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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.99 notification of industrial dispute

Automotive, Food, Metals and Engineering Union

and

Philip Morris Limited and another

(C No. 36368 of 1994)

s.118A organisation coverage

Philip Morris Limited

(C No. 38476 of 1995)

Various employees Food, beverages and tobacco industry

SENIOR DEPUTY PRESIDENT WILLIAMS MELBOURNE, 24 JULY 1997

Organisation and award coverage

DECISION

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Introduction

The Applications

Matter C No. 36368 of 1994 (the AMWU application) concerns an application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia (the AMWU) for awards roping in Philip Morris Limited (PML) to the *Metal Industry Award 1984 - Part I* [1], the *Metal Industry Award, 1984 - Part II - Draughtsmen, Production Planners and Technical Officers* [2] and the *Metal Industry Award 1984 - Part V - Foremen and Supervisors* . [3]

Matter C No. 38476 of 1995 (the PML application) is an application by PML which, in its amended form, seeks orders under s.118A of the Act:

> 1. granting The Australian Workers' Union (the AWU) the right to the exclusion of the AMWU to represent the industrial interests of all persons who are employed or to be employed by PML in or in connection with the preparation, manufacture, processing and packaging of tobacco, cigarettes, cigars and allied products and who are eligible for membership of the AWU, and
>
> 2. removing from the AMWU any right to represent under the Act the industrial interests of any such employees whether eligible for membership of the AWU or not.

As I comprehend it, the first order is sought under s.118A(1)(a) of the Act and the second is sought under s.118A(1)(c) of the Act.

The Parties

Both the AMWU and the AWU are organisations of employees which, in their current forms, are the results of a series of amalgamations. In the case of the AMWU, one such amalgamation involved the Association of Draughting, Supervisory and Technical Employees (the ADSTE). [4] In the case of the

AWU, one such amalgamation involved the Federated Tobacco Workers' Union of Australia (the FTWU). [5]

PML is a cigarette manufacturer which, since 1955, has conducted such an operation at Moorabbin, Victoria. The operation involves both tobacco processing and cigarette manufacture. At the time these applications were heard, it employed at Moorabbin some 700 employees, of whom about 75 were employed in tobacco processing, about 265 in cigarette manufacturing and about 360 in administration.

Until some time in 1994, the manufacturing operation was conducted with tobacco workers (generally members of the FTWU) operating machines, maintenance workers (generally members of the AMWU) maintaining machines and other workers performing work ancillary to the manufacturing operation. In 1994, PML contracted out its maintenance work to Skilled Engineering Limited. PML contends that, as a result, it no longer employs persons with trade qualifications specifically as tradesmen. The implementation of a team structure at its Moorabbin plant has involved the employment of persons as Team Leaders who do, it is conceded by PML, carry out some maintenance work but who, it is argued by PML, are production oriented and carry out only minor maintenance as part of far wider duties.

Previous Proceedings

In a decision [6] issued on 17 June 1996 essentially concerned with the programming of these matters, I set out the history of these two applications. It is appropriate to reiterate:

· that, at the time at which the PML application originally came before me, the AMWU application was still before Commissioner Simmonds and was subject to the process of conciliation,

· that, after hearing the parties to the PML application, I formed the view that the matters were closely linked and I referred that application to Commissioner Simmonds for conciliation,

· that, on or about 16 February 1996, Commissioner Simmonds reported to me that neither matter had been able to be resolved by way of conciliation, that he was intending to proceed to hear the AMWU application and that the PML application was being returned to me for determination, and

· that, on 12 April 1996, as a result of an application made to her by PML, the President, pursuant to s.36 of the Act, assigned the AMWU application to me.

Being satisfied that no settlement between the parties could be achieved by further conciliation, after hearing the parties on matters of programming, I determined that the two applications be heard together. In accordance with directions contained in that decision, the parties filed and exchanged outlines of their submissions and affidavits/statements from witnesses they intended to call and/or rely upon in the proceedings.

Present Proceedings

At the hearing, which stretched over some seven days between 26 August 1997 and 29 November 1997, the parties tendered affidavits/statements of and/

or called evidence from the following:

· on behalf of PML -

Michael Carson, Manager of Corporate Planning, PML,

Timothy Maishman, Cigarette Manufacturing Manager, PML,

Kevin Rust, Quality Services Manager, PML, and

John Scott, Operations Director, PML;

· on behalf of the AWU -

Cheryl Ustianowski, Branch President of the Tobacco Workers Branch of the AWU and full time Site Convenor at PML, Moorabbin,

Mark Saunders, Team Leader, DIET, PML, Moorabbin,

Alexander Kemp, Filter Technical Operator, PML, Moorabbin, and

Ron Dore, former State Secretary of the Federated Tobacco Workers Union;

· on behalf of the AMWU

Julian Sutcliffe, Organiser, AMWU, and

Julius Roe, Acting Assistant Secretary, Technical and Supervisory Division, AMWU.

In addition, some 61 exhibits were tendered, a number of which were quite substantial in their content. Upon completion of the hearing of the evidence, I reserved my decision subject only to the receipt of written submissions from the parties. Those written submissions have been received and I am now in a position to make a decision without further hearing.

