TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**
**DEPUTY PRESIDENT GOSTENCNIK**
**COMMISSIONER BISSETT**

**D2023/1**

**s.94(1) RO Act - Application for ballots for withdrawal from amalgamated organisation**

**Application/Notification by Jolly**
**(D2023/1)**

**Melbourne**

**10.00 AM, TUESDAY, 6 JUNE 2023**

**Continued from 10/05/2023**

PN1

THE ASSOCIATE: The Fair Work Commission is now in session. Matter D2023/1, application by Paris Jolly for hearing.

PN2

JUSTICE HATCHER: I'll take the appearances. Mr Borenstein and Mr Bakri, you appear for the applicant in the matter and the respondent on the motion? And Mr Dowling and Mr Massy, you appear for the RTBU, the applicant on the motion?

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MR C DOWLING: Yes, your Honour, thank you.

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JUSTICE HATCHER: Mr Kemppi, you appear for the ACTU, seeking to intervene.

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MR KEMPPI: Yes, your Honour.

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JUSTICE HATCHER: Is there any opposition to the ACTU intervening to make the submissions, in the limited form contained in the document file?

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MR BORENSTEIN: Your Honour, we don't want to take up a lot of time. Our concern is about there being enough time in the day today for the union and us to make our submissions and complete them. We don't mind the ACTU, we don't oppose the ACTU filing its written submission but Mr Kemppi has told us that he wants to make oral submissions which might go for 30 minutes and we thought that, given that his submission is, essentially, subsumed in the union's submission, the point is made by the union, that the appropriate course is to receive the written submission but not to hear from Mr Kemppi orally.

PN8

JUSTICE HATCHER: I think what we'll do is we'll allow the intervention and as to oral submissions, we'll deal with that as we see how the day develops but certainly, obviously, the direct parties will be heard first and then we'll see what time we have.

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MR BORENSTEIN: We would have anticipated, given the position that the ACT takes, that their submissions would follow the union's submissions so that we could respond to both at the same time.

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JUSTICE HATCHER: All right. Well, let's just see how we go through the course of the day.

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MR BORENSTEIN: Yes.

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JUSTICE HATCHER: All right, Mr Dowling?

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MR DOWLING: Thank you, your Honour. On that last topic can I give some comfort to Mr Borenstein and members of the of the Full Bench, I anticipate that my primary submissions will be somewhere between 45 minutes and 60 minutes and allowing 15 minutes, perhaps, to half an hour for reply, I think there's adequate time, should Mr Kemppi seek to make any oral submissions.

PN14

The principal task for the Commission, on this application, in our submission, is to determine whether paragraph 6A(b)B(c) of the amended application and the evidence relied upon, in support of those paragraphs are relevant to the assessment under section 94A(2)(b) of the Registered Organisations Act, and that is:

PN15

> *The assessment of the likely capacity of the new organisation to promote and protect the economic and social interests of its members.*

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There are two subsidiary questions that we will come to, but the principal task will be that assessment.

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The paragraph of the statement of Mr Jolly that are relied upon, in support of those paragraphs of the amended application, are paragraphs 86 through to 222, and I just note a correction in our reply submissions, we said '66', it should be '86', 86 to 222, noting also that, as we understand it, Mr Jolly does now not seek to rely upon those paragraphs contained at 156 to 170 of this statement.

PN18

But those paragraphs, 86 through to 222, are those paragraphs where Mr Jolly, or his predecessor, air grievances about the union over the last decade, the period 2013 to 2023.

PN19

We should also be clear that the union's application is made in circumstances where not only are the impugned paragraphs not relevant or not only do the impugned paragraphs not adequately plead the matters alleged but, in circumstances where the union seeks to avoid a hearing on Mr Jolly's out of time application, effectively, under section 94A, that will require, on our estimate, as things stand at the moment, up to 10 days of the Full Bench's time and that, of course, also means, in our submission, a waste of the union's money, a waste of the union's resources and, indeed, a waste of the Commission's resources, given what we say about the construction of 94A and the confined matters that the Commission is required to deal with.

PN20

Before I outline the structure and then the submissions to be made, can I make clear the material relied upon by the union, in its application, and that is this.

PN21

Firstly, the application itself, that is the application to strike out the relevant paragraphs of the amended application, or Mr Jolly's statement, and that's the application dated 5 May of this year. Secondly, the union's response to Mr Jolly's amended application, that is also dated 5 May of this year, 2023. Thirdly, the union's submissions filed, primary submissions filed, in this application. They are dated 26 May of this year and they were filed together with the next item, the affidavit of Marcus Clayton, affirmed on 26 May 2023. Fifthly, and lastly, the union's submissions in reply, of yesterday, 5 June 2023. That is the material relied upon.

PN22

Can I start by identifying those things on which the parties agree? This bit might not take very long. It seems that the parties have both set out in writing, in some detail, the applicable principles for the Commission to apply, for the Full Bench to apply in the determination of today's application.

PN23

There does not appear, on our reckoning, to be any dispute that the Commission has the power to strike out the paragraphs of the amended application or to determine not to admit into evidence the relevant paragraphs of Mr Jolly's statement.

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JUSTICE HATCHER: Sorry, before you go on, I just might mark the affidavit.

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MR DOWLING: Certainly, your Honour.

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JUSTICE HATCHER: So the affidavit of Marcus Roger Clayton, affirmed on 26 May 2023 will be marked exhibit A on the motion.

**EXHIBIT #A WITNESS STATEMENT OF MARCUS CLAYTON AFFIRMED 26/05/2023**

PN27

MR DOWLING: Thank you, your Honour.

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So, as I say, there does not appear to be any dispute that the Commission has the requisite power to grant the orders that are sought in the applicant.

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I then identify the three issues that we will address today. The first, and this was the principal one, that I identified earlier, the proper construction of 94A(2)(b) and the relevance, or irrelevance, of the impugned paragraphs of the evidence in the amended application.

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Secondly, the union's submission, on the meaning of 'appropriate', in 94A. That's relevant to the alternative basis upon which the applicant says that the paragraphs are relevant.

PN31

Thirdly, and very much alternatively, the adequacy of the amended application. If it is not already clear to the Full Bench, you will not be required to rule on the adequacy of the complaints, of course, or the adequacy of those paragraphs, if you determine that they are not relevant and should be struck out. Only if you determine they should remain will you need to determine the adequacy.

PN32

Can I then deal with the first of those issues, the proper construction of 94A(2)(b)? As I said, this is relevant because this is to determine the construction and, therefore, assess whether the impugned paragraphs are properly relevant.

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Can I make reference to our primary submissions, at paragraphs 18 through to 20, without asking the Commission to go to those primary submissions, but I want to identify how we articulated the construction and this relevance question, at paragraph 18 through to 20 of our primary submissions.

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There we said:

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*It is readily apparent from the text of 94A(2)(b) that the assessment the Commission must undertake is a prospective one.*

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I'll come to whether there's a controversy about that:

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*The Commission must assess the likely capacity of an organisation, which has not yet been registered, to promote and protect the economic and social interests of its members.*

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Again, we don't understand too much controversy about that. But paragraph 19 is the substance of the relevance issue.

PN39

It must be noted, the only basis on which the union says that the Commission should not be satisfied of the likely capacity of the proposed organisation to represent the economic and social interest of its members concerns the finances of the new organisation.

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The union says that the VLD has been operating in breach of the rules and the money maintained in its bank accounts is not, in accordance with the rules, the property of the VLD. Accordingly, the union says that:

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*The new organisation will have less assets than proposed and will not be able to promote and protect the economic and social interests of its members.*

PN42

That's the confined nature of the attack on capacity.

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Paragraph 19 goes on to say:

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*Aside from the financial viability issue, the union makes no contention as to the adequacy of any representation that would be provided.*

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That is, for example, the union does not say that the officials at the VLD are not competent and not otherwise capable of representing the interest of its members, if it were granted separate registration.

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So, in the primary submissions, on that basis, it says:

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*The material identified at 86 through 222 of the witness statement cannot be relevant to that assessment, keeping in mind that confined issue on capacity.*

PN48

We have sought to, having seen what it is that the applicant says, in his submissions in this application, we endeavour to save some time by setting out, in writing, what we say in reply. So I want to just emphasise those matters we say in reply, on the construction of 94A(2)(b).

PN49

Firstly, as I said, it should be construed as requiring a prospective assessment of the capacity. The word 'likely', in our submission, is directed at the probability of the new organisation having the capacity, rather that the extent of the capacity. I'll expand on that notion. It's in that context that we say the notion of capacity is a binary one. It's not a gradation exercise, where you are required to assess the level of capacity and rate the prospective new organisation, from a C minus to a B plus, or something else.

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The section is directed at whether the new organisation will have that capacity to promote and protect rather than, as I say, the quality. The way we identify that, in our reply submissions, is to say:

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*If the hurdle is cleared, the margin by which it is cleared does not matter.*

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And, as a consequence, it is not relevant that the capacity is greater or lesser than the capacity of the current organisation or the current administrative unit within

the union. That comparison between the old and the new, if you like, is not instructive and is not relevant to the assessment that the Commission has to undertake.

PN53

I'll come to the explanatory memorandum but, before I do that, can I just identify what, from our reading of the applicant's submissions, it appears the applicant accepts, consistent with our construction, at least?

PN54

It appears that the applicant accepts that the exercise is a forward looking one, and you will see that at paragraph 37 of the applicant's submissions. It appears that the applicant accepts that what is required is a binary assessment of capacity, and you will see that - sorry, the first reference to 'forward looking' is at paragraph 37, the reference to the binary assessment or the way we read the applicant's submissions, that that accepts a binary assessment, is at paragraph 36. Lastly, the word 'likely' in the subsection is directed, in the applicant's words, 'at the likelihood of the VLD having capacity'.

PN55

Now, those concessions, we say, are properly and necessarily made and we have footnoted, and the intervener has extracted, the explanatory memorandum of the amending Act that inserted 94A. You will have seen, and it's instructive and bears repeating, we say, there, at paragraph 31 of that explanatory memorandum it's there said:

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> *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 the members for their benefit. Any demonstrated ability of the part to influence, advocate and promote the wellbeing of its members.*

PN57

And the applicant relies on that paragraph but then it doesn't take you to paragraph 32 which provides, 'This is a forward looking consideration that does not require the Commission to assess the relative capacity of the constituent part to relevantly promote and protects its members moving forward, as compared to when it was part of the amalgamated organisation.' And by and large, with some exceptions that have other problems and difficulties which we'll come to, by and large that's the exercise that the applicant asked you to undertake.

