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**CHANGING MEMBERSHIP ELIGIBILITY RULES OF REGISTERED  
ORGANISATIONS: A REVIEW OF PATHS AND PRACTICALITIES**

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# Avenues for changing Membership Eligibility Rules of Registered Organisations: a review of paths and practicalities

*Joanna Williams\**

*Registered organisations, employee unions and employer associations, are carefully managed and defined by the Fair Work (Registered Organisations) Act 2009 (Cth) (RO Act). This article considers how these organisations are regulated, how the rules of organisations are regulated and how those rules can be changed. In particular, this article examines the three methods for registered organisations to change their eligibility rules, focusing on the newest method under s 158A of the RO Act and using the recent application by the Australian Municipal, Administrative, Clerical and Services Union as a case study. The analysis of both the legislation and the case study demonstrate that in practice the section is a relatively blunt tool preoccupied with avoiding eligibility contests, an emphasis common in the requirements under the RO Act. The case study also highlights a number of procedural matters that could help future applicants expedite their applications.*

## I INTRODUCTION

Under the *Fair Work (Registered Organisations) Act 2009* (Cth) ('RO Act') two main types of organisations can be registered and regulated: employer associations and employee unions. These organisations, in particular employee unions, have had a long and influential presence in Australian industrial relations history and "have played a significant part in the establishment and enforcement of [Australian] employment laws", primarily through representation of members and lobbying governments on issues affecting members.<sup>1</sup>

Under Australia's 'Fair Work' industrial relations system, passed under the Rudd Government in 2009, these organisations now boast their own Act. In over 350 sections and two schedules, the *RO Act* carefully defines, manages and provides for control of these organisations. A significant portion of the effort of the *RO Act* surrounds the requirements for, and rules surrounding, an organisation's internal rules.

This essay will examine how these organisations are regulated under the *RO Act*, how the organisations' rules are regulated and how those rules can be changed. In doing so, this essay will focus on the newest method of altering rules under s 158A of the *RO Act*. A strong focus on preventing demarcation disputes is demonstrated by analysis of both

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<sup>1</sup> Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 3<sup>rd</sup> ed, 2011) 14.

the context in which s 158A sits, in the system for organisations to alter their rules, and the legislative history of the section. The Australian Municipal, Administrative, Clerical and Services Union ('ASU') has recently made the first application under s 158A ('ASU Application')<sup>2</sup> and this will be used as a case study to demonstrate that in practice the section is a relatively blunt tool preoccupied with avoiding eligibility contests. The ASU Application can also provide useful procedural lessons to help guide and improve future s 158A applications.

## II REGULATING REGISTERED ORGANISATIONS

An examination of the background and context of the regulation of registered organisations is necessary to understand how s 158A of the *RO Act* functions. The Commonwealth regulates organisations by registration under the *RO Act*, the intention of which is "to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation".<sup>3</sup> One of the ways the *RO Act* will fulfil that purpose is "if associations of employers and employees are required to meet the standards set out in this Act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act".<sup>4</sup>

Organisations are registered under Chapter 2 of the *RO Act*, which includes requirements for eligibility,<sup>5</sup> registration criteria,<sup>6</sup> the registration process<sup>7</sup> and any cancellation of registration.<sup>8</sup> Registration bestows upon 'organisations' (defined by the *RO Act* as an organisation registered under the *RO Act*)<sup>9</sup> a separate legal identity. By virtue of registration, an organisation "is a body corporate" with "perpetual succession", that can deal with property, must have a common seal and may sue or be sued.<sup>10</sup> According to Creighton and Stewart, it has "long been accepted that incorporation was intended by the wording".<sup>11</sup>

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<sup>2</sup> Australian Municipal, Administrative, Clerical and Services Union, *Application for Consent to the Alteration of Eligibility Rules of an Organisation by General Manager* (24 December 2012) ASU National <[http://www.asu.asn.au/documents/doc\\_download/105-2012-rule-change-national-eligibility-rules-121224](http://www.asu.asn.au/documents/doc_download/105-2012-rule-change-national-eligibility-rules-121224)> ('ASU Application').

<sup>3</sup> *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(1) ('*RO Act*').

<sup>4</sup> *Ibid* s 5(2).

<sup>5</sup> *Ibid* ss 18–18D.

<sup>6</sup> *Ibid* ss 19–20.

<sup>7</sup> *Ibid* ss 25–27.

<sup>8</sup> *Ibid* ss 28–32.

<sup>9</sup> *Ibid* s 6.

<sup>10</sup> *Ibid* s 27.

<sup>11</sup> For a full discussion of the case law, see Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 4<sup>th</sup> ed, 2005) 487–9. Creighton and Stewart's comments, and the summarised case law, do relate to previous legislation, however the text of this provision has not changed.

