SHIFTING THE GOALPOSTS: INTERPRETATION OF UNION MEMBERSHIP ELIGIBILITY RULES IN THE MODERN AWARD ERA

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Daniel White[1] (Special Counsel, Perth), Mills Oakley Lawyers,
dwhite@millsoakley.com.au

Abstract

*The interpretation of union membership eligibility rules (**union rules**) has attracted considerable attention from Courts and Tribunals. The amalgamation of unions over the years has by no means assisted, resulting in ambiguous and confusing union rules which are very difficult to interpret. Union rules also overlap considerably, resulting in claims of membership coverage by multiple unions paving the way for costly demarcation disputes. As of 1 July 2009 the new Fair Work Act 2009 (Cth) placed unions as bargaining representatives at centre stage of the collective enterprise-based bargaining regime. The result has drawn particular focus back to union rules as the source of eligibility to be a bargaining representative and the rights and obligations that flow from that. Awards have historically played an important role in carving out union "turf" under previous legislative schemes and thus assisted in defining the scope of union rules. However as of 1 January 2010, the introduction of Modern Awards, which do not name unions as being "a party", has opened up the way for some unions to contest coverage and even venture into "new turf". This paper will reflect on the key decisions concerning the interpretation of union rules, examine the patterns/trends taken by the Courts and Tribunals concerning union rules in the Modern Award era (particularly around bargaining) and promote some ideas for further debate around union rules.*

Introduction

The introduction of the *Fair Work Act 2009* (Cth) (**FW Act**) on 1 July 2009 cemented collective enterprise-based bargaining at the heart of the Federal industrial relations system. The role of "bargaining representatives" in the new enterprise bargaining system sought to place unions at centre stage, but not without limitation requiring unions to be "*eligible to represent the industrial interests"* of the particular employee. Unions have now sought to use the new enterprise bargaining regime as means to expand their coverage. As a result, a

[1] Daniel White is the joint head of the Workplace Relations, Employment and Safety Practice at Mills Oakley Lawyers in Perth (Western Australia). Daniel holds a bachelors degree in industrial relations (with 1st Class Honours) and a bachelor of laws from the University of Western Australia. He has also completed the degree of Masters of Employment and Labour Relations Law from the University of Melbourne. Daniel has co-authored a number of articles for leading journals and conferences focused on the topics of enterprise bargaining and managing unions in the workplace. He is a member of a number of societies and organisations and centrally involved in the ongoing debate of reforming Australia's industrial relations system.

greater focus has once again shifted to union membership eligibility rules in order to determine whether a particular union (or union official) is entitled to be a "bargaining representative" for an employee in respect of an enterprise agreement. Awards have historically played an important role in interpretation of union membership eligibility rules. This was due to previous legislative schemes providing for awards resulting out of industrial disputes – which often determined a union's ability to cover a particular workforce on a geographical, industry or occupational basis. On 1 January 2010 the new Modern Awards commenced in operation which rationalised some 1,500 awards into 122 "Modern" industry and/or occupational based awards. However the new Modern Awards no longer named relevant unions as a "party", which has opened up the way for some unions to contest established coverage and even venture into "new turf".

The recent case of *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153 (along with other authorities) provides an interesting example of how ambitious unions no longer "shackled" by named awards can set about to use the new bargaining processes to represent employees (through bargaining) where their union has not previously covered them. This is particularly the case where union membership eligibility rules are ambiguous and overlap with other union rules. Section 176(3) of the FW Act has a considerable role to play in limiting a union's ability to represent employees (as a bargaining representative) that it has not historically sought to cover. This paper demonstrates the modern approach the Courts and Tribunals takes in interpreting union membership eligibility rules in these circumstances, with a greater focus on the common understanding of union rules through established custom and practice. It is likely that a considerable amount of "rule cases" will continue to emerge within the context bargaining arising from section 176(3) of the FW Act.[2] What is needed is a "modernisation" of union rules, a process which could be readily undertaken by a newly established Registered Organisation Commission. This is particularly the case with further union mergers foreshadowed creating further complexities and overlapping coverage which is no doubt likely to result in damaging union demarcation disputes.

History of union rules and role of awards

Industrial organisations have a long history in Australia (both unions and employer associations). It is said that as early as the 18th century Australian workers organised their labour in craft unions which matured and developed overtime into influential institutions which have shaped Australian working society.[3] According to Creighton and Stewart, *"in what might be called its 'natural' state, a trade union is a voluntary unincorporated association"*.[4] However, statutory incorporation and regulation has always been accepted by unions as part of their ability to be recognised and participate in the Australian industrial relations system at both State and Federal level. Employer associations also formed at similar times and also became subject to similar legislation.

The *Conciliation and Arbitration Act 1904* (Cth) (**CA Act**) first sought to regulate the participation of industrial organisations in the Australian industrial relations system. One of

[2] Note that the FWC cannot exercise a judicial function in this regard.

[3] Bray, M et al (2014) *Employee Relations: Theory and Practice* (3rd Ed), McGraw-Hill Education.