PN58

Look, what happened to us in 2013 and the hindrance, it says that was imposed upon us, and compare that to us now. That is the very thing that the explanatory memorandum, and on our construction, the section does not require you to do.

PN59

As I said, and we need to be clear about this, if it isn't already from our written submissions the challenge made by the union on the likely capacity of the new organisation is limited to what we say about the available funds of the new organisation. And the Bench will find that paragraph, in the union's response to the amended application, at paragraph 6A(b).

PN60

And that paragraph identifies that the challenge is limited to the funds relied upon by Mr Jolly not being part of the property at the VLD. And the new organisation says – sorry, and the new organisation absent the cash reserves relied upon, whether it will have sufficient ability to generate income to be able to adequately promote and protect the economic and social interests of its members. That's the confined nature of the challenge on capacity. The likely capacity of the new organisation is not otherwise put in issue.

PN61

The paragraphs that we attack, the paragraphs of the statement of Mr Jolly that are said to be in support of 6A(b), B(c) in our submission only go to the quality of capacity. How high over the hurdle can the applicant jump? If it can get over the hurdle, how high can it jump? And that, on our construction, and on the only sensible construction we say cannot be relevant to the Commission's task.

PN62

Can we give you an example? The 2019 negotiations are relied upon. Indeed, the 2015 negotiations in respect of the enterprise agreement to cover members of the union, including the applicant's administrative unit. The 2019 and 2015 negotiations, as we understand it, are advanced to demonstrate the difficulties faced by the VLD in those negotiations.

PN63

The only apparent relevance, as we read it, is that those paragraphs are designed to demonstrate that without those difficulties the VLD would have had a greater capacity to promote and protect. And that's at the heart of the problem.

PN64

That enhanced quality of capacity is not relevant to the Commission's task. It's not, as I said, a grading exercise where the Commission is being asked to say how well it can represent B, C or D level. It is asked to assess whether it is more probable than not that it will or will not, in a binary way, have that capacity.

PN65

Now in order to further make good that submission, we have in our primary submissions, identified each of the topics covered by the paragraphs 86 through to 222. And what we have endeavoured to do there is explain the complaint made by Mr Jolly, as we understand it, and how that does not bear on 94A(2)(b). And we've addressed each under a sub-heading and each are responded to.

PN66

By our reply submissions what we have endeavoured to do is respond more expressly to the primary submissions of Mr Jolly on this application filed on

Friday. And what we have endeavoured to do is identify each of those topics and how we say they are not relevant, or how they could not possibly be relevant.

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So as to focus today's submission, we are content to rely upon what we say in writing are the primary submissions on each of those individual topics. The Bench will find that those submissions made at paragraphs 22 through to 43 of our primary submissions.

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And then, rather, direct the Commission's attention for today's purposes to our reply submissions at paragraphs 9 through to 18, where we address each topic.

PN69

So can I go to what we say in reply, in respect of each of the topics? And start with the complaint relied upon from 2013 in respect of train driver qualifications. As we understand it – sorry, let me go back one step. It should be clear, and we should make clear, that the National union represents train drivers throughout the country. And in that capacity it engaged in a process in respect of train driver qualifications.

PN70

The complaint made by Mr Jolly is that the VLD did not like the approach taken by the National office and asked to take over the process. And, as it happens, was permitted to take over the process. All of this, 10 years ago, and all of this amongst what we must understand is most in Mr Jolly's most important complaints about the running of the union in that period of a decade.

PN71

Now, if our construction is right and the only issue on the question of capacity is whether the new union, or the new organisation will have sufficient financial resources, in our submission, those paragraphs are simply not relevant to the exercise. Keeping in mind its perspective, it's binary, the only matter put in issue on capacity is those financial resources. In our submission, we cannot see any way in which those events a decade ago have any relevance to the task of the Commission under 94A(2)(b).

PN72

The next set of circumstances is a consultation complaint, again in respect of 2013, and as we understand it there is some suggestion in the submissions made on this application that the VLD had to force the Branch secretary to change her position. We say, firstly, on a fair reading of Mr Jolly's affidavit that does not reveal the forcing of a change. And that submission is not consistent with the statement.

PN73

But what seems abundantly clear is that that complaint, and indeed the submission made at paragraph 50, is entirely directed at the asserted capacity of the new organisation as compared to the capacity of the VLD in 2013. And that, we say, for the reasons I have already identified is not relevant. And as we saw expressly

described by the explanatory memorandum as something that is not relevant to the exercise.

PN74

Grouping the 2015 and the 2019 bargaining complaint together, this is addressed at least in the applicant's submission on the application at paragraphs 55, through to 57, it is a dispute about the conduct for the enterprise agreement negotiations. Firstly, eight years ago. And, secondly, five years ago.

PN75

And, as we understand it, some difference in negotiating position that was adopted between the VLD and the balance of the union. And the response, or the submissions of the applicant, at paragraphs 55 to 57 referred to the union's – a resolution within the union from 2017 which was a resolution to deal with the differing positions of the union and how that might be resolved.

PN76

The applicant now asserts, 'Well, that resolution was not followed.' Firstly, can we identify this? In our submission that misunderstands the effect of what it is the union is contending. The union's contention is that the Victorian Branch did not take any steps to prevent the VLD from representing its members as part of that process. Whilst the VLD was not successful it was able to demonstrate the necessary capacity.

PN77

But, in any event, the matters are not relevant to the only matter in issue on capacity. And as I said that is, whether the new organisation will have the sufficient financial resources. Again, it is only directed at the asserted capacity of the new organisation as compared to the capacity of the VLD in 2015 and 2019. And for the reasons we have explained and consistent with a sensible construction and the explanatory memorandum we say that's not relevant.

PN78

The next group of complaints we have described as the tram and bus division accounting complaints. The response, it appears to what submissions are made by the union about this is to say well, because there is effectively a reference in some way to the finances of the organisation, and you will see that at paragraphs 59 to 61 of the applicant's submissions that the matters referred to in those paragraphs somehow become relevant.

PN79

But, of course, we say simply a reference to finances doesn't make them relevant. They have to, to be relevant be responsive to the only matter in issue on capacity about finance, and that is whether the union has the adequate financial resources in circumstances where the duties were paid in the way that they were.

PN80

This issue, as we understand it, is that expenses were allocated to the Tram and Bus Division, and to be fair possibly also allocated to the VLD in circumstances where it is said that they were not expenses that ought to have been allocated to those administrative units.

PN81

And the effect of that, as we see it, is that the Commission is being asked to determine whether the internal allocation of shared expenses was proper and appropriate. That, in our submission, has nothing to do with the discrete question that's put in issue about capacity. And, indeed, it could not be described in any sensible way as responsive to the matter put in issue on capacity.

PN82

Can we then deal with two sets of complaints made about the conduct of the past Branch secretary? And those matters take up paragraphs 191 to 199 and 200 to 205 of the statement of Mr Jolly.

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The Commission will have observed from our written submissions that these allegations were investigated and determined by the Registered Organisations Commission. The response to that submission is that the Registered Organisations Commission did not carry out a full investigation. But there is no explanation as to how the Registered Organisation's investigation was not a full investigation.

PN84

Again, it appears that the apparent relevance of these paragraphs from the applicant's submissions filed on Friday is that they relate to finances. Again, they do not relate to and are not an answer to the discrete submission about financial capacity.

PN85

In any event, we should add that's what is clear from the complaint made by Mr Jolly is that the relevant expenditure in respect of the past Branch secretary was Branch expenditure and Branch money. And it's certainly not contended that it was some use of the moneys held by the VLD. But in circumstances, in any event, where it is not responsive to the only matter put in issue on capacity cannot possibly relevant we say.

PN86

That leads to the allegations contained in the current Federal Court proceedings about the annual magazine, and also some miscellaneous government complaint.

PN87

Again, we say they do not relate to the only issue of capacity put in issue, and again we say, insofar as the applicant says now that they are financial matters, and a reference to financial capacity sweeps up all financial matters, we say that submission should not be accepted.

PN88

It is a discrete, effectively a legal issue, about whether the monies received directly by the VLD should have been paid from the members to the union, and whether it is properly the union's money rather than the VLD, and that the money that the VLD rely on in support of its application is properly it. That's a discrete legal inquiry.

PN89

And none of those issues about the annual magazine or the miscellaneous government's complaints respond to, or are relevant to that issue. So, can we summarise the first of the three topics that I identified, in this way. 94A(2)(b) requires a prospective assessment on the capacity of the new organisation. It's a binary assessment. It is not a relative assessment between the new and the old.

PN90

The only matter in issue is whether the new organisation will have the sufficient financial resources, and paragraphs 86 through to 222 are not relevant. None of those issues answer that discrete issue.

PN91

DEPUTY PRESIDENT GOSTENCNIK: Mr Dowling, just so that I'm clear, in paragraph 19 of your primary submissions the union contends that, in effect, but for the finances of the proposed organisation, the Commission could otherwise be satisfied that the proposed organisation has a lot of capacity to represent the interests?

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MR DOWLING: That's right.

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JUSTICE HATCHER: So we can positively be satisfied, save for the financial aspect?

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MR DOWLING: Yes, that one discrete issue. We don't otherwise take up any issue about capacity.

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JUSTICE HATCHER: I suppose what I'm trying to assess is whether or not you say we can possibly be satisfied that the union has a capacity.

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MR DOWLING: Well, can we add this much. As we approach this proceeding, it's inter-parties litigation. That is the only issue that we raise against the submission put by the applicant, and no others.

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JUSTICE HATCHER: But the matters in 94A(2) are about the Commission's satisfaction.

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MR DOWLING: We don't challenge the satisfaction, other than the discrete issue.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, all right, thank you.

PN100

JUSTICE HATCHER: So, if I recall correctly, that submission was made in the context whereby it was contended by Mr Jolly that much of this material was put in response to what the RTBU had originally said about capacity?

PN101

MR DOWLING: I think it's justified in several ways, but that's right. If we can narrow the issue, we are very clear that the attack in respect of capacity is only that one, and that otherwise, perhaps to be more direct to the Deputy President's question, otherwise you can be satisfied of capacity.

PN102

Can we say one last thing about the first topic, and that is the construction of 94A(2)(b). In the event that the Commission is against us, and that it might be relevant to compare the old and the new, the problem that is then left for the applicant is that there is no evidence as to how the matters identified impacted on the old organisation.

