DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Ambulance Employees Association of Western Australia
v
United Workers' Union
(C2024/4538)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT WRIGHT

SYDNEY, 6 DECEMBER 2024

Appeal against decision [2024] FWC 1573 of Deputy President Colman at Melbourne on 17 June 2024 in matter D2023/6 – Application for registration under the Fair Work (Registered Organisations) Act 2009 (Cth) by an association of paramedics and ambulance officers – Majority but not all of members of association perform work in the same enterprise – Application for registration dismissed by Deputy President because it had no reasonable prospect of success – Whether association is able to be registered – Association is an enterprise association but not a federally registrable enterprise association – Association not able to be registered under either ss 19 or 20 of the Fair Work (Registered Organisations) Act 2009 (Cth) – Permission to appeal granted – Appeal dismissed.

Introduction and background

[1] This appeal raises a discrete, but important, question concerning the requirements for an association of employees to become registered as an organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) (the **RO Act**). In a practical sense, the question is whether an association, the majority but not all of whose members perform work in the same enterprise, is able to be registered as an organisation.

[2] The question arises from an application by the Ambulance Employees Association of Western Australia Incorporated (the **AEA**) for registration as an organisation. An objection to the application was lodged by the United Workers' Union (the **UWU**). The application was dismissed by a Deputy President of the Fair Work Commission (the **Commission**) under s 587(1)(c) of the *Fair Work Act 2009* (Cth) (the **FW Act**) on the basis that it had no reasonable prospects of success.[1]

[3] The background to the application is as follows. The AEA was formed by a group of paramedics, ambulance officers, transport officers and communications centre staff employed by St John Ambulance Western Australia Limited (**St John Ambulance**) in around 2014. St John Ambulance is the largest employer of workers engaged in ambulance and patient transport services in Western Australia and is contracted to provide ambulance and patient transport services to the Western Australian government. The AEA became incorporated on 31 October

2014 under the *Associations Incorporation Act 1987* (WA) and continues to be incorporated under what is now the *Associations Incorporation Act 2015* (WA).

[4] The eligibility of persons to join the AEA is governed by rules 9 to 12 of its rules. Rule 9 sets out eligibility by "Industry" in the following terms:

> **Eligibility – Industry rule**
> The AEAWA shall consist of an unlimited number of members who work as employees in or in connection with the ambulance industry anywhere in the State of Western Australia.

[5] Rule 10 sets out eligibility by "Occupation" in the following terms:

> **Eligibility – Occupations rule**
> The AEAWA shall consist of an unlimited number of members who work as employees in the following occupations anywhere in the State of Western Australia: student ambulance officer, ambulance officer, ambulance paramedic, medic, ambulance driver, communications officer, station manager, trainer, critical care paramedic, clinical support paramedic, community paramedic.

[6] Rules 11 and 12 sets out the AEA eligibility of employees and officers of the AEA and independent contractors. The AEA's rules limit eligibility for membership to persons in Western Australia. The evidence filed by the AEA indicated that it has no plans to operate in any other State or Territory.

[7] The AEA currently has approximately 1,079 members. At the time of the hearing before the Deputy President, all but three members of the AEA were employed by St John Ambulance. The evidence indicated that those three members had left their employment with St John Ambulance and were now employed performing ambulance work for other employers. The three employees remained members of the AEA despite working for other employers.

[8] On 15 August 2023, the AEA applied for registration. The application was made by completing a Form F56 entitled "Application by an association of employees (other than an enterprise association) for registration as an organisation". The application referred to s 18(b) of the RO Act being a reference to a "federally registrable association of employees". The application did not, on its face, suggest that the AEA was seeking to be registered as a "federally registrable enterprise association" for the purposes of s 18(c) of the RO Act.

[9] On 6 December 2023, the UWU lodged an objection to the application. On 7 March 2024, the UWU applied under s 587(1)(c) of the FW Act for the application to be dismissed on the ground that it had no reasonable prospects of success. The UWU contended that the AEA could not be registered under s 19(1) of the RO Act because that section applied only to registration of associations "other than an enterprise association". The AEA was, the UWU asserted, an enterprise association within the meaning of s 18C(1) of the RO Act.

[10] The AEA, in turn, sought that the Commission dismiss the UWU's application. The AEA contended that the UWU's standing to participate in the proceedings was limited by regulation 23 of the *Fair Work (Registered Organisations) Regulations 2009* (Cth) (the **RO Regulations**) to pursuing its objection lodged in accordance with that regulation. The AEA

contended that the UWU did not have standing to apply to have the application dismissed in accordance with s 587 of the FW Act.

[11] The Deputy President conducted a hearing in relation to the application on 17 June 2024. At the outset of the hearing, the Deputy President suggested to the parties that he would put to one side the objection as to the UWU's standing and determine whether the application had reasonable prospects of success on the Commission's own initiative pursuant to s 587(3) of the FW Act. At the conclusion of the hearing, the Deputy President handed down his decision and gave ex tempore reasons. The Deputy President subsequent published his reasons.

[12] The Deputy President considered that it was common ground that the AEA is an enterprise association as defined in s 18C(1) of the RO Act and that, as a consequence of certain changes in the composition of its membership, the AEA is no longer a federally registrable enterprise association.[2] The Deputy President did not accept the submission advanced by the AEA that an enterprise association can apply for registration either under s 18(b) or (c) of the RO Act.[3] In any event, the Deputy President concluded that there remained an insurmountable impediment to the application in that the requirements of s 19 could not be satisfied because the words "other than an enterprise association" make clear that an application can only be granted under s 19 if it is made by an association that is not an enterprise association.[4]

[13] The AEA seeks permission to appeal and to appeal from the decision of the Deputy President. Permission to appeal should be granted. In our opinion, it is in the public interest that permission to appeal be granted for the purposes of s 604(2) of the FW Act. The appeal raises a novel and important question in relation to the requirements imposed by the RO Act for an association of employees to become registered. That question should be considered by the Full Bench. The application is of obvious importance to the AEA and, if it has been wrongly prevented from obtaining registration, that should be rectified.

