced into the Act,[1] the purpose of the limitation was to identify a period in which an amalgamation could not be undone. Whilst s. 94A is a new exception to that general proposition, it must be construed in light of the fact that Parliament has maintained the time limit in s. 94(3). The applicant's construction would completely denude s. 94(3) of meaningful work.

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[1] Paragraph 15.40 of the explanatory memorandum to the *Workplace Relations & Other Legislation Amendment Bill 1996* (Cth) provided 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.*
> (Emphasis added)

3. The applicant relies on the explanatory memorandum. The explanatory memorandum identifies that sub-section 94A(2) sets out an exhaustive list of matters that the "*FWC must consider*". Properly understood, the explanatory memorandum identifies that s. 94A(2) is a complete list of the mandatory considerations. That does not in terms limit the matters that the Commission may consider. If Parliament had intended to confine the broad discretion given by use of the word "*appropriate*" to the matters limited in sub-section (2), it would have been a simple matter to say so. The conventional method is to state that regard must be had *only* to the matters identified. The fact that Parliament has not is dispositive of the applicant's contention.

4. At [23] of the applicant's outline, the applicant misapprehends the CFMMEU's submission. The CFMMEU's submission is that s. 94A(1) and (2) do not embrace a form of relativism. The focus is on the extent of the constituent part's non-compliance. It does not matter that comparatively the amalgamated organisation's record might be much worse. The question facing the Commission is should the constituent part be granted an opportunity to obtain separate registration? If the constituent part has a demonstrated history of non-compliance, that is a matter which counts against being granted the opportunity to obtain separate registration.

5. The applicant's submissions at [25] are not correct. It may be accepted that Part 3 of Chapter 3 permits the withdrawal from amalgamation. However, the applicant's submissions overlook the context provided by s. 94(3). The evident purpose of a time limit of that kind is, as identified by the explanatory memorandum, to identify the period in which an amalgamation cannot be undone. It can be accepted that s. 94A is an exception to the general rule. However, accepting that there is a general rule, the exception should not be construed in a way which would disrupt the statutory scheme. It should not be construed in such a way which would cause uncertainty to existing amalgamations which have passed the five-year period. To put it another way, what is "*appropriate*" is informed by the statutory scheme as a whole.

6. The applicant's criticism at [26] of his outline is misplaced. It is true that the passage relied upon from *Kelly v CFMMEU* was directed at s. 94. However, those comments inform the way in which the exception to the general rule should be construed.

THE CONSTITUENT PART AND ALTERNATIVE CONSTITUENT PART CONTRIBUTION TO THE RECORD OF NON-COMPLIANCE

7. The applicant's submissions at [29] to [36] misapprehend the CFMMEU's contention. The CFMMEU has not contended that it does not have a record of non-compliance. So much can be seen from the concession in [15] of the CFMMEU's outline.

8. The submission at [27] of the applicant's outline repeats the error described at [4] above. The focus of s. 94A(2)(a) is the extent of the non-compliance by the constituent part. The fact that it may be comparatively smaller than the amalgamated organisation's record, does not affect the relevance of the non-complying conduct.

9. At [40], the applicant seeks to downplay the constituent part's unlawful behaviour. The applicant seems to suggest that it was the victim's fault.

10. The applicant's submissions also ignore the civil penalty imposed in *CFMEU v BHP Steel (AIS) Pty Ltd* [2000] FCA 1908 for contravention of s. 178 of the *Workplace Relations Act 1996* (Cth). The definition of workplace law in s. 93 includes the Act. 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.[2]

11. The submission at [42] is misplaced. The Act is of course a relevant workplace law within the definition. In that proceeding Senior Counsel for the Union *conceded a breach of the Act*.[3] The effect of the decisions pointed to by the CFMMEU are that the delegate made findings that certain conduct *had been engaged* in contravention of the RO Act.[4] Whilst the ultimate conclusion reached was a state of satisfaction, that does not change the nature of the anterior findings of fact.

12. At [45] to [49], the applicant makes submissions about the orders made pursuant to s. 418 of the FW Act. Those submissions should not be accepted. *Firstly*, s. 94A(2)(a) does not speak of a contravention of a civil remedy provision. The broad language used in the section suggests that parliament was concerned with more than just findings of a contravention of a civil penalty provision. If that was the purpose, that was a matter which could easily have been said.