One of the criteria for registration is that the association wishing to be registered has a set of rules that will satisfy the “incredibly detailed requirements”<sup>12</sup> for an organisation’s rules under the *RO Act*.<sup>13</sup> Chapter 5 of the *RO Act* contains the provisions regulating and controlling the rules of organisations, and sets out processes available to members who are concerned that their organisation’s rules are either not being followed or do not comply with the *RO Act*.<sup>14</sup> The minimum requirements for what an organisation’s rules must contain are detailed in s 141 and include such matters as meetings,<sup>15</sup> elections of officers,<sup>16</sup> powers and duties of committees,<sup>17</sup> auditing,<sup>18</sup> the spending of funds<sup>19</sup> and the manner of notifying the Fair Work Commission (‘Commission’) of industrial disputes.<sup>20</sup> Overlaying these issues, s 142 sets out the general requirements for rules of organisations, which include that the rules must not be contrary to law,<sup>21</sup> prevent members from obeying the law or entering into agreements under the industrial relations law,<sup>22</sup> impose on members or potential members conditions which are “oppressive, unreasonable or unjust”<sup>23</sup> or discriminate between members or potential members on the basis of a number of attributes.<sup>24</sup>

Importantly, the second requirement for the content of an organisation’s rules is that they “must specify... the conditions of eligibility for membership”.<sup>25</sup> These eligibility rules play an important part in regulating Australian organisations, as Australia’s historical development has led to frequent overlaps between workplaces and industries, for trade unions in particular.<sup>26</sup> This patchwork of organisations has led to a system of intersecting eligibility rules and strong competition between organisations to represent particular classes of members.<sup>27</sup> As a consequence, both the requirements for registration<sup>28</sup> and the requirements for changing eligibility rules are careful to include steps to avoid contested eligibility, or demarcation disputes.

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<sup>12</sup> Stewart, above n 1, 16.

<sup>13</sup> *Ro Act* s 19(1)(f).

<sup>14</sup> *Ibid* s 139.

<sup>15</sup> *Ibid* s 141(1)(b)(ii).

<sup>16</sup> *Ibid* ss 143–147.

<sup>17</sup> *Ibid* s 141(1)(b)(i).

<sup>18</sup> *Ibid* s 141(1)(b)(x).

<sup>19</sup> *Ibid* s 141(1)(b)(xi).

<sup>20</sup> *Ibid* s 141(1)(b)(vi).

<sup>21</sup> *Ibid* s 142(1)(a).

<sup>22</sup> *Ibid* s 142(1)(b).

<sup>23</sup> *Ibid* s 142(1)(c).

<sup>24</sup> *Ibid* s 142(1)(d).

<sup>25</sup> *Ibid* s 141(1)(a).

<sup>26</sup> See Creighton and Stewart, above n 11, 505–9.

<sup>27</sup> *Ibid* 505–6.

<sup>28</sup> For example, upon application for registration of a new organisation, one of the factors the Fair Work Commission must consider, under s 19(1)(j) of the *RO Act*, is whether there is another organisation to which members might ‘more conveniently belong’ and would ‘more effectively represent those

### III ALTERATION OF ORGANISATIONS' RULES

One aspect of the regulation of organisations is how an organisation can alter its own rules. Under the *RO Act*, there are three methods for organisations to change their rules: organisations can change their name or eligibility rules under s 158, change rules other than eligibility rules under s 159, or apply to have the General Manager of the Commission ('General Manager') consent to changes to eligibility rules under s 158A.

Under s 159, an organisation may alter any of its rules, other than the eligibility rules, by lodging the particulars of the alteration with the Commission to allow the General Manager to certify that the alterations comply with the industrial relations system, are not otherwise contrary to law and have been made under the organisation's rules.<sup>29</sup>

Section 158 contains the main method for an organisation to alter its eligibility rules or name. In consenting to an alteration under this section, the Commission must be sure that the alteration would not result in potential coverage of persons who could "more conveniently belong" to another organisation that "would more effectively represent those members",<sup>30</sup> unless the organisation provides an undertaking that will avoid demarcation disputes.<sup>31</sup> The Commission can consent to an alteration under s 158 in whole or in part<sup>32</sup> and can refuse an alteration on a number of bases, including if the change could contravene an understanding or agreement regarding eligibility<sup>33</sup> or if the change "would give rise to a serious risk of a demarcation dispute".<sup>34</sup>

### IV THE OPERATION AND LEGISLATIVE HISTORY OF S 158A

Section 158A is a recent addition to the *RO Act* that operates slightly differently to the two other methods for registered organisations to change their rules. Examination of the origin and operation of this section demonstrates that at its core, s 158A is designed to reduce demarcation disputes.

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members'. If such an organisation does exist, the association seeking registration can submit an undertaking to avoid demarcation disputes under s 19(2) of the *RO Act*.

<sup>29</sup> *RO Act* s 159(1).

<sup>30</sup> *Ibid* s 158(4).

<sup>31</sup> *Ibid* s 158(5).

<sup>32</sup> *Ibid* s 158(2).

<sup>33</sup> *Ibid* s 158(6).

<sup>34</sup> *Ibid* s 158(7)(b).

## A The Legislative History and Background of s 158A

Section 158A was brought in among the multitude of changes introduced in 2009 led by the *Fair Work Act 2009* (Cth) ('*FW Act*') to repeal the Work Choices legislation. Along with the *FW Act*, many of the changes in the shift from Work Choices were brought in by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('*TPCAA*'). In part, the *TPCAA* repealed the *Workplace Relations Act 1996* (Cth) ('*WR Act*') except for Schedules 1 and 10, which dealt with registered organisations and transitional registered associations. The *TPCAA* made further amendments to those Schedules as part of the transfer from the Work Choices system and renamed those two remaining Schedules of the *WR Act* as the *RO Act*. Section 158A was inserted by s 63A of Schedule 22 of the *TPCAA*.

The *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (Cth) ('*Bill*') was introduced and read for a first and second time in the House of Representatives on 19 March 2009. On the same day the Senate referred the provisions of the *Bill* to the Senate Standing Committee on Education, Employment and Workplace Relations ('Senate Committee') for report by May 2009.