[14] The manner in which the Deputy President disposed of the AEA's application for registration was perhaps unusual. The application was dismissed on the basis that it did not have reasonable prospects of success. The UWU filed a notice of contention to the effect that the AEA's application was incompetent because it is an enterprise association and cannot apply for registration under ss 18(b) and 19(1). On hearing of the appeal, the parties accepted that, in effect, the course taken by the Deputy President was to determine a preliminary question as to whether the AEA was able to be registered as an organisation. If that question is answered adversely to the AEA's submissions, it is fatal to its application and it was appropriate for the application to be dismissed. In those circumstances, it is unnecessary to separately deal with the UWU's notice of contention. It is sufficient to consider whether the Deputy President was correct to find that the AEA could not become registered.

[15] Although permission to appeal should be granted, for the reasons that follow, the decision of the Deputy President is correct. The AEA is not able to become registered under the RO Act with its current membership either as an association of employees for the purposes of s 18(b) or an enterprise association for the purposes of s 18(c).

Statutory scheme

[16] Trade unions and employer associations have been regulated by legislation since the late 19th century. The creation of statutory schemes of compulsory conciliation and arbitration of industrial disputes in the early part of the 20th century prompted the enactment of federal and state legislation which provided for the registration of unions and employer associations for the purposes of participation in the conciliation and arbitration system.[5] Such legislation has always contained some limitations as to the type of associations that are capable of becoming registered.

[17] The registration of unions and employer associations as organisations is now governed by the RO Act. Section 5 of the RO Act sets out Parliament's intention in enacting the Act. Section 5(2) indicates that the intention of the RO Act will be enhanced if associations of employers and employees are required to meet the standards set out in the RO Act. Section 5(3)(e) asserts that, among other things, the standards set out in the RO Act "facilitate the registration of a diverse range of employer and employee associations". Section 5(4) records that:

> (4) It is also Parliament's intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

[18] The current requirements for registration are found in Part 2 of Chapter 2 of RO Act. Section 18 permits three types of associations to apply for registration as an organisation in the following terms:

> **18 Employer and employee associations may apply**
>
> Any of the following associations may apply for registration as an organisation:
> (a) a federally registrable association of employers;
> (b) a federally registrable association of employees;
> (c) a federally registrable enterprise association.

[19] The concept of a federally registrable association of employers, a federally registrable association of employees and a federally registrable enterprise association are then defined in ss 18A, 18B and 18C. Section 18A, 18B and 18C contain positive and negative stipulations that govern when an association is "federally registrable".

[20] Sections 18B and 18C are central to the arguments advanced on this appeal. Section 18B deals with a "federally registrable association of employers" and provides:

> **18B Federally registrable employee associations**
>
> (1) An association of employees is federally registrable if:
> (a) it is a constitutional corporation; or
> (b) some or all of its members are federal system employees.
> …

[21] Section 18C both defines an "enterprise association" and indicates when an enterprise association is federally registrable. The section relevantly provides:

18C Federally registrable enterprise associations

(1) An enterprise association is an association the majority of the members of which are employees performing work in the same enterprise.

(2) An enterprise association is federally registrable if:

(a) it is a constitutional corporation; or

(b) some or all of its members are federal system employees; or

(c) the employer or employers in relation to the relevant enterprise are constitutional corporations; or

(d) the relevant enterprise operates principally within or from a Territory; or

(e) the relevant enterprise is engaged principally in trade or commerce between Australia and a place outside Australia; or

(f) the relevant enterprise is engaged principally in trade or commerce among the States; or

(g) the relevant enterprise is engaged principally in trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or

(h) the relevant enterprise is engaged principally in the supply of postal, telegraphic, telephonic or other like services; or

(i) the relevant enterprise is engaged principally in banking (other than State banking not extending beyond the limits of a State); or

(j) the relevant enterprise is engaged principally in insurance (other than State insurance not extending beyond the limits of a State); or

(k) the relevant enterprise is in Victoria, and the provisions of this Act that would apply to the association (both before and after registration), fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

[22] The definition of an "enterprise association" is that found in s 18C(1), that is, it is an association the majority of the members of which are employees performing work in the same enterprise. That is underlined by the definition of an "enterprise association" in s 6 which provides that: "***enterprise association*** has the meaning given by subsection 18C(1)". Section 18C(2) sets out various circumstances in which an enterprise association is federally registrable in a manner that provides a relevant constitutional connection so as to sustain the operation of the provisions.

[23] Section 18C(3) is also of significance because it provides that an enterprise association is not federally registrable if it has a member who does not fall within one of four categories of persons. Section 18C(3) provides:

(3) An enterprise association is not federally registrable if it has a member who is not one of the following:

(a) an employee performing work in the relevant enterprise;

(b) a person specified in subsection (4) performing work in the enterprise;

(c) an independent contractor performing work in the relevant enterprise who, if he or she were an employee performing work of the kind which he or she usually performs as an independent contractor, would be:

(i) an employee who could be characterised in the way mentioned in paragraph (a) of the definition of federal system employee in section 6; and

(ii) an employee who would be eligible for membership of the association;

(d) an officer of the association.