Order of Determination of the Applications

The AMWU application for roping-in awards is opposed by both PML and the AWU. The PML application for s.118A orders is supported by the AWU and opposed by the AMWU.

If the PML application is granted, it would have the effect of taking away from the AMWU any rights it may have to represent the industrial interests of PML employees at Moorabbin. As a result, the AMWU would cease to have any right to pursue the making of the proposed roping-in awards. There is nothing to be gained in proceeding to a determination of the AMWU application if, in the end result, I form the view that the PML application should be granted. It is appropriate, therefore, that I determine the PML application before turning to consideration of the AMWU application. In doing so, I should note that most, if not all, of the material and submissions presented by the parties was relevant to both applications and I make it clear that I have taken into consideration all of that material and those submissions.

S.118A Application

Effect of *Workplace Relations and Other Legislation Amendment Act 1996* on s.118A Application

With one exception (which is dealt with below), the effect on the PML application of the coming into operation of the *Workplace Relations and Other Legislation Amendment Act 1996* (the WROLA Act) was not a matter of contention as between the parties. In this respect, I refer to the recent decision of the Full Bench in *Re National Rail Corporation Limited* .[7] One of the issues for determination in that matter was the effect of Schedule 4 of the WROLA Act on a matter referred to a designated Presidential Member pursuant to s.118A(5) of the *Industrial Relations Act 1988* , the determination of which was not concluded by 31 December 1996, the date on which Schedule 4 commenced. The Full Bench concluded that, in the circumstances of that case, the "matter" referred under s.118A(5) was the s.118A application itself, that, in so far as the matter concerned any determination to be made under s.118A(5), it was "an application made under section 118A of the Workplace Relations Act" and that it was an application "in respect of which the Commission had begun the substantive hearing before the commencement of" item 12 of Schedule 4 of the WROLA Act. It therefore followed that, pursuant to item 12(2) of Schedule 4, s.118A as in force immediately preceding 31 December 1996 continued to apply in relation to the hearing of the application. The matter having been referred to a designated Presidential Member pursuant to the former s.118A(5), the designated Presidential Member was empowered, under the former s.118A(6), to "determine such alterations (if any) of the rules of any organisation concerned as are, in the Presidential Member's opinion, necessary to reflect the Commission's order".

Applying the same reasoning to the facts of this case, it is clear that the matter I have before me is an application made under s.118A of the *Workplace Relations Act 1996* and that it is an application in respect of which the Commission had begun the substantive hearing before the commencement of item 12 of Schedule 4 of the WROLA Act. Item 12(2) therefore applies and I am required to deal with the matter as if s.118A as in force immediately preceding 31 December 1996 were still in force. Should I make any order under s.118A(1), it would be open to me to then refer the matter to a designated Presidential Member.

It follows from the above conclusion that references in this decision to the various sub-sections of s.118A are references to those sub-sections as they were before the amendments effected by the WROLA Act.

The exception which is referred to above as being a matter of contention related to whether the objects of the Act to which I should have reference were the objects as they were prior to the WROLA Act coming into operation or the objects as they now are. That question is dealt with later in this decision.

Principles to be applied

In *Construction Forestry and Mining Employees Union and another and Federation of Industrial, Manufacturing and Engineering Employees* [8], I expressed my views as to the manner and circumstances in which the Commission should exercise its powers under s.118A in the following terms:

> "A consideration of the provisions of the Act itself and the decisions that have so far been made in relation to s.118A matters that have come before the Commission leads me to the following conclusions as to how and in what circumstances the Commission should exercise its powers under s.118A(1) of the Act -
>
> · The exercise of those powers is discretionary. There is no compulsion on the Commission to make orders under s.118A(1) of the Act even if they are proposed by consent of all the parties concerned. The normal onus rests on any applicant to make out its claim.
>
> · The powers are not to be exercised so as to exclude unions totally from an area of employment. [9]
>
> · There are no positive criteria expressed in s.118A for the exercise of the powers conferred by that section. The discretion is a discretion at large, subject only to -
>
> 1. the obligations expressed in s.118A(2), namely to consider consultation with appropriate peak councils and to have regard to agreements or undertakings of a certain kind, and
>
> 2. the requirements of the Act in relation to the general functions of the Commission. [10]
>
> · S.118A was inserted into the Act in its present form as part of an inter-related package of legislative and administrative measures intended to assist in bringing about a more rational union structure along broad industry lines.
>
> · A union, once registered under the Act, has a right to represent the industrial interests of its members and its potential members. That is a right which is at the very core of the federal system of registration of organisations. It is a right which should not be diminished or denied unless there is a strong reason for doing so, a reason that is related to the achievement of the objects of the Act. As was stated by Munro J in Re Queensland Alumina Limited [11]-
>
> "The subject matter of the power, the operation of section 90 and the context in which section 118A appears lead me to conclude that the discretion conferred is relatively unfettered although I do not consider it to be exercisable by reference solely to what I, as the relevant organ of the Commission, might consider desirable. Exercise of the discretion must be related to considerations relevant to the granting or withholding of registration, the prevention or settlement of demarcation disputes and considerations which are comprehended within matters of public interest required to be taken into account under section 90." [12]
>
> · S.118A is not intended to discourage union memberships as a whole. One of the objects of the Act is to encourage union membership. As the High Court has in recent times stated and repeated -