[2] See *Application by Kelly* [2021] FWCFB 6002 at [45] and endnotes 3 to the Act.
[3] See [132] of the Decision.
[4] See [135] of the Decision.

13. *Secondly*, the applicant relies upon the fact that the jurisdictional precondition for an order to be made pursuant to s. 418 is a state of satisfaction. Whilst that is true, it does not prohibit the Commission from making *findings of fact* which are anterior to the establishment of the relevant opinion. In the cases relied upon findings of fact, as opposed to mere opinions, were made.[5]

14. At [50], the applicant repeats the error of engaging in a process of relativism. The question is not whether the Constituent Part or Alternative Constituent Part's records are dwarfed by the amalgamated organisation. The inquiry is on the contribution made by the Constituent Part or Alternative Constituent Part and how that interacts with the question of whether it is appropriate to grant an opportunity to obtain separate registration.

15. At [52], the applicant contends that matters relied on arising out of the *Workplace Relations Act 1996* (Cth) are not relevant because the *Workplace Relation Act 1996* is not included in the definition. For the reason set out above at [10], that is not correct.

CAPACITY TO REPRESENT

16. At [55] to [63], the applicant responds to the submissions concerning the capacity for the Alternative Constituent Part to establish that it can effectively represent any members. The difficulty with the applicant's submissions is that both Schedules 3 and 4 to the application, completely overlook that the Alternative Constituent Part is a different part of the CFMMEU to the M&E Division. The M&E Division is identified as a separately identifiable constituent part within the meaning of sub-section (c) of the definition of separately identifiable constituent part. The Alternative Constituent Part however is identified as a constituent part within the meaning of paragraph (b)(i) of the constituent part definition. They are not co-extensive, and they are not the same part of the CFMMEU.

17. The failure to grapple with that difference is precisely the point the CFMMEU makes. In circumstances where no attention has been paid to that difference, the Commission cannot be satisfied on the material before it that the Alternative Constituent Part will be able to be effectively represent its proposed members.

[5] See *BHP Coal Ltd v CFMMEU* [2013] FWC 2571 at [4] sub paragraph (6), *Delta Coal Mining Pty Ltd v CFMEU* [2016] FWC 9146 at [26], [29], [31] and [32], AGL Loy Yang Pty Ltd v CFMEU [2017] FWC 432 at [29].

OTHER CONSIDERATIONS

18. At [64] to [67], the applicant once again endeavours to minimise its record in respect of the two findings of contempt of court by reference to the record of the CFMMEU. The question is how do the contempt of court findings reflect on whether it is *appropriate* for the Constituent Part and Alternative Constituent Part to be granted the opportunity to obtain separate registration?

19. The submission at [66] is misplaced. The contempt of court by the Lodge Secretary related to the production of documents concerning his organisation of industrial action.[6] That is, the documents sought related to work matters and not in some personal capacity. In any event, he is a member of the Alternative Constituent Part, and his conduct is relevant as it reflects the conduct of the Alternative Constituent Part.

20. The applicant's submission at [68] involves the same error of relativism described above.

21. The applicant's submission at [70] misapprehend the CFMMEU's submission. The CFMMEU's position is not that the Commission can take the extant proceedings into account as if the allegations have somehow been established. The point made by the CFMMEU is that those proceedings give rise to the possibility of further contraventions by the Constituent Part and the Alternative Constituent Part. That is a matter which bears on whether it is appropriate at this time to accept the application out of time. The Commission is not required to determine the application at any time and is entitled to refrain from deciding the application until those matters have been determined.

22. The submissions made at [73] of the applicant's outline fall away once s. 94A(1) is properly construed. Having regard to the scheme of Chapter 3, the decisions taken in reliance upon the amalgamation being permanent, are plainly relevant to whether it is appropriate to now allow a ballot to potentially unwind the amalgamation.

[6] *AGL Energy Limited v Hardy* [2017] FCA 420 at [4] and [5].

CONCLUSION

23. The applicant does not clearly articulate why it is *appropriate* for the Commission to accept the application out of time. Rather, the applicant merely seeks to say that its record is not as bad as the CFMMEU's record, so therefore, the application should be accepted. With respect, that does not answer the question asked of the Commission. Absent a coherent articulation of why it is appropriate, the Commission could not be satisfied that it should grant the application.

CW Dowling

CA Massy

24 October 2022