[24] As will be apparent, s 18C(1) and (3) provide distinct requirements for an association to be an "enterprise association" and a "federally registrable enterprise association". An association will be an "enterprise association" in accordance with s 18C(1) if a majority of its members are employees performing work in the same enterprise. To be federally registrable, however, s 18C(3) dictates that an enterprise association must not have any single member who falls outside the categories set out in the subsection.

[25] The criteria for registration are then set out in ss 19 and 20. Section 19 deals with "Criteria for registration of associations other than enterprise associations". Relevantly, s 19(1) provides:

> **19 Criteria for registration of associations other than enterprise associations**
> (1) The FWC must grant an application for registration made by an association (other than an enterprise association) that, under section 18, may apply for registration as an organisation if, and only if:
> (a) the association:
> (i) is a genuine association of a kind referred to in paragraph 18(a) or (b); and
> (ii) is an association for furthering or protecting the interests of its members; and
> …

[26] The words in parentheses in s 19(1) are of particular significance to the present appeal in that the obligation placed on the Commission to grant an application for registration made by an association if the requirements of the subsection are met only operates with respect to an association that is not an enterprise association.

[27] Section 20 is entitled "Criteria for registration of enterprise associations". Section 20(1) provides:

> **20 Criteria for registration of enterprise associations**
> (1) The FWC must grant an application for registration made by an enterprise association that, under section 18, may apply for registration as an organisation if, and only if:
> (a) the association:
> (i) is a genuine association of a kind referred to in paragraph 18(c); and
> (ii) is an association for furthering or protecting the interests of its members; and
> …

[28] In considering s 20, it is to be remembered that the reference to "a genuine association of the kind referred to in paragraph 18(c)" is a reference to a federally registrable enterprise association. The Commission cannot grant an application for registration under s 20(1) by an enterprise association that is not a federally registrable enterprise association, for example, if it is not federally registrable by operation of s 18C(3).

[29] The RO Act also makes provision for cancellation of registration. Relevantly, s 30(1)(c)(v) allows for the Commission, on its own motion, to cancel the registration of an organisation if the organisation is not, or is no longer, a federally registrable association. Section 171A, however, endeavours to ensure that registered organisations remain federally registrable. Relevantly to an enterprise association, s 171A(1)(c) provides that, if a person is not or is no longer a person referred to in s 18C(3)(a), (b), (c) or (c), the person's membership of an organisation that is an enterprise association immediately ceases. In short, if a person's ongoing

membership would cause an organisation not to be federally registrable, the person's membership ceases by operation of the RO Act.

Grounds of appeal

[30] The AEA's notice of appeal contains seven somewhat overlapping grounds of appeal. Although no amended notice of appeal was filed, the AEA's written submissions rely on only two grounds of appeal. The first ground is that the Deputy President erred in finding that the AEA was an "enterprise association" within the meaning of s 18C(1) of the RO Act. The second ground is derivative of the first and alleges that the Deputy President erred in finding that the AEA's application had no reasonable prospects of success because it is, in fact, a federally registrable association of employees for the reasons advanced in relation to the first ground.

[31] The impediment facing the AEA's application is twofold. First, it accepts that, by the time of the hearing before the Deputy President, it was not a federally registrable enterprise association as a result of the fact that three of its members were not employees performing work in the enterprise of St John Ambulance for the purposes of s 18C(3)(a). As such, it could not satisfy the requirements which must exist for the Commission to be required to grant the application for registration under s 20 of the RO Act because the AEA was not an enterprise association that was able to apply for registration as an organisation under s 18 for the purposes of s 20(1) or a "genuine association of a kind referred to in paragraph 18(c)" for the purposes of s 20(1)(a)(i). Second, the words in parentheses in s 19(1) dictate that the Commission must grant an application for registration made by an association under that section other than an enterprise association. If the AEA is an enterprise association then, on the face of s 19(1), the Commission is not required or able to grant its application for registration as an organisation under that section either. If it is an enterprise association, but not a federally registrable enterprise association, its application for registration cannot be granted.

[32] The consequence is that the central issue raised by the AEA's appeal is whether it is an "enterprise association" for the purposes of s 18C(1). It will be recalled that an enterprise association is defined as an association the majority of the members of which are employees performing work in the same enterprise. The AEA does not dispute that, at the time of hearing before the Deputy President, the overwhelming majority of its actual members were employees performing work for St John Ambulance. It says, however, that the terms "member" or "members" in s 18B and 18C of the RO Act do not require the Commission to make a finding of fact about the actual membership status of the flesh and blood persons who are members of an association at the time of application.

[33] Rather, the AEA submits that whether some or all of the members of an association are federal system employees for the purposes of s 18B(1)(b) or a majority of members of an association are employees performing work in the same enterprise for the purposes of s 18C(1) is answered by reference to the association's rules. It points out that the AEA's rules do not limit its membership to employees of St John Ambulance and its eligibility rules extend to employees in or in connection with the ambulance industry anywhere in the Western Australia and to persons who work in various occupations anywhere in Western Australia. If the assessment is made by reference to its rules with respect to membership rather than its actual flesh and blood members, the AEA submits that it is an association that is federally registrable under s 18B(1)(b) and not an enterprise association for the purposes of s 18C(1).

[34] The AEA places considerable reliance, in this regard, on the judgments of members of the Full Court of the Federal Court in *Australian Education Union v Lawler* [2008] FCAFC 135; (2008) 169 FCR 327 (*AEU v Lawler*). That decision involved a challenge to decisions of the Commission granting an application for registration by the Australian Principals Federation. One question raised in those proceedings concerned whether the Australian Principals Federation was eligible to apply for registration in circumstances in which its rules, properly construed, permitted a person to remain as a member even though the person had ceased to be an employee capable of being engaged in an industrial dispute.