PN103

How did, for example, the previous branch secretary's alleged conflict of interest impact on the old organisation in such a way that the new organisation will not face the same impact? It is simply asserted that there was a conflict of interest and it's not said, well, that impacted upon us.

PN104

What's said on the submission filed on Friday, well, you can infer that there was one, but that's highly inadequate in our submission, because if it is relevant, and if you are to compare the old and the new, you must be told something about how there was an impact. Did Mr Jolly, for example, have to remove himself from dealing with his own members, to deal with the issues of conflict of interest.

PN105

Did his legal officer have to remove herself from dealing with her duties otherwise, to deal with the question of conflicts of interest. That's the sort of information, if the comparison is relevant which we say it's not, but that's the sort of information that we say must be necessary, and that's the sort of information that Mr Jolly is in the position to give.

PN106

He simply asserts a complaint, and then asserts, well, it's going to be relevant to the new organisation's capacity. He must say, this is how it hindered us in some way, this is how it detracted me from my duties, so as you are then able to form a proper assessment, comparing the old and the new.

PN107

DEPUTY PRESIDENT GOSTENCNIK: Well, it's not even just that. I mean, if it's comparative, and part of the comparative exercise says there'd been an attack on either the honesty or the competence of officials of the RTBU in the past, then one has to make an assessment of the possible honesty and competency of the new union's officials in the future, to do the comparison and that just gets into all sorts of a mess, as I would have thought.

PN108

MR DOWLING: Indeed. Yes. That's a variation on the proposition I'm putting, your Honour, where you must have some information. What was it that Mr Jolly couldn't do because of what the branch secretary did, that he will now be able to do. But even then, as your Honour says, you've got to judge that against a very difficult prospective exercise and that's true of all of these paragraphs.

PN109

You've got to try and look into the future and say, what was the difference, but also, will that happen again, or won't that happen again? And that is not the sort of evaluative exercise that the Commission is being asked to perform under 94A(2)(b). But as we say, even if it was, the evidence is wholly inadequate to enable the Commission to perform that exercise.

PN110

Can we then deal with the second of what we've described as the three issues. And this is the proposition that the applicant contends that the impugned paragraphs of the amended application in the evidence may be relevant depending on the case advanced by the union as to the meaning of 'appropriate', in 94A.

PN111

And as we understand it, the applicant contends that if the union argues, or proposes to argue that consideration of, 'appropriate' is at large, then all of the impugned matters in the amended application in Mr Jolly's statement become relevant. And he says that because it seems in another case, another party made such a submission and it was not ruled upon that 'appropriate' was at large.

PN112

We made this clear in our primary submissions but for the benefit of the applicant we need to make it clear. The union contends that the only matters relevant to an assessment of whether it is appropriate to accept Mr Jolly's application are those matters identified in 94A(2) and 94A(3), and the context of 94A provided for by part 2 of chapter 3, and Section 94 – 94 is the section that provides the time limit in respect of withdrawal from amalgamation, for which 94A is the exception.

PN113

They are the only matter and they, in our submission reveal this, that the policy of the act is to encourage and make easier the process of amalgamations. And we make that submission by reference to the AMA v CFMMEU decision that we've footnoted in paragraph 21 of our reply submissions, reported at volume 268 of the Federal Court reports, and it's particularly at paragraph 5 of the Full Court decision where they describe the policy of the act being to encourage and make easier, the process of amalgamations.

PN114

The sections we have identified reveal that policy. That policy is given effect to by the process of part 2 in chapter 3. Section 94 in part 3 of Chapter 3, imposes time limits on the withdrawal from amalgamation, and the evident purpose of those time limits is to create a period after which amalgamations become final. 94A, obviously enough, is an exception to those time limits in Section 94.

PN115

The approach to, 'appropriate', and how much weight is to be given to the considerations in 94A(2) and (3), must have regard to the context that 94A provides for an exception to a general rule. To approach, 'appropriate' otherwise, we say in these circumstances, would denude the operation of the time limit in 94.

PN116

DEPUTY PRESIDENT GOSTENCNIK: Mr Dowling, just to be clear, your client doesn't contend that the words, 'may accept', in subsection (1) of 94A itself, creates a residual discretion? That is, even if the Commission reaches the requisite state of satisfaction, it then still has a discretion?

PN117

That is, to put it another way, the section could have said the Commission must accept an application if it's satisfied that it is appropriate?

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MR DOWLING: We don't contend that.

PN119

JUSTICE HATCHER: No.

PN120

MR DOWLING: It's facilitated in it. And perhaps we can make that more concrete in the present circumstances, where the amalgamated organisation, as here, does not have, and I know there's a contest about this, but does not have a record of noncompliance under 94A(2)(a), and the new organisation has the capacity to protect the economic and social interests of its members, like one might expect of all administrative units.

PN121

And assuming for the moment you're against us on what we say about the financial capacity, a finding that it was appropriate would mean that the time limit in Section 94 would have no meaningful operation. Because any administrative unit could then come along and say, we have the capacity under 94A(2)(b). There is no record of noncompliance.

PN122

All we have to demonstrate to extend our time is that we have that capacity. And if that's the approach and that's the construction applied to 94A, that would completely denude the time limit, the longstanding time limit, in Section 94 of any operation.

PN123

And in our submission substantial weight should be given to the fact that the union does not have a record of noncompliance, such that it would not be appropriate for the Commission to accept the application in circumstances where there was no record of noncompliance, and to be clear, we rely on 94A(2) and (3), because (3) tells you, if there is a record of noncompliance and the applicant did not contribute in any way, they must be allowed out.

PN124

Whereas 94A(2)(a) tells you if there's a record of compliance and it measures perhaps the level of the contribution to that record of noncompliance. What those two paragraphs clearly do when read together, is demonstrate the emphasis that is placed on the record of noncompliance. Now, what our friends say in response to that is, you don't read 94A(2) and 94A(3) together. They are separate tests and requirements.

PN125

That, in our submission, is wholly unorthodox. It is unorthodox to say that you are not to read two sections together, two subsections of the one section, to construe that subsection. The High Court has had a lot to say about context in construction and that, we would say, is an invitation to jurisdictional error, to say do not read 94A(2) in the context of 94A(3).

PN126

JUSTICE HATCHER: But (3) has the odd result that if it applies, the application must be accepted, even if the constituent part has no capacity to constitute an independent union?

PN127

MR DOWLING: Yes. Yes. As we say, reinforcing the focus on record of noncompliance. There is a record of noncompliance. There is no contribution to the noncompliance. Capacity doesn't matter. You must be allowed out.

PN128

JUSTICE HATCHER: I suppose subsection (4) might be read as supporting the proposition that the matters in subsection (2) and (3) are exhaustive. That is it only contemplates submissions about those two matters and nothing else.

PN129

MR DOWLING: That would be consistent with the construction we have put. So I think what that means is that the contention by the applicant that the material is relevant if it is the case that the union contends 94A and appropriate within 94A is to be construed at large falls away, because it's not the contention of the union that appropriate is at large, it's the contention that it's the confined way that we have just described and discussed, and if that's right the alternative basis for the material must, we say, inevitably fall away.

PN130

That leads us to the third topic, and as I said at the outset it is only necessary to decide the third topic if the Commission determines that the paragraphs of the amended application are to remain and are relevant. The complaint in respect of the third topic is this, that those paragraphs do not properly or adequately particularise the claims, the specific claims of unlawfulness, oppression and dysfunction. Those three terms are deliberately and consistently used. This is not a small issue. The substance of the complaint is that the union is not given proper notice of the case that the applicant makes about unlawfulness, oppression and dysfunction.

PN131

The applicant's answer to that in his submissions on Friday appears to be that - the facts relied upon are set out, and it is otherwise a matter for submissions as to whether those facts amount to unlawfulness, oppression or dysfunction. Can we say two things; firstly and notably, in the submissions filed by the applicant in support of his 94A application there are no submissions articulating how those facts are said to be unlawful, oppressive or had led to dysfunction. But secondly, we agree that it is necessary to set out all of the relevant material facts. No dispute on principle between us there. However, it is also necessary to allege how those facts constitute unlawfulness or oppression or dysfunction.

PN132

And the Commission might have seen in our reply submissions we give the example of an underpayment under an enterprise agreement, and we say you might set out material facts such as work was done of a particular kind, payments weren't made. But what you will then and necessarily plead is how those facts led to a contravention of the enterprise agreement and/or a contravention of the Act. Those next steps are important. What happens here, and perhaps we can use the example of the allegations made against the past branch secretary, in the submissions made on Friday in this application the applicant alleges for the first time, it's not put in the amended application or in the submissions in support of it, but for the first time it's said that the secretary's conduct, the past secretary's conduct amounted to non-compliance with sections 293C and 293D of the (Registered Organisations) Act.

PN133

Firstly, of course that should have been pleaded in the amended application, but we say it's still not enough, because those sections are directed at disclosure or notice of material personal interest. And what isn't pleaded is what is or what was the material personal interest. If the applicant wants to allege that the conduct was unlawful because of the material personal interest, and it was a breach of 293C and D, the applicant is obliged to put us on notice and set out what was the material personal interest, how was there a contravention of 293C and D. If we are going to face an allegation that that conduct was unlawful we are entitled to know how it is set out.

PN134

Of course that becomes particularly telling when we say the Registered Organisation Commission as part of its investigation relevantly concluded that there was no material personal interest, and determined the same complaints that are made by Mr Jolly in his statement.

PN135

As an alternative we understand to the failings to properly plead those serious allegations the applicant submits that unlawful and oppressive and dysfunction are relied upon based on their ordinary meaning, and perhaps as we understand it just in an adjectival way. Now, if that's right and they're just used as adjectives and an allegation is not properly made of any unlawful conduct, then they should come out. There's no reason for them and there's no basis for them and they're not relevant to the task that the Commission is required to determine under 94A(2)(b).

PN136

In other words if it's a legal contravention you allege particularise it. If it's simply an adjectival use of these words then the remedy, and this might be a short circuit remedy for the Bench is simply to strike out those adjectives. Because what the union wants to avoid is the applicant saying, well we don't really allege it in a legal sense, but then come the hearing we are faced with allegations that the applicant says, well we told you it was unlawful and we told you it was oppressive. We didn't tell you how, and we told you it led to dysfunction. We didn't tell you how, but you've now got to respond to it.

PN137

JUSTICE HATCHER: What's the non-legal meaning of unlawful?