> "The history of industrial regulation in this country has shown the desirability of ensuring that industrial representation is structured in the interests of employees and the industry in which they are engaged, both for the purpose of avoiding demarcation disputes and for the purpose of ensuring effective industrial representation." [13]

· It is not the role of the Commission "to devise and impose a general plan for union representation". [14] Nor is it the role of the employer or employers to determine the basis of any union rationalisation. It is the union movement itself which is primarily responsible for its own rationalisation and an important factor to be taken into account in any s.118A matter is the level or measure of agreement amongst the unions involved as to the orders proposed. [15]

· Where, however, there is no such agreement, factors to be taken into account in determining whether or not a registered organisation's right to represent the industrial interests of its actual and potential members should be diminished or denied would include the following (though not necessarily in any order of priority) -

1. whether the order or orders would achieve any of the objects of the Act,

2. whether the order or orders would assist in reducing the number of unions in any industry or enterprise,

3. the respective eligibility entitlements of the organisations concerned,

4. the established pattern of membership and award coverage,

5. the industrial behaviour of the organisations concerned,

6. the preference of the employees concerned,

7. the preferences of the employer or employers concerned,

8. the effect of the order or orders on employer operations, work practices, award structures and the potential for demarcation disputes,

9. the views of appropriate peak councils, and

10. the terms of any existing agreements and/or understandings in the area."

On several occasions [16], I have said that the views I expressed in that case -

> "... are a summary of and, as far as I am aware, accord with conclusions expressed in other decisions of this Commission. Although that

decision was the subject of an appeal, that appeal (which, in any event, was unsuccessful) did not involve any suggestion that the summary was inaccurate or incorrect."

I am not aware of any decisions of this Commission which would convince me to resile from that view. Indeed, similar principles were adopted and applied by Deputy President Duncan in his decision in *Construction, Forestry, Mining and Energy Union and Abbot Point Bulkcoal and others* . [17] The Full Bench in the appeal against that decision made no criticism of the Deputy President's identification of the range of factors relevant for consideration in determination of the s.118A applications before him. [18]

Further, it appears from the written submissions of the parties that it is common ground that the above principles reflect the proper approach to s.118A applications. I will, therefore, apply those principles in this case.

Finally, I note that PML accepts that the exercise of s.118A powers is discretionary and that the onus is on it to make out its case. That approach accords with the following statement made by a Full Bench in *Health and Research Employees Association of Australia and The State Public Services Federation* [19]:

> `In dealing with any application for orders under s.118A, the Commission is exercising a discretionary power. In some circumstances, particularly in contested matters, the Commission may not consider it appropriate to make any orders at all. Applicants in such matters bear the same onus as in other contested matters of satisfying the Commission that orders should be made.'

An Abuse of Process?

One matter that needs to be dealt with at this stage is the AMWU's submission that PML's bringing of this application is in effect an abuse of "the processes of the Commission" and should not be sanctioned. This submission is based upon the following background to the two matters:

· For some time prior to 20 July 1994, PML had been a member of the Metal Trades Industry Association (the MTIA) and, as such, was said to have been bound by the terms of the various metal industry awards referred to at the beginning of this decision. On or about 17 August 1994, the AMWU was advised by the MTIA that PML had, effective from 20 July 1994, resigned its membership. As a consequence, PML ceased to be bound by the terms of those awards.

· On 22 August 1994, the AMWU served a letter of demand and log of claims upon PML and another company and, on 24 August 1994, notified the Commission of an alleged dispute arising out of the failure of PML and the other company to accede to its demands. On 24 November 1994, Commissioner Simmonds issued a decision [20] in which he found that the log of claims and letter of demand had not been properly authorised, that its service could not give rise to a finding of dispute and that there was therefore no ground for the Commission to exercise its jurisdiction.

· On 12 December 1994, the AMWU served another letter of demand and log of claims upon the same two companies and, on 19 December 1994, notified the Commission of an alleged dispute. On 14 March 1995, Commissioner Simmonds issued a decision [21]

including a formal finding of dispute. Leave to appeal against that decision was refused by a Full Bench on 9 August 1995 [22] and, on 24 August 1995, PML lodged its s.118A application.

It is apparent that PML did not institute s.118A proceedings until after its attempts to scuttle the AMWU application on technical grounds had failed. Against this background, the AMWU contends that the PML application is being used as a defence to the AMWU application and is not founded upon any dispute between two unions and their members. In fact, it argues, there is no dispute between the two unions about representation and the seeking of the s.118A orders is not intended to resolve any ongoing demarcation issue. Prior to the AMWU vigorously pursuing its roping-in application, PML had not expressed any concerns with the AMWU having any representative rights.

Although the powers conferred by s.118A might be exercised for the purposes of preventing or settling a demarcation dispute, the existence of such a dispute is not a prerequisite for the exercise of those powers. [23] Even if, at the time the PML application was lodged, there was no issue about representation between the two organisations, such a fact would not have constituted a bar to PML instituting or pursuing its application. In circumstances where an employer is faced with a union application which, if successful, might, in the perception of the employer, raise an issue of representation contrary to its interests as an employer, it is open to that employer to seek to use such processes as are available to it under the Act to oppose that application. S.118A specifically allows an employer to bring an application and, if an employer chooses to do so as a means of bringing about what it perceives to be an appropriate rationalisation of union representation at its operations, I do not comprehend such an application as being, either as a matter of course or in the circumstances of these two matters, an abuse of the processes of the Commission.