[35] The relevant provisions governing the registration of associations considered in *AEU v Lawler* were found in Schedule 1B to the *Workplace Relations Act 1996* (Cth) as it existed prior to the amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (the **Work Choices Act**). At that time, s 18(1)(b) of Schedule 1B provided:

> 18(1) Any of the following associations may apply for registration as an organisation:
> …
> (b) an association of which some or all of the members are employees who are capable of being engaged in an industrial dispute and the other members (if any) are:
> (i) officers of the association; or
> (ii) persons specified in subsection (3); or
> (iii) independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be employees eligible for membership of the association;
> …

[36] Although not directly at issue in *AEU v Lawler*, it is relevant to note that s 18(1)(c) of Schedule 1B then provided for an application for registration by an enterprise association in the following terms:

> 18(1) Any of the following associations may apply for registration as an organisation:
> …
> (c) an association (an enterprise association) of which some or all of the members are employees performing work in the same enterprise and the other members (if any) are:
> (i) officers of the association; or
> (ii) persons specified in subsection (3); or
> (iii) independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be employees eligible for membership of the association.

[37] The "persons specified in subsection (3)" for the purposes of s 18(1)(b)(ii) and (1)(c)(ii) were as follows:

> (3) The persons specified for the purpose of subparagraphs (1)(b)(ii) and (c)(ii) are persons (other than employees) who:
> (a) are, or are able to become, members of an industrial organisation of employees within the meaning of the *Industrial Relations Act 1996* of New South Wales; or
> (b) are employees for the purposes of the *Industrial Relations Act 1999* of Queensland; or
> (c) are employees for the purposes of the *Industrial Relations Act 1979* of Western Australia; or

> (d) are employees for the purposes of the *Industrial and Employee Relations Act 1994* of South Australia.

[38] Jessup J (and Lander J) concluded that an applicant for registration under s 18(1)(b) of Schedule 1B was limited to having members who fall within the categories in s 18(1)(b)(i) to (iii) and it was not competent for the Commission to grant an application for registration if the applicant had within its membership any persons who were not employees and did not come within one or more of the categories in (i) to (iii).[6]

[39] In determining whether an association complies with that requirement, Jessup J accepted the submissions of the AEU that s 18(1)(b) was not concerned with the flesh and blood individuals who happened to be members of the association at the relevant time save to the extent that it was necessary that there be at least 50 members. The members to which s 18(1)(b) referred were the categories of persons who could be members.[7] Among other things, his Honour concluded (at [261]) (emphasis added):

> The position adopted by the Federation involves the necessary consequence that the conditions of eligibility set out in the rules of an applicant association might bear no relation to the criteria which, under s 18(1)(b) make the applicant competent to apply for registration. Merely by ensuring that its actual membership at the point of registration was confined to persons of the kind described in s 18(1)(b), an applicant might, over the long term, accept as members persons who had ceased to be and, for that matter, persons who never were, employees. I cannot imagine that the potential for such an outcome was ever within the contemplation of the legislature. I consider that the carefully drawn provisions of s 18(1)(b) and its predecessors, were based upon a legislative intention that the capacity of organisations, and applicant associations, to enrol persons who were not employees should be limited to those categories for which specific, and limited, exception was made. Those categories referred not to the flesh and blood persons who happened to be members of an applicant association at the time of registration, but to the capacity of such an association, in accordance with its rules, to accept persons as members.

[40] A number of considerations were said to favour the conclusion that the determination of whether an association was capable of applying for registration under s 18(1)(b) of Schedule 1B was to be undertaken by reference to the categories of persons eligible to become members of the association in accordance with its rules rather than the actual membership at the time the application was determined. Jessup J noted that it was unlikely Parliament intended to create a condition precedent to registration based on membership in a manner that would permit the membership of the association, once registered, to alter materially and bring into existence an association of a materially different character which did not meet the requirements for registration.[8] His Honour also noted that the "more conveniently belong" criteria now found in s 19(1)(h) was applied by reference to the genus of person who might belong to the applicant association rather than its actual members.[9]

[41] The essential submission advanced by the AEA is that, if the rules-based analysis adopted in *AEU v Lawler* is followed and applied to what is now s 18C(1), it cannot be said that it is an association "the majority of the members of which are employees performing work in the same enterprise". The AEA notes that its eligibility rules do not confine the persons able to be members to persons performing work for St John Ambulance and do not impose any limit on the number of persons it can enrol as members of the kind referred to in s 18C(1). If the assessment is made by reference to the capacity of the AEA to accept persons as members, it is not an enterprise association as defined in s 18C(1) of the RO Act.

[42] The UWU, on the other hand, submits that the flaw in the reasoning of the AEA is that it fails to pay appropriate attention to other parts of the relevant provision which can only be read as referring to "flesh and blood" members. In particular, the definition of an enterprise association in s 18C(1) refers to "an association the majority of members of which are employees performing work in the same enterprise". The UWU submits that the reference to the majority of members of an association is a clear indication that the section requires examination of the actual members of the association. The UWU further submits that the provision in s 18C(3)(a) that an enterprise association is not federally registrable "if it has a member who is not an employee performing work in the relevant enterprise" is also an indication that the section is referring to flesh and blood members.