PN138

MR DOWLING: How that's used in an adjectival sense I don't know, but that's for Mr Borenstein. But there also seems to be the suggestion, well it might be one or two or three, it might not be all, but it's not delineated that way in the application, and we're left with an allegation that for example the 2013 train driver qualification complaint was unlawful. How, we are only left to guess. How that conduct was unlawful we are only left to guess. The same with the 2015 negotiations. How was it unlawful?

PN139

That's as much as we want to say on the third of the topics that we have identified. That just leaves us to summarise where we say that leaves the Commission. In respect of the first issue our construction, some of which is consistent with what the applicant says, it's prospective, it's binary, it's not a comparison. The material insofar as all it does is create a comparison between the old and the new, and all the difficulties associated with that and the lack of evidence about it cannot possibly be relevant.

PN140

On the second, the alternative proposition put, we only rely on it if they say our appropriate is at large. We dispose of that because we say we don't contend that way. And on the third I have just addressed you on why we say if it's meant in a lawful way it has to be particularised. If it's meant adjectivally it should go.

PN141

It is for all those reasons that we say the paragraphs relied upon in the amended application and those put in support in Mr Jolly's application from 86 to 222, removing 156 to 170, are not relevant, or do not give fair notice, and having regard to the substantial cost to be incurred and time wasted we have said, and we said to your Honour, the President, at the mediation that as things presently stand - at the directions hearing, my apology - we would ask that the Commission allocate a period of 10 days if it is determined to deal with all of these complaints over that period of a decade.

PN142

We think a prudent course would be to allocate 10 days. It might be after our reply submission goes in that we might provide some comfort that it's not 10, it's eight or seven, but it's a substantial period of time; certainly more than five and somewhere in between five and 10. We think the only prudent course if the

Commission was to determine to leave it in and wanted to program the matter with some efficiency would be to allocate 10 days now, revisit that at the end of the submissions and evidence of the union and the reply submissions of Mr Jolly, remembering of course that the way the chronology unfolded is that the applicant Mr Jolly filed his amended application and then filed his submissions and evidence in support of that amended application. Sorry, I got that around the wrong way. The 94A application was filed, the submissions in support of it and then his statement, Mr Jolly's statement was filed.

PN143

There was then a complaint about the breadth of that, and your Honour the President determined that an amended application be filed and a repleaded amended response be filed. That was done. The union has not filed its submissions on the application itself or its evidence, because of course it says we need to decide this question first, we need to see what it is we're responding to. So it's in those circumstances that the matter still needs to be programmed.

PN144

JUSTICE HATCHER: So it would follow that if the material was allowed in the RTBU would then be at large to file its own evidence in response, and I suppose that if it was determined that the parties were at largesse to appropriateness then it could help its own garbage dump on Mr Jolly and his lot and we could work our way through all that.

PN145

MR DOWLING: It would have to respond to the allegations. The union could not leave the allegations that it contests are untested. It would have to respond to them unfortunately. There might be all sorts of consequences if it didn't and there were findings made to that effect. So it would have to respond to them. Unless I can assist in any other way subject to anything in reply they're the submissions of the union.

PN146

JUSTICE HATCHER: Thank you. So, Mr Kemppi, we have obviously read your written submissions and I think it's fair to say the ACTU's approach broadly echoes that of the RTBU as to the construction of section 94A(2)(b). What else do you want to say in addition to that?

PN147

MR KEMPPI: Thank you, your Honour. I won't take too much time. I have previously indicated an estimate of about half an hour. I will take considerably less than that given what's already been covered in our written submissions and elsewhere.

PN148

In essence our intervention is primarily concerned with the proper construction of 94A(2)(b) about which we say three things; that it requires a prospective assessment. It's not a subjective assessment and it's not a relative assessment and we will point out the way in which those two latter points are led.

PN149

I have provided a list of authorities which goes to the principles of statutory interpretation. I won't take you to all of those cases, that would take too long, but simply I will just make a very quick point, which is to say as summarised in *Sztal v Minister for Immigration and Border Protection* the starting point is the text in the statute having regard to context and purpose and extrinsic material is permissible.

PN150

In terms of statutory construction we develop two key themes. The first is the text of the statute clearly supports our construction. The second is if there was any doubt the extrinsic material makes it absolutely clear in favour of our preferred construction. The first point that it's prospective assessment, this ground has largely been covered, but in essence the key points we make are that this is an assessment of the likely capacity of something that doesn't exist yet. It can only be a forward facing exercise.

PN151

If again there's any doubt paragraph 32 of the explanatory memorandum makes this absolutely clear. Forward looking consideration does not require the Commission to assess the relative capacity, and that also supports the third point that we make about relativity.

PN152

The second point, and this overlaps somewhat with the third point we make about relativity, is that there's a distinction between the factors which might motivate the applicant and the factors which the Commission must consider, and the nexus between the two is that how the applicant feels or perceives they might do out on their own is a subjective assessment. That might be relative. The applicant may form the view, rightly or wrongly, that they will be a better union on their own, but that can only ever be a relative and subjective consideration that does not form part of the task before the Commission.

PN153

Once again, if there was any doubt, this is made clear, in our submission, from the Minister's second reading speech, which clearly delineates between two phases of the process we see before us.

PN154

In the second reading speech for the bill, the then Minister for Industrial Relations said the following, and I'll paraphrase:

PN155

> *There are various circumstances that might give rise to a constituent part of an amalgamated organisation forming the view that the amalgamation is no longer serving the best interests of its members.*

PN156

The Minister then goes on to list some examples of how that view might be formed.

PN157

Slightly later on in the second reading speech, the Minister comes to the point where an application is on foot and clearly shows a delineated second phase where the Commission now must grapple with its own considerations. The Minister says:

PN158

*The Commission must have regard to specified factors before approving an application. These are: whether the amalgamated organisation has a record of not applying –*

PN159

et cetera –

PN160

*and the likely capacity of the constituent part –*

PN161

et cetera. In our submission, what that shows is a clear intent from the legislator to acknowledge that there might be circumstances in which a constituent part seeks to leave an amalgamated organisation, but create a slightly different test that isn't based on the motivations of that constituent part but is instead based on a more robust assessment from the perspective of the Commission of the likely capacity of that part.

PN162

The third point we make is that the Commission's consideration does not involve an assessment of the relative future capacity of the organisation versus its present capacity, and involved in this point is the point about it being a binary assessment and not one which admits degrees.

PN163

The term, 'capacity', has several ordinary meanings, the most relevant of which, in our submission, to the present circumstances is 'the ability of an organisation to carry out certain tasks or produce certain goods, capability.' And my apologies, I believe I may not have footnoted that in our written submission. It is from the Macquarie Dictionary.

PN164

Importantly, the term, 'capacity', as it appears in 94A(2)(b) isn't qualified. It appears by itself, as in it doesn't appear as a part of a term, 'better capacity', 'relative capacity' or 'greater capacity', which might admit of degrees or comparison. The fact that the word, 'capacity', exists alone in that section, that subsection, simply points to something that is on or off, present or not present. It is purely a binary assessment.

PN165

Once again, the legislator could have put a qualifier there. It could have phrased that term very differently if it wanted to indicate that there was some level of degree or comparison, but it chose not to, and this, in our submission, is telling.

PN166

Once again, even if there were any doubt, our submission is that the extrinsic material makes clear the meaning of this term, and once again, that is in the extract of the explanatory memorandum at 32 where it speaks about not being a relative assessment.

PN167

Accordingly, the crux of our submission is that a relative evaluation of how a constituent part's capacity to promote the economic and social interests of its members in the future as a new organisation versus its perceived ability to do so currently can do no more than motivate that constituent part.

PN168

It isn't a factor that bears consideration for the Commission in the present application. The relative assessment attaches to the motivating factors for the applicant. It's not the task before you in this application.

PN169

If it please the Commission, unless there are questions, those are our submissions.

PN170

JUSTICE HATCHER: Thank you, Mr Kemppi.

PN171

MR KEMPPI: Thank you.

PN172

JUSTICE HATCHER: Mr Borenstein.

PN173

MR BORENSTEIN: If the Commission pleases. Mr Dowling has indicated three matters which he says the Commission needs to consider on this strike-out application. We agree that the three matters which are set out in paragraph 1 of the reply submissions that we received yesterday afternoon are those three. We would, however, approach them in a different order, and we would commence by dealing with the question of the meaning of 'appropriate' in section 94(1).

PN174

Perhaps before we do that I should emulate Mr Dowling and indicate the materials that we propose to rely on. There is of course the statement of Mr Jolly, which the Commission has heard about it. There is the amended application, which was filed on 26 April 2023. There is an outline of submissions dated 3 April 2023. We have filed an outline of submissions in reply dated 2 June 2023, and we seek to rely on all of those documents.

PN175

Turning then, as I said, to the issue of what is meant by 'appropriate' in section 94A(1), we have addressed this subject commencing at paragraph 69 of our reply submissions. We have made the point that our primary submission is that the reference to 'appropriate' in section 94A(1) is bound to the consideration of only the two matters that are identified in subsection (2)(a) and (b).

PN176

JUSTICE HATCHER: So on that constructional issue you're at one with the RTBU?

PN177

MR BORENSTEIN: No. We say that the consideration of 'appropriate' doesn't go beyond consideration of whether the two requirements that comprise the list of matters to be taken into account in subsection (2) exist or don't exist, and how they exist.

PN178

Our primary submission is that, apart from taking into account those two matters, that you don't go beyond that to take account of the other matters that the RTBU proposes. We say that the matters in subsection (2) are an exhaustive list of the things to be taken into account in determining whether it's appropriate to receive the application, and we say that that is supported – that construction is supported in the explanatory memorandum at paragraph 28 where it said that the new subsection sets out an exhaustive – and it uses that word, 'exhaustive' - list of the matters that the Commission must consider for the purpose of assessing whether it's appropriate to accept the application.

PN179

JUSTICE HATCHER: Sorry, Mr Borenstein, I might be missing something. I thought the RTBU agrees with that proposition. Is that correct?

PN180

MR BORENSTEIN: I thought that they said that in deciding whether it's appropriate you'd take into account a range of other matters, including the time limit in section 94, the asserted purpose of the provisions about encouraging amalgamations and all those sort of things.

PN181

JUSTICE HATCHER: No, I thought they were matters identified as bearing upon the construction of 94A(1) and (2), but the - I thought the RTBU accepted for its part that the matters in subsection (2)(a) and (b), as well as subsection (3), are the totality of the matters to be considered in determining whether it is appropriate to accept the application. Is that right? Have I understood that correctly?

