



Australian Government
Department of Employment
and Workplace Relations

DECEMBER 2022

**REPORT OF THE REVIEW OF THE OPERATION OF THE *FAIR WORK
(REGISTERED ORGANISATIONS) AMENDMENT (WITHDRAWAL
FROM AMALGAMATIONS) ACT 2020***

1 INTRODUCTION: THE REVIEW

This document constitutes the review by the Department of Employment and Workplace Relations (the department) required by s 92A of the *Fair Work (Registered Organisations) Act 2009 (RO Act)*, s 92A. That section requires:

- the Minister to cause a review to be conducted of the operation of the amendments made to Part 3 (Withdrawal from Amalgamations) made by Schedule 1 to the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020 (2020 Amendment Act)*
- the review to be completed, and a written report given to the Minister, no later than the second anniversary of the day the amendments commenced (ie the due date being 16 December 2022), and
- the Minister to cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the day the Minister receives the report.

Key findings

The department's review of the provisions has been informed by analysis of the use of the relevant provisions. The department's key findings are that:

- (a) there has been only one application made in reliance of the principal statutory amendment, to extend operation of the withdrawal provisions (s 94A and related amendments), which was undecided at the time of writing, meaning the operation of the provisions could not be evaluated, and
- (b) the remaining provisions are technical in nature and infrequently used, meaning there was only limited evidence available about their practical operation. There has been no substantive tribunal or court commentary about their operation.

2 BACKGROUND: 2020 AMENDMENT ACT

The RO Act provides for the registration of certain employee and employer organisations and related matters including governance. Organisations registered under the RO Act have certain rights under the *Fair Work Act 2009 (FW Act)* and other legislation, including in relation to bargaining for enterprise agreements. Registered organisations that represent the interests of employees include trade unions and professional associations, whilst registered organisations that represent the interests of employers or an industry are referred to as employer organisations.

The RO Act provides for the following (amongst other things):

- the registration of employee and employer associations (registered organisations)
- the cancellation of registration of registered organisations
- the amalgamation of, and withdrawal from amalgamation from, registered organisations and associations
- the making of orders regarding the representation rights of registered organisations;
- requirements for the rules of registered organisations
- entitlements to become and remain a member and the termination of membership of registered organisations

- the democratic control of registered organisations including the conduct of elections for office
- the keeping, reporting and lodgement of financial records and accounts, and disclosure obligations, of registered organisations
- the duties of officers of registered organisations
- the imposition of civil penalties and bringing proceedings for contraventions of the RO Act
- the establishment, and the functions and powers, of the Registered Organisations Commissioner (the RO Commissioner) and the Registered Organisations Commission (the ROC) (noting that the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* will abolish the office of RO Commissioner and the ROC)
- the functions and powers of the General Manager and the Fair Work Commission (FWC) with respect to the RO Act
- the conduct of inquiries and investigations, and
- protections for whistleblowers.

Part 2 of Chapter 3 of the RO Act provides a framework for two or more organisations to amalgamate, and Part 3 sets out a process that enables a constituent part of the amalgamated organisation to withdraw from the amalgamated organisation. An application can be made to the FWC for a ballot to allow members of the constituent part to vote on whether that part of an amalgamated organisation can withdraw from the organisation.

The 2020 Amendment Act addressed the time limitation in the RO Act by establishing a procedure by which a constituent part of an amalgamated organisation may withdraw from that organisation beyond the five year time limit (RO Act, s 94A). In such circumstances, the FWC may accept an application from a constituent part to hold a ballot of its members on the question of whether to withdraw from an amalgamated organisation if the FWC is satisfied it is appropriate to accept the application having regard to the following matters:

- whether the amalgamated organisation has a record of not complying with workplace or safety laws (as defined in the amendments) and any contribution of the constituent part to that record, and
- the likely capacity of the constituent part seeking to withdraw to promote and protect the economic and social interests of its members as an independent registered organisation.

The Explanatory Memorandum to the 2020 Amendment Act stated the underlying objective was to uphold the principle of freedom of association, by giving all constituent parts of amalgamated organisations ‘the freedom to decide on the governance and structure that will allow them to best represent the interests of their members’. The second reading speech further explained that the intention was to ‘give greater flexibility to constituent parts, such as branches and divisions, of amalgamated registered organisations by providing them with an opportunity to withdraw from an amalgamation if that will better serve them and their members’.¹

The 2020 Amendment Act also amended the RO Act to:

- provide for the naming and rules of the new organisation and amalgamated organisation (s 95A)
- amend the rules for giving effect to ballots, to determine the assets and liabilities etc. of the new organisation (s 109(2))
- specify when the rules of the amalgamated organisation and newly registered organisation take effect (s 110A)

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11006 (Christian Porter, Attorney-General, Minister for Industrial Relations and Leader of the House).

- (d) establish a process for the FWC to accept undertakings in the specified circumstances (s 110B)
- (e) establish a process for the constituent part's members to cease being members of the amalgamated organisations (and become a member of the newly registered organisation) (s 111)
- (f) establish procedural requirements for ballot applications, whether postal or other forms (eg attendance ballot) (s 102(2) – (4))
- (g) permit a ballot to be conducted by a designated official (rather than the Australian Electoral Commission) in certain circumstances (ss 102(1A), 103(1A) – (1C)), and
- (h) make technical amendments to support the substantive amendments.

In 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* was enacted, and included substantial amendments to the RO Act, including by abolishing the ROC and transferring the relevant functions to the General Manager of the FWC. (At the time of writing this report, the relevant amendments were yet to commence). No amendments were made however to the provisions under review here.