[43] The issue raised by these submissions involves, obviously enough, a question of statutory construction. The principles that govern the task of statutory construction are well-settled and not disputed in the present appeal. A statutory provision is to be construed by considering the words used read in their context. "Context" encapsulates surrounding statutory provisions, the mischief that the statute is intended to remedy, the provision's purpose or policy, and extrinsic materials, including legislative history.[10] Context is to be considered in the first instance, but must be understood to be a tool that assists in fixing the meaning of the statutory text. In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, for example, French CJ, Hayne, Crennan, Bell and Gageler JJ explained (at [39]):

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

[44] Statutory construction involves attribution of meaning to statutory text.[11] The text – specifically, the "ordinary grammatical sense of the statutory words … having regard to their context and the legislative purpose"[12] – is the starting point. The task begins with a consideration of the meaning of the words in which a provision is expressed.[13] Departure from the natural and ordinary meaning of the statutory text may be justified if that meaning would lead to a result that is improbable or does not conform to the evident purpose or policy of the provision.[14] It is not, however, for a court to impose its own idea of a desirable policy.[15] The clearer the natural meaning of the statutory text, the more difficult it will be to justify departure from that meaning.[16]

[45] In this matter, it is appropriate to commence with an examination of the text of s 18C, then consider the history of that section and associated provisions and, finally, turn to the submissions advanced as to the consequences of the respective constructions advanced by the parties.

Text of s 18C

[46] In our opinion, the text of s 18C does not support the AEA's submissions. The stipulation, in s 18C(1), that an enterprise association is an association the majority of the

members of which are employees performing work in the same enterprise is difficult, if not impossible, to reconcile with an approach that focuses on the categories of employees capable of being members of an association rather than its actual membership at a point in time. The reference to "the majority of the members" invites a numerical assessment of whether more than half of the association's members perform work in the same enterprise. It is difficult to conceive of how one would even begin to assess whether a majority of the class of persons falling within the theoretical membership of an association are employees performing work in the same enterprise.

[47] That view is reinforced when regard is had to other parts of s 18C. In particular, s 18C(3) provides that an enterprise association is not federally registrable if it "has a member" who does not fall within one of the categories in subparagraphs (a) to (d). The reference to an association that "has a member" falling outside the designated categories of persons can only be understood to be a reference an actual member. The AEA apparently acknowledges that this is so. It accepts that it was not, at the time of the hearing before the Deputy President, a federally registrable enterprise association because it had three specific named members who were not then employees performing work for St John Ambulance. If s 18C(3) operates by reference to actual flesh and blood members, there is no obvious reason why s 18C(1) should not also be construed as referring to a majority of the actual membership of the association.

[48] If the AEA's construction is correct, the only circumstance in which an enterprise association could exist would be if the rules of the association specified that at least a majority of its members must, at any point in time, be employees performing work in the same enterprise. The AEA referred the Full Bench to a number of examples of organisations whose rules limited membership to persons employed by a particular employer or enterprise.[17] It is certainly possible for an association's eligibility rules to provide that a person is entitled to be a member only if employed by a particular employer. That type of association would fit within the definition in s 18C(1) on the AEA's construction.

[49] However, that does not answer the practical difficulty in applying s 18C(1) if the AEA's construction is correct. Section 18C(1) is drafted at least in contemplation that there will be associations that fall within the definition because the majority but not all its members perform work within the same enterprise. The AEA did not refer the Full Bench to any union that has, or has ever had, rules that define those persons eligible to become members by requiring that a majority of members must be employed by a particular employer or enterprise. It is difficult to envisage how such a rule could be drafted or operate in a practical manner. If the rules of an association permitted acceptance of members performing work in other enterprises but also required that a majority perform work for one enterprise, the rules would presumably need to automatically purge members or permit it to refuse applications for membership in the event that the changing composition of its membership threatened to result in less than a majority of members being employed to perform work in the same enterprise. It is unclear how such a rule could operate in practice or could be consistent with the entitlement of a person who is eligible to become a member of an organisation to be admitted and remain as a member.[18] This provides a further reason why the reference to "the majority of members" in s 18C(1) must be understood as referring to actual membership rather than the category of persons eligible to become a member of the association.

[50] For these reasons, the text of s 18C(1), understood in the context of that section as a whole, does not support the construction advanced by the AEA. The requirement that the majority of members of an enterprise association be employees performing work in the same enterprise strongly suggests that the examination is directed at the actual members of the association rather than the categories of person eligible to become members.

Statutory history

[51] The submissions of both the AEA and UWU referred to the history of the provisions governing the registration of organisations. In short, the AEA submits that *AEU v Lawler* authoritatively determined the meaning of the terms "member" and "members" for the purposes ss 18B and 18C and there is no indication that Parliament intended to change the meaning or effect of the provisions or the focus on the categories of persons entitled to membership. The UWU submits that the legislation considered in *AEU v Lawler* was substantially amended by the Work Choices Act and that the AEA's submissions fail to address the different wording now employed in s 18C(1).

[52] The evolution of the provisions dealing with the registration of organisations in the period since 2006 is convoluted and the reasons for the amendments is largely unexplained in the available extrinsic materials. The provisions considered in *AEU v Lawler* are, relevantly, set out above. Under s 18(1) of Schedule 1B, as it then existed, three categories of associations could apply for registration as described in s 18(1)(a), (b) and (c), namely, an employer association, an employee association and an enterprise association.