### 1 The First Manifestation of s 158A as Passed through the House of Representatives

The *Bill* as first read did not include s 158A. Instead, s 63 of the *Bill* contained a new subsection 5 to s 158 of what would become the *RO Act*. This proposed s 158(5) was a slightly modified version of the resulting s 158A. Most notably, the proposed s 158(5) contained a requirement that the State or Territory registered association had been actively representing its members to whom the eligibility rules (as proposed to be altered) of the organisation seeking the alteration would apply.<sup>35</sup>

The first Explanatory Memorandum ('first EM') explained that the new s 158(5) was "intended to allow an organisation to expand State eligibility rules to pick up the coverage of its counterpart State association".<sup>36</sup> The first EM further explained that:

"The requirement that a State association be actively representing its members that are covered by the rules relevant to the alteration is intended to prevent organisations expanding their coverage in the federal system where the State counterpart has never used that wider coverage to recruit members or otherwise actively represent employees in those sectors or occupations".<sup>37</sup>

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<sup>35</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (Cth) s 158(5) ('*TPCAA Bill*').

<sup>36</sup> Explanatory Memorandum, *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (Cth) [House of Representatives] 123 ('First EM').

<sup>37</sup> *Ibid* 124.

Additionally, the first EM provided a short and simple illustrative example of how and when s 158(5) might operate.<sup>38</sup> The *Bill* passed through the House of Representatives with s 158(5) and without s 158A on 2 June 2009.

## 2 *The Addition of s 158A in the Senate*

The *Bill* was introduced and read for a first and second time in the Senate on 15 June 2009. The Senate passed the *Bill*, but made a number of amendments, one of which was the addition of s 158A and the removal of the proposed ss 158(5)-(5A). The Revised Explanatory Memorandum used the same illustrative example as the first EM and stated that the provision was “intended to allow an organisation to expand State eligibility rules to pick up the coverage of its counterpart State association”.<sup>39</sup>

Senator Arbib introduced the proposed amendments, including s 158A, into Senate debate on 16 June 2009. The Supplementary Explanatory Memorandum for the Senate (‘Supplementary EM’) details the amendments including s 158A and states that s 158A “will require the General Manager to consent to an application by an organisation to alter its eligibility rules to incorporate any broader eligibility rules of an equivalent State registered association where he or she is satisfied of certain matters”.<sup>40</sup> In a speech given on 15 June 2009, Senator Arbib outlined the amendments. Relevantly, he stated:

“In relation to registered organisations, the government proposes a number of amendments to *further assist state and federally registered organisations to rationalise their affairs and simplify their operations across multiple jurisdictions*. The amendments include changes to the provisions allowing federal organisations to extend their eligibility rules to reflect the broader rules of an equivalent state association, and *ensure that settled demarcations are not reopened* by allowing Fair Work Australia to make a federal representation order that reflects a state order in situations where a federal organisation has altered its eligibility rules to reflect those of an equivalent state association”.<sup>41</sup>

It would appear significant that s 158A does not include a requirement of active representation, as the previous version in s 158(5) did. It was noted in the Senate Committee report that the Australian Council of Trade Unions (‘ACTU’) was concerned about the active representation requirement in the proposed s 158(5) as “it would

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<sup>38</sup> Ibid 124.

<sup>39</sup> Revised Explanatory Memorandum, Fair Work (Transitional Provisions and Consequential Amendments) *Bill* 2009 (Cth) [Senate] 137 (‘*Revised EM*’).

<sup>40</sup> Supplementary Explanatory Memorandum, Amendments to the Fair Work (Transitional Provisions and Consequential Amendments) *Bill* 2009 (Cth) [Senate] 7.

<sup>41</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 June 2009, 3185 (Mark Arbib) (emphasis added).

potentially deprive employees in certain sectors of representation by any union at all”.<sup>42</sup> The Senate Committee report provided no further discussion on this point, but merely re-stated what the ACTU had noted in its submission.<sup>43</sup> Indeed, even the ACTU submission is disappointingly silent on how or why the active representation requirement might deprive some employees of any representation at all despite claiming to “support the government’s intention that such expansion should not be available where the State counterpart ‘has never used that wider coverage’”.<sup>44</sup>

Nevertheless, despite the Senate appearing to follow the concerns of the ACTU and removing active representation, under reg 125A, the requirement of active representation is a ‘prescribed matter’ for s 158A(1)(e).<sup>45</sup> As a consequence, all of the requirements of the original proposed s 158(5) remain, though in modified format in the requirements of s 158A and the regulations (with additional new requirements as well).

The Senate agreed to the *Bill’s* third reading on 17 June 2009. The *Bill* was returned to the House of Representatives with amendments that same day. Attorney-General McClelland introduced the relevant amendment with a speech that was largely identical to Senator Arbib’s reproduced above.<sup>46</sup> The House of Representatives passed the amended *Bill* on 18 June 2009 and it received assent on 25 June 2009.

## B The Operation of s 158A

Under s 158A, an organisation may apply to the General Manager of the Commission to alter its eligibility rules to “extend them to apply to persons within the eligibility rules of an association of employers or employees that is registered under a State or Territory industrial law”.<sup>47</sup> The General Manager must consent to such an application if he or she is satisfied of five matters: that the alteration has been made under the organisation’s rules;<sup>48</sup> that the organisation is a federal counterpart of the State or Territory association;<sup>49</sup> that the alteration will not extend the organisation’s eligibility rules beyond those of the State or Territory association’s;<sup>50</sup> that the alteration will not apply

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<sup>42</sup> Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (2009) 36.