Application of Principles

Having considered all the evidence and submissions, I have reached the following conclusions.

Achievement of the Objects of the Act

As is set out in the immediately preceding section of this decision, one of the factors to be taken into account in determining an application under s.118A is whether granting the orders sought would achieve any of the objects of the Act. However, as a result of the amendments effected by the WROLA Act, the objects of the Act have changed. A question arises as to whether the objects of the Act to which I should have reference are the objects as they were prior to the WROLA Act coming into operation or the objects as they now are. PML and the AWU contend for the former and the AMWU contends for the latter.

S.118A, in the form in which appeared in the Act prior to 31 December 1996, was introduced into the Act by the *Industrial Relations Legislation Amendment Act 1990* [24], the legislation that contained a package of amendments designed to bring about what was perceived to be a more rational union structure in the national industrial relations system. As part of that legislative package, the Act was amended so as to include as specific objects of the Act the "object" that, immediately prior to 31 December 1996, appeared in s.3(f) (the encouragement and facilitation of the development of organisations, particularly by the reduction of the number of organisations in an industry or enterprise) and the object that then appeared as an object of Part IX - Registered Organisations in s.187A(e) (the encouragement and facilitation of the amalgamation of organisations). For this reason, the relationship between s.118A and the former s.3(f) has, in previous decisions relating to s.118A applications, been treated as having been more direct than the relationship between s.118A and any other objects of the Act. [25]

One effect of the WROLA Act is that the two objects referred to in the immediately preceding paragraph have been repealed. The AMWU contends that, even though the PML application is to be determined pursuant to the provisions of that section as in force before 31 December 1996, those provisions are to be read taking into account the objects that now appear in the Act as a result of the amendments made by the WROLA Act. In particular, the AMWU refers to the new s.3(f) relating to "freedom of association", which, it submits, replaces the former s.3(f) relating to union rationalisation.

PML, on the other hand, directs my attention to the specific provisions of item 12(2) of Schedule 4 of the WROLA Act and contends that

> "the reference to ` *that section as in force immediately before the commencement of this item continues to apply in relation to the hearing of the application* ' clearly means that section in the context of where it fell in the Act and where part of the objects to which it applied dealt with reducing the number of organisations in an enterprise".

It follows, in PML's submission, that

> "it was clearly the intention of the transitional provisions [contained in Schedule 4 of the WROLA Act] and the legislature that existing [s.118A] applications be dealt with pursuant to the old Act".

I am inclined to the view that PML's interpretation of item 12(2) and the conclusion it draws from that interpretation do not take into account the whole of that item. That item opens with the words "[*d*] *espite the amendments made to section 118A of the Workplace Relations Act by this Schedule* ". The part of the item upon which PML relies must be read in conjunction with these opening words. Item 12(2), in my opinion, does no more than require me to apply s.118A in the form in which it appeared in the Act prior to the amendments made by the WROLA Act, that is, without considering the requirement that there be a demarcation dispute and without being obliged to have regard to certain matters now specified in the section as amended. Nor does the Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* where it is dealing with that item suggest to the contrary. That Memorandum states that, where a s.118A application is one which was made, and in respect of which the substantive hearing was commenced, before 31 December 1996, "it is to be dealt with as if section 118A had not been amended". There is no requirement suggested anywhere in that Memorandum or by the WROLA Act itself that, where the Commission is dealing with any such application, it is to be dealt with as if the objects of the Act had not been amended.

On the other hand, I can comprehend some merit in an argument that the intended effect of the transitional provisions in relation to s.118A applications was that existing applications were to be dealt with in the same manner in which they had previously been dealt with, ie as if there had been no legislative changes at all.

If it were necessary for the determination of this application to reach a conclusion on this question, I would, on balance, be of the opinion that, in so far as it is appropriate to take into account the objects of the Act, unless otherwise directed by the legislation itself, I should take into account the objects in existence at the time the application is being determined. However, I am satisfied that, whichever set of objects is to be taken into account, my conclusion would be the same.

As was the case before the coming into operation of the WROLA Act, the Act now specifies a "principal object" and then sets out various methods by which that object is to be achieved. As I said in *Re CSR Limited and others* [26], it is arguable that the provisions of paragraphs (a) to (k) of s.3 must be read

in the context of the opening words of the section. Those paragraphs may not be "objects" of the Act as such. Rather it may be that they should be treated as an expression of the methods by which the Act is intended to achieve the provision of the framework which is the principal object of the Act. Such an approach is reinforced by a reading of the Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* which, in relation to the relevant amending provision, states as follows:

> This item would repeal the principal object set out in section 3 of the *Industrial Relations Act 1988* (the IR Act), replacing it with a new object. The principal object of the *Workplace Relations Act 1996* (the WR Act) reflects the intention of the legislature to reform Australia's industrial relations arrangements by providing a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia. *The means by which this is to be achieved are set out in paragraphs (a) to (j) of proposed section 3 of the Act.* [my emphasis]