[53] The Work Choices Act repealed s 18. The three categories of associations able to become registered were retained, but were dealt with in the new ss 18A, 18B and 18C. Section 18B then made provision, as it does now, for an association of employees to apply for registration. After the amendment made by the Work Choices Act, s 18B(1) provided as follows (emphasis added):

> **18B Federally registrable employee associations**
>
> (1) An association of employees is federally registrable if:
> (a) it is a constitutional corporation; or
> (b) the majority of its members are federal system employees.
> …

[54] As will be apparent, s 18B(1)(b) replaced the requirement previously in s 18(1)(b) that "some or all of the members are employees" with a requirement that "the majority of its members are federal system employees". Similarly, s 18C(1) and (2) as enacted by the Work Choices Act provided (in part) as follows (emphasis added):

> **18C Federally registrable enterprise associations**
>
> (1) An enterprise association is an association the majority of the members of which are employees performing work in the same enterprise.
>
> (2) An enterprise association is federally registrable if:
> (a) it is a constitutional corporation; or
> (b) the majority of its members are federal system employees; or

….

[55] Section 18C(1) remains in the same terms today including reference to "the majority of members" being employees performing work in the same enterprise. Section 18C(2) provided a number of alternative constitutional foundations for the regulation of an enterprise association including, relevantly, in s 18C(2)(b) that "the majority of its members are federal system employees" rather than that "some or all of the members are employees performing work in the same enterprise" as previously appeared in s 18(1)(c).

[56] Sections 18B and 18C were amended again in 2007 by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) (the **Stronger Safety Net Act**). Section 18B(1)(b) was amended to remove reference to "the majority" of the members and instead substitute a reference to "some or all" of the members being employees. From 2007, s 18B(1) provided as follows (emphasis added):

> **18B Federally registrable employee associations**
>
> (1) An association of employees is federally registrable if:
> (a) it is a constitutional corporation; or
> (b) some or all of its members are federal system employees.

[57] Section 18C(2)(b) was also amended to remove reference to "the majority" and substitute again "some or all". However, the reference to "the majority of the members" in s 18C(1) was retained. As such, from 2007, s 18C(1) and (2) relevantly provided as follows (emphasis added):

> **18C Federally registrable enterprise associations**
>
> (1) An enterprise association is an association the majority of the members of which are employees performing work in the same enterprise.
>
> (2) An enterprise association is federally registrable if:
> (a) it is a constitutional corporation; or
> (b) some of all of its members are federal system employees; or
> ….

[58] The extrinsic materials associated with the amendments made in 2006 and 2007 provide no direct explanation in relation to these changes.[19] No explanation is provided as to why the reference to "some or all members" was changed by the Work Choices Act to a reference to "the majority of members" in ss 18B(1)(b), 18C(1) and 18C(2)(b). No explanation is provided as to why ss 18B(1)(b) and 18C(2)(b) were changed back, but s 18C(1) retained the requirement that "the majority of members" be employees performing work in the same enterprise. No obvious purpose is revealed by the terms of the legislation either. To say that the legislative history is opaque is a considerable understatement.

[59] The AEA relies upon subsequent amendments that were made by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the **Transitional Provisions Act**) to address the ramifications of *AEU v Lawler*. The Explanatory Memorandum to that Act refers to the decision in *AEU v Lawler*. The Explanatory Memorandum indicates that ss 26A and 171A were enacted to address the uncertainty created by *AEU v Lawler* in

relation to the registration of organisations that did not have a rule that automatically purged from membership persons who ceased to be employees and to ensure that, going forward, the membership of persons who would cause the organisation to not be federally registrable immediately ceases by operation of the legislation.[20]

[60] The AEA suggests the explanation of the enactment of ss 26A and 171A demonstrates that the legislature was aware of the decision in *AEU v Lawler* and that there is no indication that Parliament intended to upset the understanding of the concept of a "member" or "members" established by that decision. The difficulty with the submission is that ss 26A and 171A were incorporated into the RO Act by later amendment some years after the amendments in 2006 and 2007 which enacted ss 18B and 18C in their current form. Section 18C(1) used, and continues to use, different language to that found in ss 18(1)(b) and 18(1)(c) considered in *AEU v Lawler* by linking the definition of an enterprise association with the nature of the work performed by "the majority of members". The fact that Parliament appears to have been aware of the decision when making other amendments at a later date does not assist in construing s 18C(1) itself.

[61] The legislative history does not, in our opinion, permit an inference to be drawn that Parliament intended to retain the approach in *AEU v Lawler* in s 18C(1). The language used in s18C(1) is different to that language considered by the Full Court. The insertion of reference to "the majority of members" is materially different to the provisions considered in *AEU v Lawler*. For the reasons we have explained, it is difficult, if not impossible, to apply the reasoning of the Full Court to the language now found in s 18C(1). Furthermore, the amendments in 2006 and 2007 which enacted ss 18B and 18C in their current forms were made prior to the decision in *AEU v Lawler* being handed down. Those amendments cannot have been informed by a desire to retain or discard the approach adopted by the Full Court. The reenactment presumption[21] is inapplicable in those circumstances. Parliament cannot be presumed to have intended that the approach in *AEU v Lawler* be applied to amended provisions that were already in place. Section 18C(1) must simply be construed in accordance with its terms understood in the context of the RO Act as a whole.

Consequences and alleged absurdities

[62] The AEA also submits that the adoption of the rules-based analysis adopted in *AEU v Lawler* avoids inconvenient and absurd consequences that would flow from the construction advanced by the UWU. The identification of consequences of a particular construction that are "absurd", "extraordinary", "capricious", "irrational' or "obscure" may provide a basis for concluding that the legislature could not have intended such a result, and an alternative interpretation should be preferred.[22] However, some caution is to be applied to that form of reasoning. In *Peter Greensill Family Company Pty Ltd v Federal Commissioner of Taxation* [2021] FCAFC 99; (2021) 285 FCR 410, for example, the Court said (at [70]):

> Neither argument is persuasive. First, although anomalous or capricious consequences may be an indication that Parliament did not intend the provision to be read in that way (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321), the identification of possible anomalies or capricious consequences does not mean that the provision should be construed differently: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 where Black CJ and Sundberg J stated at 519:

> Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament.