<sup>43</sup> *Ibid.*

<sup>44</sup> Australian Council of Trade Unions, Submission No 14 to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, March-April 2009, 13.

<sup>45</sup> *Fair Work (Registered Organisations) Regulations 2009* (Cth) reg 125A (‘*RO Regulations*’).

<sup>46</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 2009, 6493–4 (Robert McClelland).

<sup>47</sup> *RO Act* s 158A(1).

<sup>48</sup> *Ibid* s 158A(1)(a).

<sup>49</sup> *Ibid* s 158A(1)(b).

<sup>50</sup> *Ibid* s 158A(1)(c).

outside the limits of the State or Territory for which the association is registered;<sup>51</sup> and any other matters prescribed by the regulations.<sup>52</sup> The *Fair Work (Registered Organisations) Regulations 2009* ('Regulations') only prescribe the one requirement of active representation.<sup>53</sup>

Section 158A differs from s 158, the other method of altering eligibility rules, in a number of ways. First, under s 158A the General Manager makes the decision, rather than the Commission, as in s 158: under s 158 the Commission must not refuse an application without giving the applicant or objector an opportunity to be heard,<sup>54</sup> whereas the General Manager under s 158A may "deal with the application without holding a hearing" even where there are objectors.<sup>55</sup> Second, where s 158 grants the Commission the discretion to consent to changes by using the word 'may', by using the word 'must', s 158A *compels* the General Manager to consent if all the requirements are met, thus removing the level of discretion s 158 enjoys. Third, s 158 specifies that the Commission may consent to alterations "in whole or in part",<sup>56</sup> a phrase lacking from s 158A, which simplifies the decision. However, fourth, and most significantly, s 158A does not contain any requirement or ability for the General Manager to consider whether those who would become eligible to join the organisation under the alterations would be better suited to another organisation as is a requirement in s 158. As a consequence, s 158A presents a more streamlined and simpler method of changing eligibility rules, albeit only in a very limited manner.

## V CASE STUDY: ASU

### A The First Application

The first application under s 158A has recently been made by the ASU.<sup>57</sup> It thus provides a useful tool to examine s 158A in practice, and demonstrates how and where the section can be a blunt tool in its quest to prevent demarcation disputes. Examination of the ASU Application could also be used to help other organisations prepare organised and comprehensive s 158A applications in future.

After careful analysis, a number of issues with the ASU Application came to light. One of these issues is merely procedural, requiring only clarification from the ASU. However several of the issues could have presented bigger problems for the fate of the ASU Application, which could cause the ASU Application to be fatally flawed. These three

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<sup>51</sup> *Ibid* s 158A(1)(d).

<sup>52</sup> *Ibid* s 158A(1)(e).

<sup>53</sup> *RO Regulations* reg 125A.

<sup>54</sup> *Ibid* reg 125(1).

<sup>55</sup> *Ibid* reg 125G.

<sup>56</sup> *RO Act* s 158(2).

<sup>57</sup> *ASU Application*, above n 2.

issues are: first, inconsistencies regarding excluded categories of potential members between a State association's rule and the proposed new rule; second, the existence of a Memorandum of Understanding between a State association and another association raising the question of active representation; and third, inconsistency in acronyms and short titles.

### *1 ASU's Intention*

ASU's stated intention for its application is much the same as s 158A's purpose detailed in the Supplementary EM: "[t]he Applicant applies for consent to the alteration of the eligibility rules of the organisation to extend them to apply to persons within the eligibility rules of an association of employees that is registered under a State or Territory industrial law".<sup>58</sup> Specifically, the ASU aimed its application at extending its national coverage to match four different State-registered organisations: the Queensland Services, Industrial Union of Employees ('QSU'), the New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union ('NSW USU'), the Australian Services Union of New South Wales ('NSW ASU') and the Amalgamated ASU (SA) State Union ('SA ASU'). As required by s 158A(1)(b) of the *RO Act*, the ASU is the federal counterpart of all four State associations as prescribed in the *Regulations*.<sup>59</sup>

The ASU Application includes the Form 68A application form<sup>60</sup> required by the *Regulations*,<sup>61</sup> in which the ASU attempts to set out the alterations, and the reasons and effects of the alterations.<sup>62</sup> As attachments, the ASU Application includes a formal declaration<sup>63</sup> as well as full copies of the rules of each of the four relevant State associations,<sup>64</sup> in addition to a separate attachment consisting of the eligibility rules excerpted<sup>65</sup> from each of the State associations' rules.<sup>66</sup> Copies of each of the proposed rule changes with changes highlighted by track-changes are separately attached.<sup>67</sup> The ASU Application also includes copies of documents and emails regarding the proposal and meetings in support of the claim that the changes were made under the rules of the ASU.<sup>68</sup> Finally, a copy of the Memorandum of Understanding ('CFMEU Memorandum')

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<sup>58</sup> *ASU Application*, above n 2, 1.

<sup>59</sup> *RO Regulations* sch 1A.

<sup>60</sup> *ASU Application*, above n 2, 1.

<sup>61</sup> *RO Regulations* reg 125B(1)(a).

<sup>62</sup> As required by *ibid* reg 125B(1)(c).