However, as I also noted in *Re CSR Limited and others* [27], it is common practice for the Commission and the parties appearing before it to refer to the various paragraphs of s.3 as expressing "objects" of the Act. [28] Perhaps this is due to the fact that s.3 immediately before the WROLA Act came into force specified and now specifies the *principal* object of the Act. It may be that there are other objects of the Act that may be discerned from a consideration of the legislation. [29] In this case, the parties argued their cases as if the various paragraphs of both the former s.3 and the existing s.3 did express the objects of the Act. For the purposes of this decision, I am prepared to assume that those paragraphs do, at least impliedly, set out the objects of the Act in the sense that they express the policy and purpose of the legislation.

As was stated above, it has been generally considered that the sub-section of the former s.3 which had the most direct relationship with s.118A was that set out in s.3(f), namely "the encouragement and facilitation of the development of organisations, particularly by the reduction of the number of organisations in an industry or enterprise".

In its present form, s. 3 provides as follows:

> The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:
>
> (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
>
> (b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
>
> (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and
>
> (d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards.

The underlying purpose of paragraphs (a) to (k) of s.3 appears to me to be directed to attainment of more direct, cooperative relationships between employers and employees and greater labour market flexibility. The retention of s.118A in the Act (albeit in an amended form) and, more particularly, the inclusion of transitional provisions under which certain s.118A applications made under the former provision are to be heard and determined pursuant to the former provision must, in my view, be considered as an indication from the legislature that rationalisation of union representation is perceived to be part of the framework provided by the Act for the attainment of those objectives. In this context, the reduction in the number of unions at an enterprise may well, particularly when combined with other factors present in this case, be viewed as a factor which would contribute to the achievement of cooperative relations at a particular workplace.

In coming to such a conclusion, I recognise the "object" of the Act relating to ensuring freedom of association and the choice to join or not to join organisations. It is, however, but one of the "objects" set out in s.3. S.118A is primarily concerned with the question of *representation* not *membership* . [30] Even if I were to assume, for the purposes of this argument, that, because of the provisions of s.118A(6), an order made under s.118A(1) regarding

representative rights could have consequential effects on the rights of employees to *belong to* rather than be *represented by* an organisation of their own choice, s.118A has been retained in the Act despite the insertion of this "object". In my view, its retention is confirmation of the legislature's acceptance that orders made pursuant to s.118A are either consistent with concepts of freedom of association or may, notwithstanding the existence of that "object", be made within and as part of the framework established by the Act for "cooperative workplace relations".

Respective Eligibility Entitlements

The capacity of the AWU pursuant to its eligibility rules to enrol as members all the relevant employees does not appear to be contested. Under sub-rule (22) of Section 4, Part K of Rule 6 - Eligibility for Membership, that organisation has the eligibility to enrol persons employed in or in connection with the following industries or callings:

> The preparation, manufacture, processing and packaging of tobacco, cigarette, cigars or allied products in the State of New South Wales and Victoria ...

On the other hand, as I understand its submissions, the AMWU does not claim that it is entitled under its eligibility rules to enrol as members all the relevant employees. It does, however, claim an entitlement to enrol persons employed as Team Leaders and/or maintenance supervisors and/or any other employees who exercises trade skills as a substantial part of their employment. That claim relies upon its eligibility to enrol persons employed in or in connection with the trade or calling of fitters [sub-rule 1A of Rule 1 - Name, Objects and Constitution] and/or persons employed in, usually employed in or qualified to be and desirous of being employed in the calling of foremen and supervisor of manufacturing processes [sub- rule 1C of Rule 1].

I am satisfied from the evidence that PML does not employ persons who could be properly described as being employed in or in connection with the trade or calling of fitters. The mere fact that some Team Leaders or others may have relevant trade qualifications and may perform minor maintenance work as part of their duties does not bring such employees within the purview of the AMWU's eligibility rules. On the other hand, the supervisory role of Team Leaders may well bring them within the description of foremen and supervisors of manufacturing production. But, even if I were to conclude that there are, amongst the class of employees in respect of which the order is sought, persons employed in trades or callings which fall within the eligibility rules of the AMWU, it is abundantly clear that the AMWU is unable to enrol as members all of that class of employees.

Established Pattern of Membership and Award Coverage

The unchallenged evidence of Ms Ustianowski was that all operators and about two-thirds of the team leaders were members of the AWU. The AMWU contends that traditionally employees with trades qualifications or pursuing such qualifications have been members of the AMWU and seeks to highlight the fact that no evidence was led by either PML or the AWU that any existing employee with or pursuing such qualifications is a member of the AWU. Such a contention does nothing to diminish the fact that the evidence is that the AWU has substantial membership amongst the relevant class of employees. On the other hand, whatever may have been the case before PML contracted out its maintenance work in 1994, there is no evidence before me at all that the AMWU now has any members amongst that class of employees.