PN182

MR BORENSTEIN: It is, your Honour, yes.

PN183

JUSTICE HATCHER: So it seems to me there's no contest about that constructional issue, unless I'm missing some nuance.

PN184

MR BORENSTEIN: Well, if that's right, and we had understood that in terms of their submissions on the construction of subsection (1) and the word, 'appropriate', they said 'appropriate' needs to be given a meaning that takes into account the time limit in section 94, and the objects of, you know, encouraging amalgamations and all those sort of things, and if that's right, and I thought that was their position,

then we'd take issue with that, and we say that the only things that you'd take – that, appropriate in section 94(1), only envisages taking into account whether the matters in subsection (2) have been complied with, and if that's the position then that saves a lot of time.

PN185

If that's the position, and they're the only matters that the Commission is to take into account in deciding whether it's appropriate, then there's a deal of material that we don't need to rely on, because it was advanced on the assumption that the position of the RTBU was that there was a broader field to consider under subsection (1).

PN186

JUSTICE HATCHER: Okay. Now we've sorted that out what is the material you don't need to rely upon?

PN187

MR BORENSTEIN: We will provide you with a list shortly of the deletions out of the material that we don't need, but if we are agreed about the operation of 'appropriate' in subsection (1), then we need to turn to the question of how subsection (2) operates and we can respond to the submissions that are made in the reply submissions that were filed yesterday afternoon on that topic.

PN188

Firstly, we say in relation to the submissions made by the RTBU and the ACTU about the determination of the likely capacity of the new organisation, for the purposes of paragraph 2 of subsection (2), that that involves, and must involve, an evaluative judgment by the Commission.

PN189

It is not a matter that is a black and white matter. Our friends talk about it as though it's black and white. It's an evaluative task to determine whether the new organisation will likely have the capacity to look after the interests of its members.

PN190

Mr Dowling made reference to the idea of a hurdle. The problem about that is that somebody has to set the height of the hurdle. The Commission has to be satisfied that a particular level of capacity has been reached to be satisfied of the matters that are in subsection (2).

PN191

Now, in our outline of submissions, our first outline of submissions, we made a reference at paragraph 69 to the statement by the Full Bench in the Kelly matter where the Full Bench observed at paragraph 26 that the matter to be considered under section 94A(2)(b) was whether the new registered organisation could function effectively as a registered organisation.

PN192

It's clear as a matter of logic, we would submit, that capability has various levels, and if the Commission is to be satisfied that it is going to be capable of looking

after the interests of the members of the new organisation, some evaluation has to be made of the capability of the new organisation.

PN193

Our friends draw attention or make an objection, based on lack of funds. Objections might be made about the competence of officials or of the structure that's proposed that would or would not allow for an effective representation of the membership.

PN194

They are all matters that point to the fact that it is an evaluative task and in the explanatory memorandum, to which you have already been taken, at paragraph 31, it's stated that:

PN195

*Under subsection (2)(b) the Commission could, for example, have regard to -*

PN196

And one of the things that it can have regard to is:

PN197

*Any demonstrated ability of the part to influence, advocate and promote the wellbeing of its members.*

PN198

Now, even though the ultimate decision is a forward looking decision, because you're talking about what the new organisation will likely be able to do, that judgment has to be based on some material, some evidence, you can't just pluck it out of the air. The explanatory memorandum indicates that the way you may go about it is to look at the demonstrated ability of the constituent part, to determine whether it is likely that it will be able to do the job in the future, forward looking.

PN199

So we say that there's a deal of material that we have put before the Commission that demonstrates that the constituent part has exercised the capacity and has demonstrated the capacity to represent the interests of its members, even in adverse situations which it has experienced being a part of the organisation.

PN200

As we have said, in our submissions, the relevance of that is that it is the, if you like, the counterfactual to the circumstance that would apply if the constituent part leaves the organisation and becomes a separate union in it's own right. It has demonstrated a capacity to represent the interest of its members and we say that that can be taken into account to assist the Commission in being satisfied that, going forward, it will be able to do that.

PN201

We are not asking the Commission to compare the level or the quality of the representation that it provided to its members, in the past, against the future. We are simply saying that if you are going to make an assessment of the likelihood of someone acting at a particular standard of capacity, it has to be based on

something and we say that in this context the demonstration of what it's been able to do leading up to the withdrawal is a legitimate and relevant matter to be placed before the Commission to assist the Commission in making that assessment.

PN202

JUSTICE HATCHER: With respect, Mr Borenstein, that's a complete recharacterisation of the evidentiary case you're seeking to present, isn't it? That is, it started off as a trial of unlawfulness, dysfunction and oppression, on the part of the RTBU, that is, a negative case, and now you're trying to turn that into a positive case of the virtues of the VLD.

PN203

MR BORENSTEIN: Your Honour, we have explained, in our reply submissions, how we say that that conduct, in the most part, and there are some items which we will not be relying on but, in the most part, how that conduct impacts or demonstrates or supports the fining of the likely capacity of the organisation to represent the interests of its members.

PN204

As I said a moment ago, we have sought to demonstrate that the constituent part has been able to pursue the interest of its members in many instances, even where it's activities have been opposed or obstructed or restricted by other parts of the organisation.

PN205

So, for example, Mr Dowling referenced the events concerning the classification of drivers, which occurred in 2013 and which was being negotiated by the national office. Now, any submissions Mr Dowling significantly understanded the significance of that circumstance and, when you read Mr Jolly's statement, you will see that what was reduction in the training standards and the qualification standards that drivers would have to have to operate.

PN206

Now, that was a matter of significance to the drivers in Victoria and when the constituent part became aware that the national office had agreed to reduce the qualifications, they intervened and, by reason of their intervention, they were able to take over the negotiations with the Commonwealth regulator and were able to secure a preservation of the higher standard of qualification. Now, that is an example of the demonstrated capacity of a constituent part to protect the interests of this members, and there are other examples as well.

PN207

What we say is, that although various actions that were taken and were confronted by the constituent part might be described as oppressive or dysfunctional or unlawful, the point of introducing them into the evidence is to demonstrate that the constituent part has sought to and has been able, in many instances, to represent the interests of its members successfully, even in the face of those sort of activities.

PN208

That's the only purpose of introducing them, however you describe them, and as we've said, in our submissions, and Mr Dowling indicated, the adjectives that we've attached to the conduct are not decisive. If you just look at the conduct and forget the adjectives and you look at the instances that we've shown in Mr Jolly's statement and the way in which the constituent part has had to respond, in the interests of its members, that is sufficient to demonstrate a capacity that is likely going to continue in the future, when they become a separate registered organisation.

PN209

We say that there are a number of instances that we've relied upon, and we'll give the Commission a list of those, which go to that issue and, as we've done in the outline of submissions in reply, we've sought to tie them back to that issue to make it clear.

PN210

Now, again, the question of likelihood, again is not a black and white issue. It's not a binding choice, as our friends seek to say. 'Likelihood' needs to be assessed against some background, some evidence. The fact that something is going to happen can't be a guess made in a vacuum, it must be based in some sort of evidentiary foundation. Again, the material that we've advanced has sought to demonstrate a capacity from which the Commission can draw the inference, based on the structure which is being proposed for the new organisation being, essentially, the same as the constituent part, that its capacity will likely continue in the future, when it is registered as a separate organisation.

PN211

JUSTICE HATCHER: Isn't all this material introduced by what's contained in paragraphs 86 to 89 of Mr Jolly's statement? That is, it's headed, 'Instances of disadvantage caused to the VLD by the RTBU', and then 86 contains a litany of complaints. Then what follows is set out examples of this disadvantage. Mr Jolly simply doesn't present this material in the way in which you've just described it.

PN212

MR BORENSTEIN: I'm sorry, I didn't catch the last part of that.

PN213

JUSTICE HATCHER: Mr Jolly doesn't present this material, with respect, in the way that you've described it. He doesn't present it as a list of the virtues of the VLD, he advances it as a series of criticisms of the RTBU.

PN214

MR BORENSTEIN: Well, your Honour, if you look at paragraph 90, for example, this is the qualification matter, you see, in the last two sentences:

PN215

*The VLD have objected and with the agreement of the national office, the VLD took over the negotiations for members nationally and succeeded in increasing the standard to the Certificate IV nationally.*

PN216

JUSTICE HATCHER: That has to be read with what's in 89. Ninety is said to be an example of where VLD member's interests have been disadvantaged by the national office of the RTBU for the Victorian branch. I suspect if it had been presented in the way that you've now characterised, we probably wouldn't even be here.

PN217

MR BORENSTEIN: Well, your Honour, this material was prepared at a time when there was a very cryptic statement of objections, in relation to the grounds. We've not had a fully explained explanation of the grounds the objections have taken until yesterday afternoon, with the reply submissions. But, your Honour, however the original statement is framed, the evidence of the particular events and incidents are before the Commission.

PN218

We would submit, respectfully, that it's open to the applicant to say, 'That's what I said in my statement, this is the purpose for which I wish to now advance it to the Commission'. On the argument that our friends put, they would object to that, in any event, because they would say, 'You can't take into account anything that's happened in the past because it's "forward looking"'. And they would say, 'You can't take into account any of the evidence that demonstrates a capacity in the past because its not an evaluative task, it's a binary choice, it's a yes or no'. We would say that even now, at this stage of the proceeding, a deal of this material is relevant for this purpose and we would seek to rely on it.

PN219

Mr Downing says, 'Well, the objections we take to capacity are confined to financial matters'. It makes it sound as though it's very easy and very narrow. But when one looks at the response document, it may not be that narrow and that confined.

PN220

Paragraph 6A(b) states that:

PN221

*Further, or alternatively, the proposed new organisation will not be able to adequately promote and protect the economic social interests of its members because the funds, described in paragraph 82 of Mr Jolly's written statement, are not the property of the locomotive division.*

PN222

Well, that's not something we need to address here directly.

PN223

Then, in paragraph 3, on the next page:

PN224

*Further, or alternatively, the VLD has around 730 financial members attached to it 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 property.*

PN225

Now, we would say that that puts in issue the capacity - that puts on the table an argument about the capacity of the VLD to represent 1730 members with the funds, or with the equivalent of the funds, which it is said it would have, by way of subscriptions. In the earlier paragraph Mr Dowling says that the subscriptions which the VLD is holding is not their money, it should be - it's the branch's funds, under the rules. But the reality is that those funds are the funds that have been used to represent the financial members, by the VLD.

