From: Phillip Pasfield <Phillip.Pasfield@slatergordon.com.au>
Sent: Monday, 14 June 2021 3:53 PM
To: Chambers - Ross J
Cc: Declan Murphy; J Bornstein; Vivienne Wiles; jkruschel@cfmeumd.org; Tom Roberts
Subject: Application by Kelly - D2021/2
Attachments: Kelly Further submissions 14 June 2021 .pdf

Dear Associate

Please find attached for lodgement the Applicant's Further Written Submissions.

The representatives of the amalgamated organisation, the Manufacturing Division and the ACTU have been copied into this email by way of service.

Regards

Phillip Pasfield
National Practice Group Leader
Industrial and Employment Law

SLATER AND GORDON LAWYERS
Level 5, 44 Market Street, Sydney New South Wales 2000
D +61 2 8267 0613 | **T** '+61 2 8071 2790 |
M +61 419 295 492 | **F** (02) 8267 0650
W slatergordon.com.au

I respectfully acknowledge the First Nations People as the original inhabitants of the nation and the traditional custodians of the land on which we live, work and learn, and pay respect to the First Nations People and their Elders, past, present and emerging.

Please note:
Slater and Gordon Lawyers remain open to service all new and existing clients with their legal claims. In response to Covid-19 health and safety guidelines, our legal teams will be working from home so it is important that you send all correspondence and documents to me by ***email****.*

To assist with social distancing, our meetings will continue by phone or video conference if you prefer. If you need to speak to me, please do not hesitate to call me directly on my usual number.

For other law firms, please note that we will only be accepting service of documents received digitally.

IN THE FAIR WORK COMMISSION

Matter No.: D2021/2

Re Application By: Grahame Patrick Kelly

APPLICANT'S FURTHER WRITTEN SUBMISSIONS

A. Introduction

1. At the hearing before the Full Bench on 8 June 2021, Vice President Hatcher asked whether Mr Kelly's application must fail if the Commission accepted his construction of paragraph (c) of the definition of *separately identifiable constituent part* and the associated submission that the Mining and Energy Division was a *separately identifiable constituent part* under paragraph (c), but the Commission did not accept his submission that the Mining and Energy Division became part of the CFMMEU as a result of the 2018 amalgamation between the CFMEU, the MUA and the TCFUA. It is noted that at PN196-PN202. the transcript incorrectly attributes the question of the Vice President to the President.

2. Leave was granted by the Commission to file a written response to that question. Mr Kelly's response to Vice President Hatcher's question is addressed in Section B below.

3. Furthermore, at the hearing the Commission directed the ACTU to file written submissions and granted leave to Mr Kelly and the CFMMEU to file written submissions in response to the ACTU's written submissions.

4. In accordance with that direction, the ACTU has filed written submissions dated 9 June 2021 (**the ACTU's Submissions**). Mr Kelly's response to the ACTU's Submissions is addressed in Section C below.

5. These submissions are to be read as supplementary to the written submissions filed on behalf of Mr Kelly on 2 July 2020 **(Kelly's Submissions)** and the submissions made orally on 8 June 2021. The definitions used in Kelly's Submissions are adopted in these submissions.

Lodged by: Applicant	Telephone: (02) 8071 2749
Address for service: c/o Slater & Gordon Lawyers	Fax: (02) 8267 0650
Level 5, 44 Market Street, Sydney NSW 2000	Email: phillip.pasfield@slatergordon.com.au

B. Mr Kelly's response to the Vice President's question

6. On behalf of Mr Kelly it is submitted that the question is difficult to answer because it is based on two findings which are connected by reason that they are both linked to the characterisation of what is meant by *amalgamated organisation* as defined in s.93. It is submitted therefore that the findings posited in the Vice President's hypothesis are inconsistent and cannot therefore be properly made.

7. The definition of *separately identifiable constituent part* is linked to an *amalgamated organisation* as is the definition of *constituent part*. The latter is the unit referred to in s.94(1), but by definition, it includes *separately identifiable constituent part*.

8. The Commission has heard from the parties that there is disagreement about what is meant by *amalgamated organisation*.

9. The submissions of the CFMMEU focus on the legal status given by the legislation to registered organisations and that *amalgamated organisation* should be construed as simply being a reference to the registered organisation, which is the same entity before and after a relevant amalgamation.

10. Mr Kelly has submitted that *amalgamated organisation* is referring to the manifestation of the registered organisation as it is after an amalgamation in contrast to its manifestation before the amalgamation. Thus, on Mr Kelly's submissions, there are two constructs of the registered organisation, namely the registered organisation in its form before the amalgamation and the registered organisation in its form after the amalgamation. The event that separates them is the amalgamation. The *amalgamated organisation* takes on its form as a result of the amalgamation. That is demonstrated in Part 2, and exemplified in, among others, sections 40(2)(a)(i), 45(1)(b), 74, 76, 78(2), 79 and 81. One may also note the reference to "*an existing organisation concerned in an amalgamation*" in s.73(3)(b) contrasting with the reference to "*amalgamated organisation*" in s.73(3)(d).