As to award regulation, until PML resigned from the MTIA in 1994 and the making of the *Philip Morris Limited Award 1994* [31], an award to which the AWU is the only union respondent, the terms and conditions of employment of the PML employees appear to have been regulated by at least two awards [32] and a number of agreements. The AWU (and/or the FTWU) and the AMWU (and/or the ADSTE) and, indeed, other unions have been party to and

involved in such awards and agreements. That, however, is no longer the case. The terms and conditions of employment of the relevant employees are presently governed by the provisions of the above award which, I am satisfied, covers all production employees including Team Leaders or by an unregistered agreement [Exhibit P7] which deals with salaried employees in operations up to a managerial level.

In so far as there is award regulation, it is clear that such regulation is at the instance of the AWU. It would be unfair, however, to conclude that there is an "established pattern" of award regulation. The existing pattern has existed only since 1994 and has arisen out of circumstances over which the AMWU had no control and from a situation which the AMWU has consistently and persistently sought, from its point of view, to rectify.

Industrial Behaviour of Organisations Concerned

Much has been sought to be made by PML and the AWU of the industrial behaviour of the AMWU over almost twenty years up until 1994 by comparison with what is said to be the constructive and positive approach of the AWU. Whilst the AMWU does not accept the assertions made as to the effect of its industrial action during this period, it does contend that such action is irrelevant to the determination of this application.

I have carefully considered all the material before me in relation to the industrial activities of both unions over this period. Assuming that such activity is relevant for the purpose of determining this application, I do not consider that a union should be criticised or penalised for adopting a strong and militant approach to the attainment of its objectives in the interests of its members. Nor should unfavourable comparisons be made as between unions because one adopts a more militant approach than the other. A union which conducts its affairs in a less militant manner may well be perceived by an employer to be more constructive and positive. In my view, the AMWU's behaviour was, in general, no more and no less than legitimate unionism. In the circumstances, I cannot conclude that either organisation has at any time acted other than in a manner that it perceived to be in the interests of its members.

Employees' Preference

The substantial majority of the employees concerned are members of the AWU. The Commission is entitled to assume that a registered organisation represents the views of its members and there is some justification in treating the AWU's support for the application as reflecting the preference of at least the majority of the employees who are its members. On the other hand, there is no evidence at all of membership of the AMWU or that the AMWU can or does speak on behalf of any existing PML employees.

Employer's Preference

It would be obvious from the fact that this is an application by the employer that the employer favours exclusive representation of its employees by the AWU.

Effect of Proposed Order

On the material before me, there is no doubt that, over a period of time, there have been occasions where demarcation disagreements between the two unions (and indeed others) have frustrated PML's attempts to achieve what it perceived to be desirable work practices and productivity. PML has, by reorganising its operations, already put in place changes which are intended to make its manufacturing operation more efficient and more productive. The granting of the orders sought would complement those arrangements.

As a matter of law, the award which applies to the employment of the majority of employees concerned is the *Philip Morris Limited Award 1994* . [33] That award is clearly structured to reflect the changes that PML has made in its manufacturing operations. It has not been suggested that the award's provisions are below accepted national standards.

In so far as the AMWU may have the constitutional capacity to enrol and represent PML employees, that capacity is restricted to a small proportion of such employees. Even if I were to assume that the AMWU has members amongst the relevant class of employees, there is no suggestion that such membership would be other than minimal.

In my view, for these reasons, the granting of orders under s.118A would be a further positive step in eliminating potential obstacles to the maintenance of an appropriate industrial relations situation at PML.

Peak Council Views

The only relevant "peak council" for the purposes of s.118A in this matter is the Australian Council of Trade Unions (the ACTU).

The AMWU tendered a copy of a facsimile dated 8 December 1995 from the ACTU Secretary to that organisation to which was attached a statement dated 6 November 1995 [Exhibit F16]. No party suggested that the views of the ACTU as expressed in those documents had changed. In the circumstances, I did not consider that it was necessary for me to consult with the ACTU in respect to this application.

I have carefully considered the contents of those documents. Essentially, it would appear that, as far as the ACTU is concerned, the AWU is the principal union in the industry and entitled, subject to ACTU policy, to cover all employees and the AMWU has a small number of members at PML and, therefore, should be treated as having "an other union" status in the terms of ACTU policy. As I have previously stated, there has been no evidence led in the proceedings before me that would satisfy me that the AMWU has any membership at all amongst the employees concerned.

Existing Agreements and/or Understandings

In *Association of Australian Port and Marine Authorities and others and Waterside Workers Federation of Australia* [34], it was said by a Full Bench that agreements and understandings of the type referred to in s.118A(2)(c) are to be treated as "a fundamental element" in deciding a s.118A application. The agreements in that case were agreements reached between unions essentially in the context of proceedings contemporaneously before the Commission and directly related to the representative orders being sought in those proceedings.

Over a period of some years, there have been a number of agreements entered into between the two unions. The AMWU relied in particular on agreements made in 1990 [35] and 1991. [36] Those agreements, in my view, do not pertain to PML's present method of operation and they are of no assistance to me in determining this application.

The 1990 agreement arose out of a dispute over coverage of section hands who underwent training to obtain trade qualifications and section hands who obtained such qualifications. I am satisfied from the evidence that the Team Leader position is not identical to that of the former section leader.