See also *ConnectEast Management Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 110 at [41]. As Campbell J cautioned in *Ganter v Whalland* (2001) 54 NSWLR 122 at [36], a court is not justified in using an anomaly as a reason for rejecting what otherwise seems the correct construction where on all other tests of construction, it is the correct construction as "[w]ere courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature".

[63] Further, an appeal to the capriciousness or arbitrariness of the consequences of a particular interpretation will not assist if no reasonable alternative construction of the text of the statute is available.[23] Much is likely to turn on the degree to which the ordinary meaning of the text supports one construction over another. In *Cooper Brookes*, for example, Mason and Wilson JJ said (at 321):

> Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

[64] The AEA submits that the construction for which it contends avoids a number of inconvenient or absurd outcomes. First, at least one consequence of the construction adopted by the Deputy President is, at first blush, surprising. An association of employees more than 50 percent but less that 100 percent of the members of which are employees performing work in the same enterprise would be unable to be registered at all. Such an association would fall within the definition of an "enterprise association" in s 18C(1) but would not be a federally registrable enterprise association by operation of s 18C(3)(a) because it has members who are not employees performing work in the relevant enterprise (and otherwise do not fall within the categories of person in s 18C(3)). It could not, as a result, be registered under s 20. It could also not be registered as an association of employees under s 19 because it is still an "enterprise association" and is excluded by the proviso in parentheses in s 19(1).

[65] On one view, that outcome could be regarded as arbitrary and perhaps unfair to some associations. It would, for example, permit an association 49 percent of the members of which are employees performing work within the same enterprise to become registered but an association with 51 percent of members performing work in the same enterprise could not be registered. However, we are ultimately unable to accept that this outcome can be described as absurd. There is some difficulty in discerning the statutory purpose of the majority requirement in s 18C(1) and, as we have observed, the extrinsic materials do not assist. It is not impossible, though, to imagine rational reasons why the provision may have been adopted. The legislation requires that, to become registered, an association must either be an enterprise association which is confined to members performing work in a single enterprise (and subject to the restrictions that apply to an enterprise association) or that an association have a diversity of membership such that it is not dominated by members performing work in one enterprise. It is not necessarily irrational for Parliament to have enacted that structure. Where there is room for different views as to whether the consequences of a literal interpretation are truly anomalous or

are reflective of a legitimate policy choice, it is not appropriate for the allegedly harsh consequences of a literal interpretation to be deployed to displace the ordinary meaning of the text of the statute.[24]

[66] We also do not accept that the outcome of the construction adopted by the Deputy President is inconsistent with the objects of the RO Act. The AEA relies on s 5(3)(e) which indicates that the standards contained in the RO Act "facilitate the registration of a diverse range of employer and employee associations" and s 5(4) that indicates it is also the intention of Parliament to "assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations". The articulation of the intention of Parliament in s 5 in general terms does not suggest that the RO Act guarantees registration to any association. The RO Act, and predecessor legislation, has always imposed a range of restrictions on the type and features of an association that can become registered. Reference to the object of facilitating the registration of associations does not assist in construing the specific requirements imposed on associations seeking to become registered under ss 18B, 18C, 19 and 20.

[67] Second, the AEA contends that the construction adopted by the Deputy President means that an enterprise association registered pursuant to s 20 of the RO Act would be liable to have its registration cancelled as a result of the operation of ss 18C(3) and 30(1)(c)(v) if a single member decides to end their employment with the relevant enterprise and take up other employment. The submission is misconceived. The potential for an organisation to cease to be federally registrable was addressed by the insertion of s 171A into the legislation by the Transitional Provisions Act in 2009. The effect of s 171A(1)(c) is that a member of an enterprise association who is no longer an employee performing work in the relevant enterprise will immediately cease to be a member by operation of that section. That event causes no threat to the registration of the enterprise association.

[68] Third, the AEA submits that the approach adopted by the Deputy President means that day-to-day compositional changes in the membership of an association may mean it was entitled to be registered at the time of its application for registration but cease to satisfy the requirements at the time the application is heard and determined (because its members in one enterprise have increased, or decreased, in a way that results in a majority of flesh and blood members performing work in a single enterprise). There is nothing particularly unusual or incongruous in that outcome. Whether an association satisfies the requirements for registration must be assessed at the time its application comes to be determined.[25] No absurdity is produced by the fact that an association might, at some other point in time, satisfy the requirements for registration. The requirements for registration must be assessed when the matter comes to be determined by the Commission.

[69] There is a further consequence of the construction adopted by the Deputy President averted to by the AEA in oral submissions. On that construction, the assessment of whether a majority of members of an association are employees performing work in the same enterprise is made at the time of determination of the application for registration. As such, an association could become registered if less than 50 percent of members do so at the time of the Commission's decision and later come to have a majority of members working in the same enterprise but remain registered. That was the type of consequence that Jessup J regarded as unlikely to have been intended in *AEU v Lawler*.[26] However, in the context of s 18C(1), that

consequence is made unavoidable by the imposition of a standard by reference to "the majority of the members". The assessment of "the majority of the members" can only feasibly be conducted by reference to the actual membership of the association at the time the application for registration is considered by the Commission. It must be assumed that Parliament was content that subsequent changes to the composition of the membership of the association which were regarded as inconsistent with continuing registration could be addressed by means of cancellation of registration under s 30 of the RO Act.