<sup>63</sup> As required by *ibid* reg 125B(1)(d). The declaration can be found at *ASU Application*, above n 2, 12.

<sup>64</sup> *ASU Application*, above n 2, 25.

<sup>65</sup> *Ibid* 225.

<sup>66</sup> As required by *RO Regulations* reg 125B(1)(b). The Regulations do not specify the eligibility rules of the State organisations must be extracted and reproduced additionally; the ASU appears to have done so out of caution.

<sup>67</sup> *ASU Application*, above n 2, 239.

<sup>68</sup> *Ibid* 271.

between the NSW USU and the Construction Forestry Mining and Energy Union (NSW Branch) ('NSW CFMEU') is included.<sup>69</sup>

## *2 A Minor Procedural Issue*

Upon receipt of an application under s 158A, the first matter that the General Manager must be satisfied of is that "the alteration has been made under the rules of the organisation".<sup>70</sup> Despite the ASU Application's 322 pages of seemingly comprehensive application, and given the importance of ensuring an organisation's rules have been followed, it is surprising that the ASU Application did not take the relatively simple step of making clear that the rule-changing procedure had been complied with. Firstly, the ASU Application lacks information about who originally submitted the proposal,<sup>71</sup> as required by the ASU's rules.<sup>72</sup> Secondly, it fails to provide information about the 26 November 2012 meeting at which the vote to make these changes took place, in particular regarding details of quorum and attendance.<sup>73</sup> While the lack of clarity regarding the rule-changing process is a simple matter to clear up, it would seem a striking flaw to slow down an already long and cumbersome process.<sup>74</sup>

## **B Substantive Analysis of the ASU Application**

In undertaking a closer analysis of the text and effect of the proposed changes in the ASU Application, three substantive potential problems came to light. First, there appears to be inconsistencies between the excluded categories of eligibility coverage in the NSW ASU's rules and the proposed new ASU rules. Second, given the wording of the requirements of s 158A and the *Regulations*, the existence of the CFMEU Memorandum could be problematic. Third, the ASU Application contains a lack of consistency in acronyms and short names used to refer to the State organisations.

### *1 Inconsistencies between Coverage of Existing State and Proposed Federal Rules*

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<sup>69</sup> Ibid 320.

<sup>70</sup> *RO Act* s 158A(1)(a).

<sup>71</sup> *ASU Application*, above n 2, 8.

<sup>72</sup> Australian Municipal, Administrative, Clerical and Services Union, 'Rules of the Australian Municipal, Administrative, Clerical and Services Union' (Registered Rules No 052V, 26 March 2013) r 49 ('*ASU Rules*').

<sup>73</sup> *ASU Application*, above n 2, 8.

<sup>74</sup> The process to get these rules changed could potentially take many months. Depending on the rulebook of the registered association wishing to change its rules, the internal process to make such substantive changes to such an important part of the rules could itself be a long time from conception, through required consultations and notice periods and voting. In addition, time must be allowed for the application to be studied and considered by the Fair Work Commission.

The first of the more substantive issues with the ASU Application concerns the coverage of the NSW ASU eligibility rules. It appears that there are some discrepancies between the exclusions in the NSW ASU rules and what the resulting eligibility rule would be in the ASU if the ASU Application were to be approved as submitted.

In part, this issue arose because in preparing the text to be transplanted into the ASU rules, the ASU did not simply copy and insert the relevant sections of the NSW ASU rules directly into the proposed additions to the ASU Rules. Examination of both the NSW ASU Rules as provided by the ASU Application<sup>75</sup> and the proposed text to be included in the changes to the ASU Rules<sup>76</sup> reveals that some NSW ASU eligibility exclusions are missing. As a result, careful consideration of the exclusions already in the ASU rules is required to ensure that the proposed coverage of the ASU is the same as the relevant parts of the NSW ASU and is not being changed or extended through this process.

The specific area of concern arising from this is in relation to people employed in or in connection with the industry of social and/or welfare work under PART IV of the NSW ASU rules.<sup>77</sup> Part IV states that “[t]he Union shall consist of any person employed or usually employed... in or in connection with the industry of social and/or welfare work”<sup>78</sup> but goes on to specify four categories of exceptions which would deny the NSW ASU opportunity to represent those people.<sup>79</sup> The third of these exceptions, PART IV (c), is not in the proposed changes to the ASU rules and does not appear to be wholly recreated in the current ASU rules.

PART IV (c) of the NSW ASU Rules excludes from coverage specific people who are eligible for membership of the Health and Research Employees Association of Australia (NSW Branch).<sup>80</sup> In comparison, the current ASU Rules refer to social and/or welfare employees except for certain people eligible for membership of the Health and Research Employees Association of Australia in the state of NSW.<sup>81</sup> However, the specific people the ASU Rules excludes do not appear to be clearly the same specific people listed in the NSW ASU exception. The ASU rules exclude certain people in NSW eligible for membership of the Health and Research Employees Association of Australia who are employed in a fashion connected with the Crown or in certain connections with the public service.<sup>82</sup> In contrast, the NSW ASU rules contain a much more generalised list of people who are excluded, potentially including several professions and people who are not connected to the Crown or the public service in their employment but rather employed by private employers.<sup>83</sup>

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<sup>75</sup> *ASU Application*, above n 2, 152.

<sup>76</sup> *Ibid* 5–6.

<sup>77</sup> *Ibid* 153–156.

<sup>78</sup> *Ibid* 153.