11. The definition of *separately identifiable constituent part* is in the legislation to facilitate the operation of s.94. It is thus designed to identify those parts of the amalgamated organisation that would be relevant to the operation of s.94. There would be no utility in including in the definition of *separately identifiable constituent part* "units" which could

not, by definition, be included in the operation of s.94. It would be otiose and have no purpose. That would be a result that is to be avoided.[1]

12. Reading the definition as a whole, it is apparent that it is identifying "units" which existed before the amalgamation and then existed, in the prescribed identifiable form after the amalgamation under the rules of the *amalgamated organisation*. The formulation of all three paragraphs of the definition refer to the rules of the *amalgamated organisation* and one would have expected that if the CFMMEU's submissions were correct, the reference should/would have been to the rules of the "registered organisation".

13. Thus, paragraphs (a), (b) and (c) of the definition of *separately identifiable constituent part* should be construed as identifying those parts of an *amalgamated organisation,* namely, those that are identifiable under the rules of the *amalgamated organisation* which can apply, and which were previously identifiable under the organisations which joined in the amalgamation, which in this case were the CFMEU, the MUA and the TCFUA.

14. It is this way that the definition of *separately identifiable constituent part* for which Mr Kelly contends is linked to the operation of s.94. The general rule of construction is that one reads a definition into the primary provision in order to construe the substantive provision.[2]

15. The identification of the Mining and Energy Division as a *separately identifiable constituent part* is premised on it having become part of the *amalgamated organisation* (CFMMEU) as part of the 2018 amalgamation. Section 94(1) proceeds on the premise set up by the definition, the definition having been "read into" s.94.

16. It is for these reasons that there is difficulty in answering the Vice President's question. Mr Kelly submits that on a proper construction of the definition and the application of that definition to s.94, as a matter of law the question cannot arise.

---

1 *Project Blue Sky v ABC* (1998) 194 CLR 355 at [71].

2 *Commissioner of Taxation v Auctus Resources Pty Ltd* [2021] FCAFC 39 at [56] per Thawley J, with whom McKerracher and Davies JJ agreed).

C. Mr Kelly's response to the ACTU's Submissions

17. At [4] of the ACTU's submissions it is stated that it sought to intervene for the purpose of making "submissions in relation to the questions of statutory construction which arise". However, the ACTU has then confined its submissions to the circumstances in which a constituent part becomes part of an amalgamated organisation for the purposes of s.94(1) of the RO Act.

18. At [5] of the ACTU's submissions, the interpretation of s.94(1) advanced by Mr Kelly is criticised for appearing to be novel and having not "previously been contemplated by organisations registered under the RO Act". It is not immediately apparent on what basis the latter assertion can be made, but in any event, there is an obvious answer to the "novel" submission, which is that it is addressing a new piece of legislation.

19. Secondly in response to [5] of the ACTU's submissions, once the correct construction and effect of the provisions in contention is established, any uncertainty will be resolved. What implications the proper construction of the legislation, as opposed to any submissions that are made in this proceeding, will have should not be assumed to necessarily be negative; there is no basis for knowing one way or the other. The Commission would also be aware that union amalgamations have not been numerous in recent times, even without this new legislative regime. The consequence of which the ACTU warns, if there is one, is of little if any weight.

20. Paragraph [7] of the ACTU's submissions simply restates the elements set out s.94(1), but does not deal with the issue in contention, namely, their interaction with the relevant definitions in s.93. Paragraph [8] then asserts a proposition which exposes the gaps in the reasoning of both the ACTU and the CFMMEU, namely, accounting for the linkage between the definitions of *constituent part* and *separately identifiable constituent part* and s.94(1) which is explained in Part B above.

21. At [10] of the ACTU's submissions it submits that the "*essential premise*" of Mr Kelly's construction is that "*an entirely new organisation necessarily comes into existence as a result of each amalgamation*". This submission completely misrepresents Mr Kelly's submissions. Mr Kelly does not and has not ever submitted that a new legal entity comes into existence as a result of each amalgamation. The submission made by the ACTU is similar to the submission that has been made by the CFMMEU at [65] of the CFMMEU's

Outline. Mr Kelly refers to and repeats the submissions set out in Kelly's Submissions at [71] and the submissions set out above in Section B. This misunderstanding of Mr Kelly's submissions renders [11] of the ACTU's submissions inutile.