The 1991 agreement was made in settlement of s.118 proceedings initiated by the FTWU [37] and restricted the AMWU's representative rights, in relation to PML employees, to areas which are specified in a schedule to that agreement, namely engineering tradespersons, engineering trades assistants, engineering stores and engineering trades apprentices. In relation to PML employees, the schedule makes no mention of areas which ADSTE could, pursuant to its eligibility rules or otherwise, have covered. This is to be contrasted with the specific references in the schedule to ADSTE areas in relation to the two other tobacco manufacturing companies and the reference in the penultimate paragraph of that schedule to a state award made in New South Wales which had application to ADSTE members. The failure to mention any ADSTE area of membership or potential membership in relation to PML is consistent with the evidence of ADSTE's lack of involvement with PML employees. I am satisfied from the evidence that PML does not presently employ persons in the relevant areas specified in the 1991 agreement.

Conclusions

As was stated by the Full Bench in *Re Construction, Forestry, Mining and Energy Union* [38] -

> "The determination of an application under s.118A involves the balancing of competing factors in order to ascertain where, in the circumstances of the particular matter before the Commission, the public interest and merits lie."

On balance, I have come to the conclusion that PML has made out a case for an order being made. In view of the following factors -

· the eligibility of the AWU to enrol and represent the class of employees concerned as compared to the limited (if any) capacity of the AMWU in this area,

· the actual membership of the AWU amongst the employees concerned as compared with the lack of evidence of any membership of the AMWU amongst those employees, and

· the likelihood that the making of an order would assist in removing any future demarcation problems and in maintaining an appropriate industrial relations situation at PML,

I am satisfied that the making of an order would further the achievement of the objects of the Act and contribute to the achievement of cooperative relations at the workplace at PML.

One area of particular concern to me is that the AMWU be entitled and be able to continue to service the interests of any of its members and potential members who may be employed by any contractor to perform work at the premises of PML. It is abundantly clear that the AMWU perceives that PML has obstructed it in its attempts to service its members employed by Skilled Engineering Limited. I acknowledge that PML denies that it has done so. It would, however, be reasonable, in my view, for PML to give an appropriate written undertaking in relation to this question and the giving of and continued compliance by PML with such an undertaking will be a condition of the orders that I intend to make.

S.118A(5)

The effect of the s.118A(1) orders I intend to make will be that, whilst the order continues to operate, the AMWU will be precluded from industrially representing the employees of PML. As I have stated, I consider that the AMWU's eligibility rules in this area provide it with limited, if any, coverage. The retention of that coverage, limited as it may be, could be a source of potential disruption and confirmation of its removal would complement the proposed s.118A(1) orders. I am, therefore, of the view that the AMWU's rules should be altered so as to reflect those orders. It follows that I am not satisfied that the AMWU's rules do not need to be altered and I intend to make an appropriate reference under s.118(5). In doing so, I would emphasise that the orders I intend to make under s.118A(1) are conditional and the order itself will be expressed as remaining in force "until revoked, amended or varied by a further order of the Commission".

Roping-In Application

As I intend to make s.118A(1) orders which will have the effect of preventing the AMWU from being able to represent under the Act the industrial interests of employees of PML, the AMWU, during the currency of those orders, will not have the right to obtain and/or maintain any award. The orders are, however, conditional, In any event, changed circumstances may lead to the revocation, amendment or variation of the orders. It is not appropriate, therefore, that I dismiss the AMWU's application. Rather, I will adjourn matter C No. 36368 of 1994 in so far as it concerns the AMWU's application for a roping-in award to a date to be fixed, reserving the right to the AMWU to apply on notice to PML and the AWU to have the application relisted.

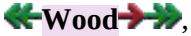
Order

An order giving effect to the foregoing is being issued contemporaneously with this decision.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Appearances :

F. Parry, S. 

, G. Smith and N. Lake for Philip Morris Limited.

P. Flint for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia.

P. Burchardt and C. Ustianowski for The Australian Workers Union.

Hearing details :

1996.

Melbourne:

August 26;

September 5, 6;

October 15.

Brisbane:

October 16.

Melbourne:

November 7, 29.

Decision Summary

		Industrial unions - union coverage - exclusive representation - s.118A Workplace Relations Act 1996 - various employees, food, beverages and tobacco industry - applications by Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) to rope Philip Morris Limited (PML) into various awards and by PML for The Australian Workers' Union (AWU) to exclusion of AMWU to exclusively represent interests of employees who eligible for AWU membership and remove AMWU right to represent such employees whether or not eligible for AWU membership - *Re National Rail Corporation Limited* (Print P0259) principles concerning effect of WR Act 1996 on undetermined s.118A applications followed - *Construction Forestry and Mining Employees Union and another and Federation of Industrial, Manufacturing and Engineering Employees* (Print K8123) principles concerning exercise of s.118A powers followed - exercise of s.118A powers discretionary so applicant must make out case (see *Health and Research Employees Association of Australia and the State Public Services Federation* (Print K2996)) - s.118A powers may be exercised to prevent and settle demarcation disputes but the existence such not prerequisite (see Prints J7763, J8477, K2940) - that no issue concerning organisations' representation rights no bar to employer bringing s.118A application - as s.118A specifically allows employer to bring application employer application to bring about perceived appropriate coverage rationalisation cannot be comprehended as abuse of process - paragraphs (a) to (k) of s.3 not objects of Act but expression of methods by which the principal object of the Act is achieved (see *Re CSR Limited and others* (Print N0461)) - underlying purpose of paragraphs (a) to (k) of s.3 directed towards attainment of more direct, cooperative relationships between employers and employees and greater labour market flexibility - retention of amended s.118A and provision for completion of commenced s.118A applications indication that rationalisation of union representation perceived part of Act's framework for attaining objectives - s. 118A primarily concerned with question of representation not membership (see Print N0461) - AWU capacity to enrol all relevant employees pursuant to its eligibility rule appears uncontested - satisfied AMWU unable to enrol as members entire class of