<sup>79</sup> *Ibid* 153–156.

<sup>80</sup> *Ibid* 156.

<sup>81</sup> ASU Rules, above n 72, rule 5(b) PART VI (c).

<sup>82</sup> *Ibid* rule 5(b) PART VI (c)(i).

<sup>83</sup> *ASU Application*, above n 2, 156.

It should be acknowledged that both sets of rules are drafted and phrased in relatively confusing fashions and could consequentially be interpreted differently than above. The ASU exception works by excluding people with reference to other paragraphs of the rules – “in respect of sub-paragraphs (a), (b)(xi), (b)(xii), (b)(xiii), (b)(xviii), and (b)(xix) herein only”.<sup>84</sup> The context and the words “herein only” strongly suggests these references should be to sub-paragraphs within the same section of the rules, however in practice this would only mean sub-paragraph (a), as the (b) sub-paragraphs stop at (b)(v). As evidenced by the ASU Application, a likely reason for these gaps could be the piecemeal and patchy fashion by which the ASU rules are changed from time to time. PART IV(c) in the NSW ASU rules, too, is unclearly phrased, consisting mainly of a long list of employers and confusing punctuation.<sup>85</sup>

As a consequence of this poor drafting and editing, there could be interpretations of the two sets of rules that mean that the exception in the NSW ASU Rules and the result of the proposed ASU rules actually are equivalent. However, this conclusion would require some craftily considered and perhaps unstable interpretation and without further work and clarification it could be quite unsound to rely on.

There is nothing else in either the ASU Application or the ASU rules that might overcome this difference in the exclusions between the NSW ASU and the ASU. If the coverage is not the same between the state and federal counterparts, the result might be that the ASU Application is fatally flawed under s 158A(1)(c), which requires the alteration does not extend the ASU’s eligibility beyond any of the State associations in the ASU Application.

## *2 Memorandum of Understanding between the NSW USU and the NSW CFMEU*

The second of the more troublesome issues is the existence of the CFMEU Memorandum. As explored above, s 158A only specifies requirements that the alteration is made under the rules, that the organisation is the federal counterpart of the state organisations, that the alteration does not extend the eligibility rules beyond the State associations’ and that the alteration does not apply beyond the State or Territory of the State association. On the face of s 158A, then, the existence of an agreement with another association should not present a problem.

However, the issue arises with s 158A(1)(e) requiring the General Manager’s satisfaction “as to such other matters... as are prescribed by the regulations”.<sup>86</sup> The *Regulations* prescribe one other matter: “that the association of employers or employees *actively represents* the class or classes of employers or employees to which the extension of eligibility rules will apply”.<sup>87</sup> The *Regulations* define ‘active

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<sup>84</sup> ASU Rules, above n 72, rule 5(b) PART VI (c)(i).

<sup>85</sup> *ASU Application*, above n 2, 156.

<sup>86</sup> *RO Act* s 158A(1)(e).

<sup>87</sup> *RO Regulations* reg 125A(1) (emphasis added).

representation' by reference to five activities, any one of which constitutes active representation.<sup>88</sup> In the ASU Application, the declaration claims that the NSW USU does actively represent the relevant classes of employees by undertaking all five of the listed activities.<sup>89</sup>

However, the *Regulations* clearly state that even if an employee association is taken to be actively representing a class of employees under regulation 125(3), if there is an agreement in favour of another organisation or association then the association is *not* taken to be actively representing those employees.<sup>90</sup> This regulation is worded very broadly: there is no active representation if the association is "subject to a representation order, a State demarcation order or a demarcation undertaking or agreement (*howsoever described*), in relation to that class of employees in favour of another organisation or association".<sup>91</sup>

The breadth of the *Regulations* can be seen in the apparent attempt to cover any form of agreement or understanding between two associations by the use of the words "howsoever worded".<sup>92</sup> Further, the *Regulations* merely need an association to be "subject to" some kind of understanding:<sup>93</sup> it does not seem to require the understanding actively restricts the association in question, merely that it exists and that it applies in favour of another association. This interpretation is given weight by looking to the Explanatory Statement for the *Regulations*, which states that this requirement applies where an agreement "exists granting representation rights to another association or organisation".<sup>94</sup> The seemingly long reach of the *Regulations* can be explained by the purpose, as stated in the Explanatory Statement, that the regulation "is designed to limit the likelihood of demarcation disputes arising as a result of a change to eligibility rules under section 158A of the [RO] Act".<sup>95</sup>

It appears, then, that to find that there is no active representation for the purposes of the *RO Act*, the *Regulations* contain three requirements. First, the presence of any kind of understanding, agreement or order between two associations, second, that it be in relation to a class of employees, and third that this understanding, agreement or order is in favour of another association (whether or not it is in favour of both associations).

As noted in the ASU Application declaration, the NSW USU is subject to the CFMEU Memorandum,<sup>96</sup> which must be read in light of the *Regulations* and their purpose. Given the breadth of the Regulation, that the CFMEU Memorandum is an "agreement"

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<sup>88</sup> Ibid reg 125A(2)-(3).

<sup>89</sup> *ASU Application*, above n 2, 18-21.

<sup>90</sup> *RO Regulations* reg 125A(4).

<sup>91</sup> Ibid reg 125A(4) (emphasis added).

<sup>92</sup> Ibid reg 125A(4).

<sup>93</sup> Ibid.