[70] The consequences of the construction adopted by the Deputy President referred to by the AEA are insufficient to warrant acceptance of the construction of s 18C(1) for which it contends. Although views might differ on whether the provisions are desirable, the consequences it refers to do not, in our opinion, rise to the level of absurdity or signal a disconformity with the purposes of the RO Act. Those consequences do not provide a basis upon which to rewrite the definition of an enterprise association in s 18C(1). The definition refers to an association the majority of the members of which perform work in the same enterprise. That phrase can only sensibly be understood as referring to a majority of the actual membership of the association at the time its application for registration comes to be considered by the Commission.

Conclusion as to construction

[71] For these reasons, the construction adopted by the Deputy President is correct. The question of whether an association is an enterprise association for the purposes of s 18C(1) of the RO Act must be assessed by reference to the actual membership of the association rather than the categories of persons eligible to become members. The consequence is that the AEA was an enterprise association at the time its application was dealt with by the Deputy President and, accordingly, not able to be registered under s 19(1). It accepts it was not a federally registrable enterprise association by reason of the operation of s 18C(3)(a) and was not able to be registered under s 20(1) of the RO Act. The Deputy President was correct to find that the AEA could not satisfy the requirements for registration.

[72] The Full Bench raised with the parties whether there is an alternative available construction of the RO Act that might permit the AEA to become registered. At first instance, the AEA contended that the reference to an "enterprise association" in s 19(1) should be read as a reference to a federally registrable enterprise association. If that construction was correct, an association such as the AEA, which is an enterprise association but not a federally registrable enterprise association, could seek registration under s 19(1). Such an association would need to satisfy the additional requirements for registration in s 19(1) but would at least have the potential to become registered.

[73] Although the AEA made that submission to the Deputy President, neither party embraced the construction on appeal. The parties were correct not to do so. Where the RO Act wishes to refer to a federally registrable enterprise association, it expressly says so. Section 19(1) refers only to an "enterprise association" and not to a "federally registrable enterprise association" and can only sensibly be read as encompassing any enterprise association. Furthermore, s 6 provides that "***enterprise association*** has the meaning given by subsection 18C(1)". If that definition is applied in s 19(1), the Commission cannot grant an application for registration by any enterprise association under that section even if it is not a federally

registrable enterprise association. There is no basis not to apply the definition in the context of s 19(1) and, as a result, the AEA cannot be registered under that section because it is an enterprise association as described in s 18C(1).

Conclusion and orders

[74] Permission to appeal should be granted, but the appeal dismissed. The Full Bench makes the following orders:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

M Harding SC and *B Bromberg*, counsel, instructed by Fogliani Lawyers for the Appellant.
H Borenstein KC and *Y Bakri*, counsel, instructed by Hall Payne Lawyers for the Respondent.
J Nucifora, Compliance and Legal Officer for the Australian Services Union.

Hearing details:

2024.
Sydney (via Microsoft Teams):
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[1] *Ambulance Employees Association of Western Australia* [2024] FWC 1573.

[2] [2024] FWC 1573 at [6].

[3] [2024] FWC 1573 at [7]-[8].

[4] [2024] FWC 1573 at [9].

[5] See, for example, *Conciliation and Arbitration Act 1904* (Cth), s 55.

[6] *AEU v Lawler* at [55] (Lander J) and [252] (Jessup J).

[7] *AEU v Lawler* at [253] (Jessup J).

[8] *AEU v Lawler* at [259] (Jessup J) referring to *Re Independent Teachers Federation* (1989) 30 IR 205 at 208-209 (Moore DP).

[9] *AEU v Lawler* at [258] (Jessup J). See also *Re Chamber of South Australian Employers (No 2)* (1991) 43 IR 424 at 432-433.

[10] *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [32]-[33] (Kiefel CJ and Keane J).

[11] *Theiss v Collector of Customs* [2014] HCA 12;(2014) 250 CLR 664 at [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

[12] *Alcan (NT) v Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [4] (French CJ).

[13] *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1 at [26] (French CJ, Hayne, Kiefel and Bell JJ); *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 271 CLR 495 at [14] (Kiefel CJ, Nettle and Gordon JJ).

[14] *Esso Australia v Australian Workers' Union* [2017] HCA 54; (2017) 263 CLR 551 at [52] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [32]-[33] and [37] (Kiefel CJ and Keane J).

[15] *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1 at [28] (French CJ, Hayne, Kiefel and Bell JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2019] FCAFC 201; (2019) 272 FCR 290 at [25] (Bromberg, Wheelahan and Snaden JJ).

[16] *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 265 CLR 137 at [64] (Edelman J).

[17] Namely, the Police Association Salaried Officers Union of New South Wales and the Industrial Staff Union – PSA of NSW.

[18] *Fair Work (Registered Organisations) Act 2009* (Cth), s 166(1).

[19] See Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at [2875] and [2880]-[2881]; Revised Explanatory Memorandum to the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth) at [12] and [18].

[20] Revised Explanatory Memorandum to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) at [792] and [802].

[21] Such as was applied in cases such as *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at [162] (Gummow, Hayne and Heydon JJ).

[22] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 (Mason and Wilson JJ).

[23] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 (Gibbs CJ) and 320 (Mason and Wilson JJ); *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; (2015) 256 CLR 203 at [45] (French CJ, Kiefel, Bell and Keane JJ).

[24] See, for example, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; (2021) 273 CLR 21 at [29].

[25] *AEU v Lawler* at [86] (Lander J) and [99] (Jessup J).

[26] *AEU v Lawler* at [259] (Jessup J).