3 OPERATION OF THE PRINCIPAL STATUTORY PROVISIONS: THE WITHDRAWAL/DE-MERGER PROVISIONS, SS 94, 94A

Chapter 3 of the RO Act deals with both amalgamation and withdrawal from amalgamation, the first in Part 2 (ss 35–91), the second in Part 3 (ss 92–131).

The objects of Part 3 are set out in section 92, which reads:

92 Object of Part

The object of this Part is to provide for:

- (a) certain organisations that have taken part in amalgamations (either under this Act or the *Workplace Relations Act 1996* as in force before the commencement of this Part) to be reconstituted and re-registered; and
- (b) branches, divisions or parts of organisations of that kind to be formed into organisations and registered;

in a way that is fair to the members of the organisations concerned and the creditors of those organisations.

The words 'divisions or parts' in paragraph 92(b) were added by the 2020 Amendment Act.

Subsection 94(1) allows an application to be made for a secret ballot to be held to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if the conditions in paragraphs (a) – (c) are satisfied. Section 94(3) identifies the persons who may make an application.

Section 94 relevantly provides:

94 Application to the FWC for ballots

- (1) An application may be made to the FWC for a secret ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:
 - (a) the constituent part became part of the organisation as a result of an amalgamation under Part 2 or a predecessor law; and
 - (b) the amalgamation occurred no less than 2 years prior to the date of the application; and
 - (c) the application is made before the period of 5 years after the amalgamation occurred has elapsed.

The 2020 Amendment Act inserted section 94A, which allows the FWC to accept an application made under that section after the end of the five year period set out by paragraph 94(1)(c) for making an application. The FWC must be satisfied, however, that it is appropriate to accept the application having regard to a number of matters. Those matters include ‘whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record’.

Section 93(4) provides that, for the purpose of Part 3, ‘a reference to a constituent part becoming part of an amalgamated organisation includes a reference to a constituent part becoming part of that organisation as it existed before any subsequent amalgamation under Part 2 or a predecessor law’.

Section 100(1) provides that the FWC must order that a vote of the constituent members be taken by secret ballot to decide whether a constituent part of the amalgamated organisation should withdraw from the organisation if, among other things, it is satisfied that the application for the ballot is validly made under section 94.

‘Amalgamated organisation’, in relation to an amalgamation, means:

the organisation of which members of a de-registered organisation became members under paragraph 73(3)(d) of Part 2, or an equivalent provision of a predecessor law, but does not include any such organisation that was subsequently de-registered under Part 2 or a predecessor law.

‘Constituent part’, in relation to an amalgamated organisation, means:

- (a) a separately identifiable constituent part; or
- (b) a part of the membership of the amalgamated organisation that would have been eligible for membership of:
 - (i) an organisation de-registered under Part 2 or a predecessor law in connection with the formation of the amalgamated organisation; or
 - (ii) a State or Territory branch of such a de-registered organisation; if the de-registration had not occurred.

‘Separately identifiable constituent part’, in relation to an amalgamated organisation, means:

- (a) if an organisation de-registered under Part 2 or a predecessor law in connection with the formation of the amalgamated organisation remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation—that branch, division or part; or
- (b) if a State or Territory branch of such a de-registered organisation under its rules as in force immediately before its de-registration remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation—that branch, division or part; or
- (c) any branch, division or part of the amalgamated organisation not covered by paragraph (a) or (b) that is separately identifiable under the rules of the organisation.

The 2020 Amendment Act inserted paragraph (c) of this definition. In *Kelly v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCAFC 130, a Full Court of the Federal Court of Australia (Katzmann, Rangiah and O’Callaghan JJ) held that:

- (a) the legislative intention [behind the addition of para (c)] was to expand the range of constituent parts capable of withdrawing from an amalgamated organisation [87], and
- (b) the paragraph (c) of the definition of ‘separately identifiable constituent part’ is not limited to a branch, division or part of a de-registered organisation [98].

'Predecessor law' (in effect) means the relevant parts of the legislation enacted since 1 February 1991 which provide for the amalgamation of organisations.

4 USE AND IMPACT OF THE PROVISIONS

Since the commencement of the 2020 Amendment Act, there have been three applications made under s 94 of the RO Act for a secret ballot to be held to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation.

Only one of those applications has sought the exercise of the FWC's discretion pursuant to s 94A of the RO Act to accept the application after the period of 5 years from the date that the relevant amalgamation occurred had elapsed.

Specifically, on 15 September 2022, Mr Grahame Kelly, the General Secretary of the Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), made an application to the FWC under section 94A for a ballot to be held to decide whether the relevant constituent part should withdraw from the CFMMEU (FWC matter no: D2022/10). This application had not been determined at the time of writing of this report.

A previous application made by Mr Kelly on 26 March 2021 did not rely upon section 94A and was dismissed by a Full Bench of the FWC *Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union* (2021) 310 IR 270). A Full Court of the Federal Court subsequently dismissed Mr Kelly's application for judicial review (*Kelly v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCAFC 130).

A further application by Mr Michael O'Connor, the Divisional Secretary of the Manufacturing Division of the CFMMEU, on 15 September 2022 and currently before the FWC also does not rely on section 94A (FWC matter no: D2022/11).

Impact of the provisions

Given the limited use of the provisions, the department considers that there is insufficient information to meaningfully assess the impact of the provisions.

In relation to the principal statutory provisions in section 94A, there has been only one application which was still on foot before the FWC at the time of the writing of this report. As such there are no relevant decisions from which to draw any conclusions about the impact of the provisions.

The department is not aware of any substantive judicial or other commentary on the operation of the remaining provisions inserted into the RO Act by the 2020 Amendment Act.

5 CONCLUSION

The department makes no recommendations at this time, given the limited data and evidence about the use and impact of these provisions.