<sup>94</sup> Explanatory Statement, Fair Work (Registered Organisations) Amendment Regulations 2011 (No 1).

<sup>95</sup> Ibid.

<sup>96</sup> *ASU Application*, above n 2, 21.

regarding “demarcation”,<sup>97</sup> as self-described, it clearly falls under the Regulation. Thus, the first part of regulation 125A(4) is satisfied: an agreement exists between the two associations. The CFMEU Memorandum relates to a class of employees,<sup>98</sup> satisfying the second requirement. The CFMEU Memorandum does not grant the NSW CFMEU exclusive rights, but rather grants rights and benefits to both associations that the other will not attempt to recruit particular members or potential members. The content, therefore, satisfies the third requirement of the *Regulations* that the agreement be in favour of another organisation. Accordingly, it appears that the class of employees the subject of the CFMEU Memorandum cannot be included in the ASU Application as they will be deemed not to be actively represented by the NSW USU for the purposes of the *Regulations*.

An argument could be mounted that the NSW USU is still ‘actively representing’ the relevant class of employees because the CFMEU Memorandum relates to recruitment rights, rather than other rights more usually linked with the idea of ‘representation’, and that consequently the CFMEU Memorandum is not covered by reg 125A(4). However, this appears to be a flawed reading of the *Regulations*. As discussed above, the *Regulations* do not require anything more specific than that the understanding, agreement or order is in favour of another association: it does not require the granting of any particular rights. Even if the regulation were read as to require the granting of ‘representation rights’, there is still a strong argument that recruitment rights are a type of representation rights for the purposes of the *Regulations*. In the list of factors that constitute ‘active representation’, the first one is “organising and recruitment activity”.<sup>99</sup> Organisation and recruitment activity, then, is enough on its own to constitute ‘active representation’ and seems to form a subset of ‘representation’. Thus, in the context of the *Regulations*, the fact that the CFMEU Memorandum grants rights in relation to recruitment, rather than full representation, seems irrelevant as a distinction.

As a result, if the portion of the ASU Application that hopes to confer eligibility rights to the ASU over the class of employees who are subject to the CFMEU Memorandum cannot be severed, the ASU Application may also be fatally flawed on this note as failing to satisfy the active representation requirement.

### *3 Lack of Consistency in Acronyms and Short Names*

Third, the ASU has potentially slowed down its application’s process even further by failing to ensure consistency with acronyms and short names used throughout the ASU Application. The NSW USU, NSW ASU and the SA ASU are all pointedly defined with those respective acronyms at the beginning of the ASU Application, within the actual Form 68A application form.<sup>100</sup> However, in the declaration and the text of the proposed

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<sup>97</sup> Ibid 321.

<sup>98</sup> Ibid.

<sup>99</sup> *RO Regulations* reg 125A(3)(a)(i).

<sup>100</sup> *ASU Application*, above n 2, 4–6.

additions, the NSW USU is referred to as the 'USU',<sup>101</sup> the NSW ASU is referred to as the 'NSW Services Union'<sup>102</sup> and perhaps most concerning the SA ASU is referred to both as simply the 'SA Union' and as the 'ASU (SA)', sometimes with both alternative names appearing on the same page.<sup>103</sup> None of these new short names are defined anywhere in the ASU rules or the ASU Application.

While noting discrepancies in acronyms and short names could seem trivial, if the proposed additions to the ASU rules were to be added in as submitted in the ASU Application, it could very well be quite unclear outside the context of the ASU Application to which bodies the acronyms are referring. This could be particularly troublesome for references to the generic 'SA Union': without the context of the ASU Application, how could a casual reader know with any certainty to *which* South Australian union the text is referring? As discussed above, given the emphasis the legislation and the legislative debate placed on ensuring that these applications would not risk muddying demarcation lines, any lack of clarity of this type ought to be very carefully handled, and the potential confusion could very well constitute extending the eligibility rules beyond the State association's.<sup>104</sup>

## C Difficulties and Particularities Highlighted by the ASU Application

From the above analysis of the ASU Application the preoccupation with avoiding contested demarcation lines between associations is clear. The ASU Application can also be a useful guide for procedural tips for future applicants.

### *1 Preoccupation with Avoiding Contests*

There is a very strong preoccupation in the legislation to avoid demarcation disputes between associations as a result of applications and changes under s 158A of the *RO Act*. This is evident in multiple ways, including the text of the *RO Act*, the *Regulations* and the explanatory materials, and in the way these provisions play out in practice as evidenced by the ASU Application.

This legislative desire is clear just from the words of the statute. The majority of the five requirements of s 158A are concerned with limiting the scope of what changes federal organisations can make to their eligibility rules. The first, that the organisation has followed its own rules in making the change,<sup>105</sup> is purely procedural. However, to reduce demarcation disputes, the other four more substantive requirements go towards ensuring that the scope of any changes to eligibility rules under this section is limited.

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<sup>101</sup> Ibid, 4, 12-14, 18, 20-21.

<sup>102</sup> Ibid, 6, 12-14, 21-22.

<sup>103</sup> Ibid, 6-7, 12-14, 22-24.

<sup>104</sup> Contrary to *RO Act* s 158A(1)(c).

<sup>105</sup> Ibid s 158A(1)(a).