PN226

So there is an argument about whether what the VLD has been able to do, for its 1730 members, in the context that our friend says that it wouldn't have sufficient funds to look after them is relevant to as assessment of whether it has the capacity and whether it's likely to have the capacity going forward, after the withdrawn from the organisation.

PN227

JUSTICE HATCHER: Perhaps, Mr Borenstein, it's timely that you advance your list or document of what it is left in Mr Jolly's statement that you want to rely upon.

PN228

MR BORENSTEIN: We'll do it as soon as the Commission adjourns.

PN229

JUSTICE HATCHER: I'd like to have it before we adjourn so that I can have a look at it, comprehend it, if that's possible.

PN230

MR BORENSTEIN: Well, if the Commission would stand down for 10 minutes we can provide it.

PN231

JUSTICE HATCHER: Okay. So you don't have it with you?

PN232

MR BORENSTEIN: No, we don't have a list because it's a moving - - -

PN233

JUSTICE HATCHER: All right. Well, we might take a morning tea adjournment. We'll, nominally, allow 15 minutes, but if you need longer can you just communicate that to our associate.

PN234

MR BORENSTEIN: We should be able to do it within that time.

PN235

JUSTICE HATCHER: All right. We'll now adjourn.

**SHORT ADJOURNMENT** **[11.30 AM]**

**RESUMED** **[11.59 AM]**

PN236

JUSTICE HATCHER: Mr Borenstein?

PN237

MR BORENSTEIN: Thank you, your Honour.

PN238

Can I indicate, by reference to Mr Jolly's statement, the parts of his statement that we don't seek to rely on and the parts that we do, or I can do it another way and just give your Honour and the Bench the items that we do seek to rely on, which are very short, and say that we don't rely on the balance between paragraph X and paragraph Y.

PN239

JUSTICE HATCHER: So the impugned paragraphs are 86 to 222?

PN240

MR BORENSTEIN: Yes.

PN241

JUSTICE HATCHER: And you've already abandoned 156 to 170. So maybe it's - - -

PN242

MR BORENSTEIN: Well, perhaps if I do it this way, and your Honour will tell me if it's convenient or not. We seek to continue to rely on paragraphs 206 to 210, and I'll come back and explain what they are, in a moment.

PN243

JUSTICE HATCHER: Just give us a second. Yes?

PN244

MR BORENSTEIN: And on paragraphs 212 to 222. Other than that - - -

PN245

JUSTICE HATCHER: That's of the impugned parts?

PN246

MR BORENSTEIN: Yes.

PN247

JUSTICE HATCHER: Yes, I'll just have a look at that.

PN248

MR BORENSTEIN: So paragraphs 206 to 210 deals with the proceedings that have been issued by the VLD against the branch secretary for alleged misuse of union funds. We say that that's an example of their capacity to protect the

interests of their members because the funds are the funds of the union, which are subsidised by the members.

PN249

JUSTICE HATCHER: If we look at 206 to 210, this is all about personal conduct, isn't it? I don't understand how this bears upon organisational capacity, taking it at its highest?

PN250

MR BORENSTEIN: Your Honour, the way in which we put it is that Mr Sharma, it is alleged that Mr Sharma has misused the funds of the branch, which are contributed to by the members of the VLD. The officers of the VLD have sought to represent their interests and taking Mr Sharma to task by proceedings in the court, to refund the monies.

PN251

JUSTICE HATCHER: Well, Mr Jolly and Mr Koch have.

PN252

MR BORENSTEIN: Yes. Well, Mr Jolly is the secretary of the VLD.

PN253

JUSTICE HATCHER: But how does that go to the capacity of the - I mean that's just conduct by two individuals. I don't even know whether they would be, in future, officials of the VLD if it became a separate union.

PN254

MR BORENSTEIN: I'm sorry, I didn't catch the last part. You don't know that they are officials?

PN255

JUSTICE HATCHER: This is litigation instituted by two persons. I mean what's the link between that and the future capacity of the VLD?

PN256

MR BORENSTEIN: The link.

PN257

JUSTICE HATCHER: Individual officials may be good or bad, it doesn't say much about organisational capacity. Sometimes the best unions elect bad officials and that's the way it is.

PN258

MR BORENSTEIN: It doesn't matter whether Mr Sharma is a good or a bad official - - -

PN259

JUSTICE HATCHER: Or Mr Jolly or Mr Koch. It's - - -

PN260

MR BORENSTEIN: No, no, no. I think your Honour's been given, in the affidavit of Mr Clayton, the pleadings in this matter, and we don't want to go

there, but the pleadings make out that Mr Jolly and Mr Koch are the secretaries of their respective division branches.

PN261

JUSTICE HATCHER: I understand that.

PN262

MR BORENSTEIN: As secretaries of the branch they are pursuing Mr Sharma to refund money which they say he properly took from the branch.

PN263

JUSTICE HATCHER: Yes.

PN264

MR BORENSTEIN: Now, that inures to the benefit of the members of their respective branches and, in that respect, it demonstrates that the branch, the constituent part, through its officers, is representing the interests of its members.

PN265

JUSTICE HATCHER: If the allegations are true, it's funds of everybody in the RTBU, it's not just the funds of those in the VLD.

PN266

MR BORENSTEIN: But the point being that these people, Mr Jolly and Mr Koch, are the ones who've actually taken the action to try and retrieve the money, if it's been misspent. That's a demonstration of the capacity of the VLD, for example, to look after the interest of its members, in the way in which paragraph (v) talks about.

PN267

JUSTICE HATCHER: It might be the evidence of the ability and competency and capacity of Mr Jolly but how do we just assign the conduct of one individual elected official to the capacity of a branch?

PN268

MR BORENSTEIN: Because the branch has to act through it's officials, through its elected officials.

PN269

JUSTICE HATCHER: Do I see Mr Jolly is going to be the head of this new union, if it's established?

PN270

MR BORENSTEIN: I think in the transitional rules he's nominated as taking over that position.

PN271

JUSTICE HATCHER: All right, so that's 206 to 210.

PN272

MR BORENSTEIN: That's those two.

PN273

JUSTICE HATCHER: Yes. Then 212 to 222?

PN274

MR BORENSTEIN: In those paragraphs - - -

PN275

COMMISSIONER BISSETT: Sorry, was it 212 to?

PN276

MR BORENSTEIN: Two hundred and twenty-two.

PN277

COMMISSIONER BISSETT: To 222, thank you.

PN278

MR BORENSTEIN: The purpose of these paragraphs is to demonstrate that within the branch there are widespread breaches of the rules, relating to finances. They put in context what is said against the VLD about the unlawfulness, under the rules of the funds that it holds in a shared account with the branch, even though that shared account has been produced by a resolution of the branch executive.

PN279

To the extent that there's going to be some argument about the fact that these funds are or are not properly held by the VLD, we wish to put before the Commission, if you like, in a contextual way, the way in which the branch generally operates, in relation to the funds held and the way in which funds are dealt with by the various divisional branches and the officers of the branch.

PN280

The Commission may or may not ultimately find that of any value but, insofar as the dealings with the funds in the branch has been brought into question, we submit that it's fair that Mr Jolly be able to apprise the Commission of how finances, generally, are dealt with in this branch.

PN281

JUSTICE HATCHER: Paragraphs 221 and, earlier, 219, cross refer to paragraphs which we are now no longer reading?

PN282

MR BORENSTEIN: I'm sorry, which numbers did you want to say?

PN283

JUSTICE HATCHER: The second sentence of 219 and then 221 - - -

PN284

MR BORENSTEIN: Yes, we're not reading those.

PN285

JUSTICE HATCHER: All right.

PN286

DEPUTY PRESIDENT GOSTENCNIK: Mr Borenstein, just going back to 206 to 210, the proceedings that are brought, by Mr Jolly and his colleague, under 164 and 164(a), are brought in their capacity as members.

PN287

MR BORENSTEIN: I beg your pardon?

PN288

DEPUTY PRESIDENT GOSTENCNIK: They're brought in their capacity as members of the organisation. That's the only basis upon which they have standing.

PN289

MR BORENSTEIN: The only persons who can, and the only capacity in which one can bring a proceeding, under 164, is as a member.

PN290

DEPUTY PRESIDENT GOSTENCNIK: Yes. How does that speak to the organisation's capacity?

PN291

MR BORENSTEIN: Because the proceeding has been brought by the branch secretary, with the authority of the branch, and in circumstances where the branch can only act through its members and its officials. We would say that it would be artificial to ignore the connection.

PN292

DEPUTY PRESIDENT GOSTENCNIK: All right, thank you.

PN293

MR BORENSTEIN: It's a bit like saying that if Mr Jolly, or another official of the branch, went down and resolved an industrial dispute that it wasn't the branch resolving the industrial dispute, it was Mr Jolly. One has to look at this thing in a realistic way and recognise that these people are acting as representatives of the branch, especially when they're elected.

PN294

JUSTICE HATCHER: Yes. But does it follow, in that logic, that if there was some evidence that was critical of Mr Jolly's competence, or probity, that that would somehow become relevant to the capacity, under 94A(2)(b)?

PN295

MR BORENSTEIN: It would depend on the nature of the (indistinct). If it was misconduct in the exercise of his duties, as a branch secretary, then there may be something that would need to be considered and the extent to which the branch sanctioned what he did would be an issue.

PN296

JUSTICE HATCHER: If our assessment requires us to take into account Mr Jolly's personal characteristics, then we might say that there's no evidence of what

else he brings to the table, in terms of competence and ability. What his negotiating capacity is, what his qualifications to manage finances are. I mean we don't know any of those things.

PN297

MR BORENSTEIN: No, you don't, but what you know is - you know that the branch has been functioning, as a constituent part. It's filed its annual returns. Mr Jolly has given you a rundown of its financial position. There have been - he's given an example of a situation where he has sought to protect the finances of the branch of which his division is a part, and he's done that as a representative of his divisional branch.

PN298

Whether he's otherwise a good person or a bad person, in terms of whether there's a capacity in the branch to effectively represent, it's been demonstrated, in this instance, through the actions of Mr Jolly. In another instance it might be demonstrated through somebody else's actions.

PN299

I'm not sure that in order to assess the likely capacity of the new union, by reference to any demonstrated conduct which shows a capacity to represent that one needs to go into a character investigation of each of the officials of the organisation.

PN300

There's no necessity for anybody to pass judgment on the character of anybody. The recovery of the funds, in the court proceedings, is simply based on the funds being used for an improper purpose.