		employees sought - majority of relevant employees AWU members - no evidence of AMWU membership or that AMWU can/does speak for existing PML employee - terms and conditions of employment for all relevant employees governed by award to which AWU only respondent union though this not indicate "established pattern" of award regulation - award reflects contemporary changes to work practices of PML and nothing to suggest award below national standards - neither organisation has acted industrially other than in manner perceived to be in members' interests - employer favours exclusive representation by AWU - demarcation disagreements occasionally frustrated PML attempts to institute perceived desirable work practices - granting PML application would complement such practices - peak council recognises AWU as `principal union' in industry while AMWU `other union' status, - satisfied PML case made out given eligibility of AWU, actual membership of AWU/lack of AMWU membership and likelihood order would help resolve demarcation problems and maintain appropriate industrial relations system at PML - satisfied making order would further the achievement of objects of Act and contribute to achievement of cooperative relations at the PML workplace - orders conditionally granted to preclude AMWU from industrially representing PML employees - matter referred to Designated Presidential member for AMWU rule alteration pursuant to s.118A(5) - order to remain in force until revoked, amended or varied by further Commission order - AMWU roping-in applications stood aside pending revocation, variation or amendment of s.118A order
Phillip Morris Limited		
C No 38476 of 1995 and another		Print P3382
Williams SDP	Melbourne	24 July 1997

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1 Print F8925 [M0039].

2 Print F5144 [M0041].

3 Print F5010 [M0177].

4 The amalgamation took effect on 1 April 1991 [Print L0950].

5 The amalgamation took effect on 30 June 1995 [Print M2895].

6 Print N2545.

7 Print P0259.

8 1993/6 CAR 314, 317-9, 50 IR 118, 120-2, Print K8123.

9 *Re Robe River Mining Co. Pty. Ltd. and another* (1991) 42 IR 416; Print K0203.

10 *Re Queensland Alumina Limited* 1991/7 CAR 185; (1991) 42 IR 304; Print J8477.

11 Ibid.

12 Ibid. 202.

13 *Re Coldham and Others; ex parte Brideson* (1988-89) 166 CAR 338, 344; *Re Coldham and Others; ex parte Brideson No. 2* (1990) 170 CLR 267, 274.

14 *National Wage Case, October 1991* , Print K0300; 1991/10 CAR 722.

15 *Health and Research Employees Association of Australia and The State Public Services Federation* 1992/5 CAR 429, (1992) 41 IR 184, Print K2996.

16 *Re Health Services Union of Australia and others* Print M1309; *Re CSR Limited and others* (1996) 65 IR 341; Print N0461.

17 Print N6720.

18 *Re Construction, Forestry, Mining and Energy Union* Print N9380.

19 1992/5 CAR 429, 447, (1992) 41 IR 184, 189, Print K2996.

20 Print L6752.

21 Print M0119.

22 Print M4202.

23 *Federated Ironworkers Association of Australia and Amalgamated Metal Workers Union and another* 1991/5 CAR 316, (1991) 38 IR 54, Print J7763; *Re Queensland Alumina Limited* 1991/7 CAR 185; (1991) 42 IR 304; Print J8477; *Federated Ironworkers Association of Australia and Amalgamated Metal Workers Union* 1992/5 CAR 345, (1992) 43 IR 6, Print K2940.

24 Act No. 19 of 1991

25 See for example *Re CSR Limited and others* (1996) 65 IR 341, 355; Print N0461.

26 Print N0641.

27 Print N0641.

28 See for example *Australian Manufacturing Workers Union and Alcoa Australia Limited and others* (1996) 63 IR 138,154; Print M8600, p. 23.

29 *Bowling v General Motors-Holden's Pty Ltd* (1980) 50 FLR 79, 94; *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129, 152-153.

30 *Re CSR Limited and others* (1996) 65 IR 341, 356; Print N0461.

31 Print L6625 [P0437].

32 *Tobacco Industry (Philip Morris Limited) Interim Award 1980* [Print E3559 [T0121]], *Metal Industry Award 1984 - Part 1* [Print F8925 [M0039]].

33 Print L6625 [P0437].

34 (1993) 51 IR 59, 70, Print K8810.

35 Annexure J to the Affidavit of Kevin Allan Rust [Exhibit P 12].

36 Annexure O to the Affidavit of Kevin Allan Rust [Exhibit P 12].

37 C No. 20447 of 1991.

38 *Re Construction, Forestry, Mining and Energy Union* Print N9380, p.8.

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