Two of those requirements specifically necessitate that the General Manager, when considering an application, ensure that any alteration does not extend eligibility rules beyond those of the State or Territory association or beyond the State or Territory boundaries.<sup>106</sup> A third limits the applications to ‘federal counterparts’,<sup>107</sup> thus restricting the reach of the potential changes an organisation can apply for to State and Territory associations they are already related to. The final requirement refers to the *Regulations*, which contain the ‘active representation’ clause, perhaps the requirement most obviously concerned with limiting how far eligibility rules can change under s 158A, particularly when considered in light of its operation in the ASU Application.

The statements made in the *RO Act’s* Explanatory Memoranda, the *Regulations’* Explanatory Statement and in the parliamentary debates, as discussed above, cement this preoccupation in the legislation. Nearly all of the discussion centres on limiting the purpose to “pick[ing] up the coverage of... counterpart State association[s]”<sup>108</sup> and emphasising a focus on “ensur[ing] that settled demarcations are not reopened”.<sup>109</sup> This focus is strengthened by the *Regulations’* Explanatory Statement adding in ‘active representation’ as a requirement “designed to limit the likelihood of demarcation disputes”.<sup>110</sup>

All three of the more substantive issues raised above with the ASU Application speak to the preoccupation with avoiding demarcation contests between organisations as practical examples of the legislative requirements. The first major roadblock for the ASU Application concerns inconsistencies between the excluded categories between the State association’s rules and the proposed rules: that such a problem could be fatal to an application shows the severity of changed rules which could potentially cause disagreement with other organisations. The third, more trivial issue of the inconsistent acronyms and short titles still raises demarcation issues in that any potential murkiness in the interpretation of the rules and what they refer to could lead to arguments between organisations as to what classes of employees are covered.

However, it is the second of the larger issues in the ASU Application that most clearly evidences the preoccupation of s 158A with avoiding demarcation disputes. The CFMEU Memorandum is a relatively content-light agreement, focusing only on recruitment of a small class of employees.<sup>111</sup> There could potentially be agreements, understandings or imposed orders that carry far more weight and are far more complex than the CFMEU Memorandum. That the CFMEU Memorandum is not a complex or far-reaching one requires a deeper analysis of the legislation and *Regulations*, demonstrating just how broad and potentially wide-sweeping the ‘active representation’ requirement could be.

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<sup>106</sup> Ibid s 158A(1)(c)–(d).

<sup>107</sup> Ibid s 158A(1)(b).

<sup>108</sup> Revised Explanatory Memorandum, Fair Work (Transitional Provisions and Consequential Amendments) *Bill* 2009 (Cth) [Senate] 137.

<sup>109</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 June 2009, 3185 (Mark Arbib).

<sup>110</sup> Explanatory Statement, Fair Work (Registered Organisations) Amendment Regulations 2011 (No 1).

<sup>111</sup> *ASU Application*, above n 2, 321.

The mere presence of this memorandum could be a very troublesome roadblock for the fate of the ASU Application.

As a result of this, it is evident that s 158A is very strict in limiting the changes to eligibility rules allowed under it. This strong emphasis on avoiding situations where there might be disagreements between organisations as to coverage of members could be seen as an extremely blunt approach. Particularly in cases where there are understandings or agreements with other organisations it could stifle an organisation's ability to cover members who the State or Territory association is perfectly able to cover. Indeed, employer and employee associations wishing to alter their rules under s 158A may (perhaps justifiably) be frustrated by the bluntness of the section, and may find it difficult or even, in some cases, impossible to perfectly match the eligibility rules between State and federal organisations.

Nevertheless, this strict approach has been taken for a reason. This section only requires consent by the General Manager under a simpler process than under s 158, the normal method of changing eligibility rules. The simpler track is available because the point is to offer an easier method for organisations to consolidate their affairs over multiple jurisdictions in a manner that cannot result in substantive changes to the organisation's coverage. In ensuring that, a strict approach is necessary, lest the process becomes too complex and thus defeats the purpose of installing it. If organisations wish to enter into potentially disputed territory in changing their eligibility rules, they must do so through the normal channel of s 158 which requires a deeper analysis of which organisation would be best to represent the classes of potential members in question.

## *2 What the ASU Application can Teach Future Applicants*

From the perspective of future applicants, the ASU Application can also provide several lessons on tips to improve applications to come. For instance: taking the time to provide a sufficient level of detail regarding the organisation's internal process to pass the rule changes to allow the Commission to be certain the organisation's rules have been followed; ensuring consistency in any acronyms or short names used; and carefully considering any areas where there could be any possible contestation of eligibility with other organisations. Another consideration could be, if permitted by the organisation's rules, to pass a motion allowing the Secretary or equivalent officer the discretion to edit an application after submission to remove any offending sections or areas raised by the Commission as problematic. This could be particularly useful if the organisation has a strong desire to make an argument that an understanding, agreement or order ought not be considered by reg 125A(4), so that if that argument is unsuccessful it can be severed without causing the whole application to fail.

## VI CONCLUSION

As registered organisations under the *RO Act*, employer associations and employee unions are carefully regulated by extensive controls and requirements. Much of the focus of those requirements, particularly those surrounding methods for organisations to change their eligibility rules, have a strong focus on preventing demarcation disputes between organisations. Section 158A of the *RO Act* is no exception. The legislative history, wording and operation of the section reflect the strong legislative desire to limit the likelihood of eligibility disputes between organisations. This is demonstrated clearly by the ASU Application, which illustrates how s 158A can become a rather blunt tool because of its devotion to avoiding demarcation issues. The ASU Application also highlights a number of procedural matters which future applicants could consider to help expedite their applications.

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