PN301

Now, if the union's got evidence that the constituent party has been using funds for an improper purpose, then it may bring that forward as evidence, perhaps, that there isn't a demonstrated capacity. At the moment, the only objection we've got is that the funds which the divisional branch holds, by the agreement of the Victorian branch of the union, is in breach of the rules, and they rely on that. But they haven't raised any other issues and we say that's where it is.

PN302

JUSTICE HATCHER: All right.

PN303

MR BORENSTEIN: So if the Commission pleases, I return to the submissions about the determination of section 94A(2)(b) and the context which should be taken into account in deciding that question. This is addressed in paragraphs 19 and following of our friend's reply submissions from last night.

PN304

We make the submission, contrary to what's said in paragraph 21 of those submissions, that it's not relevant and it's, in fact, incorrect to rely on what is said to be the policy of the Act to encourage and make easier the processes of amalgamations, drawing on part 2 of chapter 3.

PN305

In our respectful submission, that is not the policy of the Act, as a whole. The submission overlooks the fact that, for a number of years now, going back to 1996, the Act has recognised, in parallel with the encouragement of amalgamations, the ability to withdraw from an amalgamation and has, over the time, and particularly in 2020, liberalised the circumstances in which withdrawal form an amalgamation may occur.

PN306

Now, our friends rely on a passage from the Full Court's judgment, in the AMA(?) case, which is at footnote 5 of their submissions, we submit that that case does not stand for the proposition for which it's contended.

PN307

Perhaps I should, by way of introduction, indicate that what was in issue in this case, and it may be familiar, certainly, to the Deputy President and I'm not sure if your Honour sat on the Full Bench, but the question was whether the newly registered CFMMEU could be registered, because of outstanding legal proceedings and whether amendments to the legislation about the nature of the legal proceedings that were disqualifying had that effect.

PN308

At paragraph 5, which is the paragraph that our friends rely on - we have sent - I think our friends have sent the Commission an electronic copy of the case, if that's of any assistance.

PN309

At paragraph 5, after the introductory sentence, their Honours go on:

PN310

> *When, however, one examines the legitimate statutory context of the material and the terms of the various amendments made in 1990, and not thereafter relevantly altered, one does find the relevant policy to assist in the ascription of meaning to the phrase 'civil proceedings' in section 73(2)(c). The policy was to encourage and make easier the process of amalgamation of the organisation. The removal of outstanding civil penalty proceedings as a bar to that process is one of the features of the 1990 changes that give effect to that policy.*

PN311

Now, what their Honours were talking there about was the policy which they discerned, from the amendment, that removed civil proceedings from the section and therefore made it easier for withdrawal.

PN312

We are in a analogous situation because, in our circumstances, the section that we're talking about was introduced as an amendment in 2020 and expressly described, both in the explanatory memorandum and the second reading speech, as an intention to make easier and to expand the facility of withdrawing from amalgamations.

PN313

So, in the same way as the Full Court drew a particular purpose from the amendment to section 73, in part 2, we say that this Commission should find a purpose, deriving from the 2020 amendments, that are intended to make it easier to withdraw from amalgamations and, in the same way as the Full Court thought.

PN314

For the purposes of what was in issue in their case, that purpose should be given effect in the interpretation of section 73. We say that the purpose of the amendment in 2020 should be used to construe and give effect to section 94A, including subsection (2) which, as a whole, was introduced by the amending legislation and which was intended to make things easier to withdraw from amalgamations.

PN315

The question about identifying purposes of legislation is also discussed in AMA(?), starting at paragraph 80. They recognise there that legislation can have more than one purpose. Their Honours say:

PN316

*Where there is more than a single legislative purpose it may be difficult to identify which, if any, of the overarching legislative purposes is apposite to an individual provision.*

PN317

Then they extract a passage out of Gleeson CJ's judgment, in *Carr v Western Australia*, and make the comment that:

PN318

*These kinds of difficulties and challenges are well illustrated in construing section 73(2)(c).*

PN319

Then they go on, in paragraph 82:

PN320

*There are multiple underlying purposes or objects of the Registered Organisations Act, as a whole. Some of which are reflected in the statement of the parliaments intention of section 5. The full text of section 5 is set out at paragraph 26. It is made clear there that there is no single parliamentary intention underlying the enactment of the Registered Organisations Act. The intentions are diverse and include enhancing workplace relations and reducing the adverse effects of industrial disputation and so on.*

PN321

He goes on:

PN322

*There is no specific objects provision for chapter 3 in which section 73(2)(c) is located.*

PN323

So, in our respectful submission, relying on AMA to say that the purpose of the whole of chapter 3 is to encourage amalgamations, without giving any credence or any weight to the 2020 amendments, which were intentionally, deliberately and in a targeted way, intended to expand the scope for withdrawal from amalgamations is an erroneous line of legal reasoning and should be rejected.

PN324

The same applies to the submission about the way in which our friends say section 94, and the time limit in section 94, should be brought to account.

PN325

What we submit is that when one looks at the time limit, in section 94, one has to have, in the forefront of one's mind, that in 2020, long after that time limit was placed in the legislation, the parliament intentionally and deliberately passed this legislation which allowed for the time limit to be avoided, in certain proscribed circumstances.

PN326

The proscribed circumstances are set out in section 94A and our submission is that rather than allow the time limit in section 94 to govern the interpretation of section 94A, the Commission should have regard to the purpose and object of the amendment which introduced section 94A and give full effect to that. To the extent that that diminishes or reduces the field of operation of section 94, it should be inferred that that was the intention of the parliament.

PN327

Now, to make that point out may we direct the Commission's attention to the explanatory memorandum, which we've provided in electronic form, in our list of authorities. Tab 14, I'm told, in that list.

PN328

If the Commission has it, at page 1, under the title 'Overview of the bill', the explanatory memorandum states:

PN329

*The object of the amending bill is to amend the Registered Organisations Act to uphold the principle of freedom of association and provide constituent parts, for example: branches, divisions or parts of registered organisations that have amalgamated with other organisations, the freedom to withdraw from the amalgamated organisation and become a new registered organisation, outside the current time limited period of five years post amalgamation, in specified circumstances.*

PN330

Then the next paragraph:

PN331

*The bill recognises that all constituent parts of amalgamated organisations should have the freedom to decide on the governance and structure that will allow them to best represent the interests of their members. Over time a*

*constituent part of an amalgamated organisation may find that the organisation no longer represents the values and interests of the constituent parts members and may, instead, wish to withdraw from amalgamated organisation and become a new registered organisation. Accordingly, the bill makes technical amendments to address the current limitations in the Act that place time limits on when a party can seek to withdraw from the amalgamation and provides a process for applying to undertake a ballot of the constituent part's members, on the question of withdrawal from amalgamation.*

PN332

Then at the final paragraph on the page talks about the bill addressing the time limits by establishing a procedure and talks about the Commission being satisfied that it's appropriate to accept the application, having regard to the two following matters.

PN333

So we submit that that purpose and object explained there should inform and weigh heavily in the way in which the Commission interprets the operation of section 94A and the effect on the time limit, in section 94.

PN334

Our friend sought to make some submissions about the circumstances that, in this case, only one of the matters, in subjection (2), namely the likely capacity of the organisation to represent its members is present. Paragraph 33 of the explanatory memorandum envisages that such a situation may arise. In paragraph 33 it said:

PN335

*It is not necessary for both of the matters listed in new subsection 94A(2) to be present for the Commission to determine to accept the application. It is possible to the Commission, in the exercise of its discretion, to determine that it's appropriate to accept the application for ballot when only one of the matters listed in paragraph 94A(2)(a) and (b) are present.*

PN336

So the parliament envisaged that you could come and seek exclusion from the time limit, under 94A, even in relation to one matter under subsection (2).

PN337

We therefore say that it's wrong to suggest that, having only one matter under subsection (2) is anomalous or unintended or should have some effect on the operation of the section. There's nothing in the explanatory memorandum to suggest that where only one of the matters is present that the Commission should take a different position than when both are present, particularly in relation to the significance of the time limit in section 94, as opposed to or as against the intent of section 94A to make it easier for organisations to withdraw from amalgamation.

PN338

We also take issue with the suggestion or the submission that's made in paragraph 22 of our friend's reply submissions from yesterday afternoon, where it's suggested that where an application is made, under paragraph (b) only, a finding

that it would be appropriate to accept the application would mean that the time limit for section 94 would have no meaningful operation.

PN339

In our respectful submission, if you do it the other way you deprive the paragraph in section 94(2) of any effective operation. When you are weighing up the respective effects, as between the two provisions, it's critical to bear in mind and give effect to what was the intent and purpose and the object of the 2020 amendment in the first place. Where it envisaged the situation that you could have only one part of subsection (2) present for an application under 94A and didn't say that you couldn't rely on that, then whatever flows from that flows from that, by operation of the section. And if there is some diminished operation for section 94 then its to be assumed that that was intended by the parliament.

PN340

It should be remembered that although our friend assumes that all constituent parts would meet the test I paragraph (b) that not all of them may. Our friends have raised objections to whether our constituent part meets the test in paragraph (b). So it's not a given that that would happen and so the way in which our friends put that proposition, we say, is based on a false premise.

PN341

We also take issue with the final sentence of that paragraph where they say that:

PN342

*An outcome that restricts the ability to seek an application, under 94A, in those circumstances, is consistent with the scheme of the Act.*

PN343

The scheme of the Act which they refer as the scheme of the Act referred to in the AMA case and, as I've indicated, that doesn't deal with the Act as a whole and it doesn't deal with this part of the Act. It deals with the part dealing with amalgamation of organisations. And having regard to the 2020 amendment, we would say that one can't automatically extrapolate that into this part of the Act and assume that that governs this part of the Act as well. Weight has to be given to the fact that the legislation has, for many years, recognised withdrawal from application and has, in recent years, expanded the capacity to do that.

PN344

So we say that, insofar as our friends rely on a policy which they then use to seek to read down the operation of section 94A, that that argument should be rejected and that the application, if the Commission is satisfied, that the requirements of subsection (2)(b) are met by the constituent part, that the application should be received, notwithstanding the time limit in section 94.

PN345

In terms of the materials which we now rely on, in the statement, we submit that those materials go to the question of, firstly, demonstrating a capacity to represent the interests of the membership, which the Commission can use to form a view about the forward looking likelihood of the new organisation and also seek to

meet the argument that my friends advance about the way in which funds in the organisation have been administered, in breach of the rules.

PN346

Would your Honour just excuse me a moment?