22. At [12] of the ACTU's submissions it submits that "*the definition of amalgamated organisation refers back to an organisation* [of] *which members of a de-registered organisation become members under 73(3)(d)*". This submission misses the point. The ACTU is simplistically and wrongly conflating the concept of the legal entity of the host organisation with the separately recognised artefact of the *amalgamated organisation*. The provisions of Part 2 referred to in paragraph 10 above make that clear. The definition of *amalgamated organisation* in s.93(1) refers to the "*the organisation of which members of a de-registered organisation become members*". That is necessarily so because whatever effect the actual amalgamation has on the organisation in question, the very process of amalgamation under the RO Act requires the deregistration of one or more other organisations and the absorption of their members into the *amalgamated organisation*. But that does not resolve the issue in contention here. The definition makes it clear that the *amalgamated organisation* is the host organisation (the corporate entity which exists before and after the amalgamation) with the addition of the members of the de-registered organisations, but it does not go on to preclude a finding that a *separately identifiable constituent part* can become part of it.

23. Paragraphs [13] and [14] continue the argument in [12] and for the reasons in the preceding paragraph, they do not assist in the resolution of the issue before the Commission.

24. Paragraph [15] of the ACTU's submissions understates the effects of the 2018 amalgamation. The absorption of a large cohort of members numbering in the thousands, the creation of a new Division in an industry previously unconnected to the Union, the expansion of the Union's eligibility rules, the reconfiguring of the Union's governing bodies to accommodate the incoming membership from the deregistered unions, the taking on of assets and liabilities of the deregistered unions, were all significant changes that accompanied the amalgamation. It cannot be gainsaid that the Union had a different manifestation after the amalgamation.

25. We also take issue with the second sentence of [15]. It is a complete misunderstanding of Mr Kelly's submission; one caused by the erroneous preoccupation with the issue of the registered organisation. The sentence in [63] of Kelly's Submissions to which the ACTU refers, must be read together with the rest of [63] and it then is unobjectionable. The definition of *amalgamated organisation* refers to an organisation of which members of a deregistered organisation became members as part of an amalgamation. It is obvious, as is stated in [63] of Kelly's Submissions, that the CFMMEU (that is the CFMEU amalgamated with the MUA and TCFUA) did not exist as an *amalgamated organisation* until after the amalgamation. Part 2 establishes that. There is a distinction in the legislation, made clear by the definition, between the concept of registration of organisations and the concept of an *amalgamated organisation*.

26. The above errors in [15] of the ACTU's submissions flow through into [16] as well and we rely on our response in the two preceding paragraphs. We do however wish to specifically respond to the second sentence of [16] and submit that it is significant that the legislation chose to have an *amalgamated organisation* as the artefact upon which s.94(1) is based rather than *organisation* simpliciter. It forces one's analysis of the provisions to move beyond the narrow preconceptions which beset the submissions of the Union and the ACTU.

27. In [17] of the ACTU's submissions, reliance is sought to be placed on certain selected provisions in Part 2 to discredit Mr Kelly's submissions about the meaning of *amalgamated organisation*. However, the ACTU offers no explanation for the legislature's adoption and use of the description *amalgamated organisation* when referring to then organisation after amalgamation. That term refers to the organisation after it has undergone all of the changes provided for by the scheme of amalgamation and the various provisions of Part 2, including those listed in paragraph 10 above. At that point it may be the same legal entity, but Part 2 and Part 3 are concerned with its composition or manifestation or form, after the amalgamation. Part 3 does not seek to change the registered status of an *amalgamated organisation* and that it why it references the *amalgamated organisation* as such. The ACTU fails to recognise that although the organisation retained its registered status, its form changed, and it is that changed form that is referenced by the definition of an *amalgamated organisation*.

28. Paragraph [18] of the ACTU's submissions proceeds on the same erroneous theme as [17] but there are additionally a number of specific errors:

    (a) The reference to the definition of "proceeding to which this Part applies" is wrong. It is, as the words of the definition make clear, a proceeding to which the amalgamated organisation was a party immediately before the withdrawal day, not the amalgamation day as stated at the end of the second sentence of [18].

    (b) The ACTU's reference to s.94A(2)(a) and (3) echoes a question raised by the Vice President at PN410 of the transcript. It is submitted that the ACTU's submission again erroneously conflates the notion of registration with that of an *amalgamated organisation*. If, as Mr Kelly contends, the *amalgamated organisation* is the post-amalgamation manifestation of the registered organisation, there is no reason why the pre-amalgamation record is not to be taken into account.

    (c) The references to the *amalgamated organisation* in section 112, 113A and 118 do not affect Mr Kelly's argument at all; indeed they are consistent with it. The conclusion in the final sentence of [18] is unsupported by them.

29. Finally, in response to [15] to [18] of the ACTU's Submissions, Mr Kelly relies on the submissions which are set out in [61] to [71] of Kelly's Submissions and the submissions set out above in Section B.