PN347

The final thing that I'd submit is that having regard to the narrowing of the factual matters that our friends' estimate of outside limit of the duration of any trial might be would need to be revised. It's not clear to what extent they would want to put on evidence on the merits of the case, once your Honour's rule on this application. It may be that it's best to leave an assessment of the required time for a trial until we have the Commission's decision on this application.

PN348

JUSTICE HATCHER: In relation to the material in 206 to 210, is your client asking us to find that this magazine was, in fact, funded out of RTBU funds?

PN349

MR BORENSTEIN: No. What we're doing is we are - we're not asking the Commission to take on the role of the Federal Court, in relation to the breach of the rules, but we submit that it can be dealt with on the basis that there is an allegation that's been made and that the VLD and the other branch have taken steps to prosecute the allegation and, in that way, demonstrate the readiness and the capacity to protect the interests of their members.

PN350

JUSTICE HATCHER: Mr Jolly doesn't say, in paragraph 210, that he took the action on behalf of the division, does he?

PN351

MR BORENSTEIN: He doesn't say it there but it's in the materials.

PN352

JUSTICE HATCHER: Which materials?

PN353

MR BORENSTEIN: It's in the pleading, your Honour.

PN354

JUSTICE HATCHER: It's in the pleadings. All right.

PN355

MR BORENSTEIN: I'm sorry, let me put it another way. In the pleadings it's pleaded that he's a member and I believe, I'll stand to be corrected, that he hold a position in the organisation.

PN356

JUSTICE HATCHER: I know that. But I thought you went further and said that he was somehow authorised and taken on behalf of the - - -

PN357

MR BORENSTEIN: No, he doesn't say that in the statement.

PN358

JUSTICE HATCHER: No. Okay. So we're left with the fact that he has issued proceedings in the Federal Court, in respect of an allegation which may or may not be true?

PN359

MR BORENSTEIN: Correct.

PN360

JUSTICE HATCHER: Okay.

PN361

MR BORENSTEIN: Unless there are any other matters that I can assist the Commission with, they are our submissions.

PN362

JUSTICE HATCHER: Thank you.

PN363

Mr Dowling?

PN364

MR DOWLING: Thank you, your Honour. I'm conscious of the time. I can comfortably say that we'll be - - -

PN365

JUSTICE HATCHER: You haven't got much left to deal with.

PN366

MR DOWLING: No, I haven't.

PN367

Can I go back to what Mr Borenstein had said at the outset, bout the evaluative judgment. This goes to the construction of 94(2)(a). We agree it's an evaluative judgment, the difference between us is the outcome of that exercise is you either have the capacity or you don't. I'm sorry, I think I said 94(2)(a), I meant 94(2)(b).

PN368

For example, if we compare it with something like testamentary capacity, there's an evaluation of whether you have the testamentary capacity, but you either do have it or you don't. The court isn't asked to determine the level of testamentary capacity above the threshold and that's the same position we're in. So whilst we agree it's an evaluative judgment, it's still a do or a don't exercise, you either have it or you don't.

PN369

We do need to remember when my friend is going to these matters that there is only one issue, in respect of competency. Now, there's not been much said about that, but the only issue that remains is the issue of the funds, which is where I started today.

PN370

DEPUTY PRESIDENT GOSTENCNIK: Mr Dowling, do you accept that an evaluation as to capacity can be ascertained by reference to demonstrated capacity in the past to do certain things?

PN371

MR DOWLING: Yes. We haven't said that you can't look at the past. What we've said is, you shouldn't look at criticism of the union, which is the way Mr Jolly phrases his application. What you also shouldn't do is look at a relative exercise.

PN372

Now, our friend says it's not a relative exercise but, even in submissions today, he says, 'The VLD did this, in the face of'. Reading that, together with Mr Jolly's submissions, it's 'in the face of the disadvantage caused by', that's the error.

PN373

Can we address the two sets of paragraphs that remain. So they are 206 through to 210, which is the allegations about the misuse of branch funds by Mr Sharma. Much of what we want to say has really fallen in exchange between the Bench and my learned friend. It is correct that that proceeding was brought in his capacity as a member. The pleading identifies his position but it does not say, and nowhere does Mr Jolly say, in his statement, that he brought it as a representative of the branch. Neither does he say that he was authorised by the branch to do so, by the division, sorry, by the VLD and neither does he say that he did so to protect the interests of the VLD. He says none of those three things.

PN374

That seems to be the proposition put by Mr Borenstein, but the Bench will not find that in the pleadings or in the statement of Mr Jolly, that it was brought in that way.

PN375

The second important issue, in response to those paragraph is, again, the only capacity issue live is the funds and whether the VLD has sufficient funds to promote the capacity. This doesn't respond to that issue. It said, broadly, 'Well, it relates to funds', but it doesn't respond to the very specific issue in the application.

PN376

Our friend deals with that by identifying those paragraphs in the response, at 6(b)(iii) to say, 'Well, that might go further than just whether the funds exist, because there's the reference to the 1730 financial members. That paragraph ends with, 'where it has no other cash resources and has a demonstrated capacity of being unable to realise it's real property'. That goes back to the very same issue. Should the money have been yours, and if the money wasn't yours, what resources do you have? That's the only issue that's being identified, not some broader explanation or exploration into the way the branch manages its funds. Those paragraphs, dealing with Mr Sharma do not go or do not respond to that.

PN377

Thirdly, and lastly, and this was something your Honour, the President, just asked of Mr Borenstein. If the way Mr Jolly now puts his application is to say, 'This is only relied upon to demonstrate that action was taken', then it should be made clear that it is no part of the applicant's case that the allegations are true. The only thing that Mr Jolly wants to rely upon, as we understand from Mr Borenstein, is the fact that he took a step.

PN378

JUSTICE HATCHER: Based on the concession, that evidence could not support a contention of fresh and unlawfulness or dysfunctionality.

PN379

MR DOWLING: No. I want to come to that, because there's been no response to the adequacy of the pleadings in issue.

PN380

So those are the three issues about what hasn't been said by Mr Jolly. We've only got one remaining capacity issue, or one capacity issue, and the question about the truth of the allegations. For those reasons we maintain that those paragraphs are not relevant and they should be, insofar as there's a reference in the amended application, they should be struck out or insofar as the paragraphs themselves, should not be tendered into evidence or permitted to be tendered.

PN381

That only leaves paragraph 212 through to 222. Your Honour noted that paragraph 219 to 221 pick up the other allegations. Paragraphs 213 and 216 also pick up the other allegations. So I think we understand, from Mr Borenstein's response to your Honour's question, that 219 and 221 would not be relied upon. We would expect that the same would apply, in respect of 213 and 216, insofar as they pick up the other allegations.

PN382

But, fundamentally, these paragraphs deal with the past use of the shared account that's complained about by Mr Jolly. Perhaps I've narrowed it too much, the past use of funds generally. That, in our submission, is not relevant to the legal question that we identified and the construction of the rules, as to whether the money referred to by Mr Jolly, in his statement, is properly the money of the division.

PN383

That's the question that has to be answered in response to the objection to capacity that we make, not how the branch and the (indistinct) divisions have used resources in the past, but whether the money that Jolly says is his, is in fact, his. That's the only question, and that's a legal one in our submission. So, 212 to 222 do not go to that issue, and again, we maintain our objection in respect of those paragraphs.

PN384

Just a couple of short matters on construction in respect of, 'appropriate.' Mr Borenstein spent some time with the AMA v CFMMEU decision. That was raised by us in the context of the meaning of, 'appropriate.' We understood from

the exchange that the parties were really in agreement on that, and that is that the considerations are limited to those in 94A(2). We do say, of course, construed in the context of the Act, but they're limited to those in 94A(2).

PN385

What it is my friend, Mr Borenstein, sought to take from AMA v CFMMEU is that it is now, or should now be approached, those sections, on the basis that it is easier to withdraw. What that misses, and what the scheme that's relied upon by the applicant tells us, is that it is uncontested and incontrovertible that 94A goes in as an exception to the rule.

PN386

There is no intention demonstrated to override the time limit provided for by Section 94, and that, in substance, is what we are saying when we look at the new scheme. It must be viewed as an exception, because the fundamental difference between us is that on our construction, only parts of bad units can get out, and on Mr Borenstein's construction, any part representing capacity under 94A(2)(b) can get out at any time.

PN387

And if really, that's what was intended, you would expect the amendment created by 94A would say, if you have the capacity to represent, to protect and promote your members in the future, the time limit doesn't apply. Because that's the effect of the applicant's construction. If you've got that capacity, by virtue of the way 94A is said to interact with 94, the time limit just doesn't apply. And that is simply not made out, and not made out by the ex mem that Mr Borenstein took the Bench to.

PN388

He first took you to that paragraph under the heading, 'Overview of the bill', at 232 of 255 of the PDF, and the concluding words of that sentence are, 'The freedom to withdraw from the amalgamated organisation and become a new organisation outside the current time limited period of five years post amalgamation, in specified circumstances', identifies and acknowledges there is a time limit created by 94A, and what we are creating by the amendment is an exception in specified circumstances, and that is entirely consistent with the way we are asking the Bench to read the Section.

PN389

That then only leaves our third topic which was the adequateness of the scope of the lawfulness. Obviously, the scope of our third topic has changed because we're now only dealing with 206 to 210, and 212 to 222. But as we understand, what remains is still contended, at least on the paperwork as it presently is, that the conduct constituted by those paragraphs was unlawful, and there's been no effort to explain how it is that that conduct is unlawful or oppressive or dysfunctional.

PN390

There has been no response, at all, to the submissions we make about the inadequacy of the pleadings, and if those matters are maintained on the basis that they are unlawful, we maintain that what's left of the pleading, now not much but

what's left of the pleading, is still inadequate and should be struck out for that reason.

PN391

That only leaves the practical matter of what might be done about the hearing, and for our part, we agree that the most prudent course would be to await the outcome of the Full Bench's decision as to what's left before we allocate days. But we certainly make no concession that if 206 to 210, and 212 to 222 is in, it will be short. Still, there's a serious number of allegations in 2012 to 222 that would need to be addressed. But we're happy to await the outcome before we further program the matter. Unless there are any matters, they are the issues in reply.

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DEPUTY PRESIDENT GOSTENCNIK: All right, we thank the parties for their submissions and we propose to reserve our decision. We will now adjourn.

**ADJOURNED INDEFINITELY [12.49 PM]**

# LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #A WITNESS STATEMENT OF MARCUS CLAYTON AFFIRMED 26/05/2023.....PN26**