30. Paragraphs [19] to [21] of the ACTU's Submissions take matters no further. At [21] the ACTU again conflates the concept of the legal entity of the host organisation with the separately recognised artefact of the *amalgamated organisation* which is what is referred to in s.94(1). Mr Kelly relies on [61] to [71] of Kelly's Submissions and the submissions set out above in Section B.

31. In summary, Mr Kelly agrees that a new legal entity did not come into existence as a result of the 2018 amalgamation. However, whilst the same legal entity continued to exist after the amalgamation, it took on a new form or manifestation when it absorbed the TCFUA and MUA. The legal entity as it existed post the amalgamation is defined as the *amalgamated organisation* and it is that with which s.94(1) is concerned.

32. The principles of statutory construction referred to in the first two sentences of [22] of the ACTU's submissions are not in contention. However, the ACTU's reliance on *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 in the last sentence of [22] paragraph 24 is misplaced. Paragraph 48 of that judgment stands for the more limited proposition that when construing a statute "*it is preferable to adopt a construction that will avoid a consequence which appears irrational or unjust*".[3] Kelly submits that on any view, the construction he contends for is not capable of being viewed as irrational or unjust.

33. In relation to [23] of the ACTU's submissions, firstly, one imagines that the same sorts of concerns were heard in response to the original introduction of Part 3, and history shows that there was no flood of applications for withdrawal. Similarly, there is no evidence that Part 3 has had any effect on amalgamations. Secondly, the balance of [23] echoes [66] of the Union's Outline and we rely in response on [72] of Kelly's Submissions. Thirdly, the example posed in [23] was already provided and allowed under the pre-amendment legislation; it is to be noted that apart from the prescription in regulation 81 of the number of constituent members who could apply for a ballot, Part 3 did not and does not make any reference to the size of a constituent part that can apply for a ballot. The example is inutile.

34. At [24] of the ACTU's submissions, it is submitted that Mr Kelly's construction would cause very considerable uncertainty in the operation and constitution of organisations and is "*likely to operate as a disincentive for organisations to participate in amalgamations*". The ACTU's submission is nothing more than partisan polemic that provides no assistance to the Commission in undertaking the task of statutory construction before it. The Commission ought to have no regard to the submission. In any event the submission is misconceived and entirely subjective and speculative in nature. Just as one can speculate that the ability to withdraw from amalgamations might be a disincentive to organisations amalgamating, it may also legitimately be viewed as encouraging other organisations to amalgamate in the knowledge that they would be able to withdraw from a failed amalgamation.

---

[3] See *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196 at [38] (Rares, Anastassiou And Stewart JJ).

35. Also, in [24], the ACTU submits that Mr Kelly's construction is contrary to the purpose of Chapter 3 of the RO Act which it describes as "*facilitating and encouraging amalgamations*". This submission restates the submission made at [66] of the CFMMEU's Outline. Mr Kelly relies on the submission which is set out in [73] of Kelly's Outline. The ACTU's submission cannot be reconciled with the fact that Chapter 3 contains Part 2, which deals with amalgamations and Part 3, which deals with withdrawal from amalgamations. The submission cannot be reconciled with the fact that since 1996 the statute has permitted withdrawal from amalgamations.[4] Further, the ACTU doesn't address or reconcile its submissions with the fact that there has been a progressive easing of the legislative regime which allows for the withdrawal from amalgamations.

D. Competitive unionism

36. Mr Kelly understands that in response to paragraph 73 of Kelly's Submissions, the CFMMEU seeks in its further submission to direct the Commission's attention to *AIPA v AFAP* [2021] FWCFB 3293 at [6] and [48]. In that decision the Full Bench made some comments critical of the phrase "competitive unionism". The comments of the Full Bench at [48] arose in a particular circumstance and should not be read as denying the substantive effect of the progressive easing of the conveniently belong test.

37. That such a progressive easing did occur as a matter of fact, is recorded in the decision of the Full Bench in *Re CPSU, Community and Public Sector Union* (2000) 100 IR 296 (Ross VP, Munro J and Simmonds C). The Full Bench there undertook a detailed review of the legislative history and relevant extraneous material. We direct attention in particular to [17], [18], [19], [23], [24], [25] at line 1 on p.305, [26], [27], [29] at the fourth dot point, [77] and [80]. In the latter two paragraphs competition between unions is identified. Although the second reading speech and explanatory memorandum do not use the term "competitive unionism" it is apparent that the amendments were aimed at allowing employees to choose between unions. Whatever terminology one adopts, the Commission should not elevate form over substance; the substantive effect of the changes explained in *Re CPSU* is indisputable.

---

[4] Kelly's Submissions, [19].

E. Disposition

38. The Commission must conclude that the requirements in s.94(1) have been met.

DATED: 14 June 2021

H BORENSTEIN

Y BAKRI

Counsel for Grahame Kelly