[4] Stewart, A et al (2016) *Creighton & Stewart's Labour Law* (6th Ed), The Federation Press, p 814.

the main objects of the CA Act was, *"to facilitate and encourage the organisation of representative bodies of employers and employees and the submission of industrial disputes to the Court by organisations"*.[5] According to Forsyth, under the CA Act any industrial organisation who had at least 100 members could apply to the Conciliation and Arbitration Court (**CAC**) for registration and incorporation as an industrial organisation.[6] This application included the provision of objectives of the organisation and its purpose. Forsyth provides that registration then afforded certain rights to unions including rights to represent certain categories of workers, rights to undertake certain lawful industrial action, the right to enter an employer's premises and the ability to be recognised and appear before the CAC.[7]

One of the primary functions of the CAC was resolving interstate industrial disputes by means of conciliation and arbitration. The resolution of industrial disputes was often through making legally binding awards that applied to a union and list of employer respondents. According to Creighton and Stewart:

> *"Until the mid 1990s, the principal focus of both the Federal and State systems of industrial regulation was on the prevention and settlement of industrial disputes by means of what was, ostensibly at least, a process of compulsory conciliation and arbitration under the auspices of an independent tribunal. The end-product of this process might be an agreed settlement, a non-binding recommendation to the parties, or a legally enforceable instrument known as an 'award'. In some instances awards applied to whole industries and occupations; in others they applied only to part of an industry in a particular State or region, or even to specific employees."*[8]

The CA Act placed the role of awards in the settlement of industrial disputes at centre stage. Where unions sought coverage over particular groups of workers, awards usually reflected the interpretation and application of the union's rules in respect of that group of workers and applied across an industry and/or occupation. Awards in this regard became an important instrument in interpreting union rules. The role of awards significantly increased around 1914 when the High Court held that participants could create "paper disputes" in order to enliven the CAC's jurisdiction to create awards.[9] Unions in this regard could manufacture "paper disputes" to advance minimum terms and conditions on an industry and/or occupational basis in order to secure legally binding awards by the CAC. The reach of the CAC expanded and, as Plowman notes:

> *"In 1909, a year in which the Arbitration Court's scope was severely circumscribed, and restructured exclusively to the maritime and pastoral industries, only seven cases came before it… By 1919… ninety-six Federal awards and 570 Federal*

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[5] See section 2 of the CA Act.

[6] Forsyth, A (2000) 'Trade union regulation and the accountability of union-office holders: examining the corporate model', *Australian Journal of Labour Law*, Vol 13, No 1, pp 28-49.

[7] Forsyth, A (2000) 'Trade union regulation and the accountability of union-office holders: examining the corporate model', *Australian Journal of Labour Law*, Vol 13, No 1, pp 28-49.

[8] Stewart, A et al (2016) *Creighton & Stewart's Labour Law* (6th Ed), The Federation Press, p 314.

[9] Stewart, A et al (2016) *Creighton & Stewart's Labour Law* (6th Ed), The Federation Press, p 57.

agreements were in force, half the workforce was unionised, and 80% of unionists belonged to federally registered unions."[10]

The Federal awards importantly did not operate as "common rule" awards that applied to all employers in a particular industry like in the Western Australian State industrial relations system (and possibly other State industrial relations systems). Each employer bound by the Federal award had to have some "connection" with the original dispute or were often "roped in" to a dispute before the CAC and made a respondent to the particular industry and/or occupational award.[11]

For over 80 years the CAC stood as the key Federal body making awards that covered employers all around Australia. At the same time the State industrial tribunals continued to make State awards that applied to various employers. It was often the case for larger employers that different parts of their workforce were subject to State awards whilst others were subject to Federal awards. Some employers sought strategic advantage by opting in and out of State and Federal industrial relations systems, usually informed by the government and policy of the day.

Both at State and Federal level the making of awards by industrial tribunals was often a result of a demarcation dispute between two competing unions for coverage of workers. The observations detailed in the awards did not just pertain to wages and conditions, but often included detailed analysis of the union's rules and their eligibility to cover particular groups of workers to the exclusion of another union. Awards in this regard became a central feature of interpretation of union rules and provided a long history of carving-out union eligibility to cover particular groups of workers in certain locations, industries and/or occupations. In *AMWU v RedMed Ltd* [2014] FWCFB 3501 the Full Bench held at [34] that:

"Federal awards, including consent awards, made by Commonwealth industrial tribunals at a time when the legislative award-making power was founded upon the industrial disputes power in s.51(xxxv) of the Constitution, are important sources in this respect since a union may only be a party to an industrial dispute involving employees eligible to be its members: Co-operative Bulk Handling Ltd v Waterside Workers' Federation of Australia (1980) 49 FLR 355 at 370."

The central feature of awards was all set to change however with the shift in focus to enterprise-based bargaining in the late 1980s and the repeal of the CA Act by the *Industrial Relations Act 1988* (Cth). The focus on enterprise-based collective agreements away from arbitrated industry and/or occupational awards to regular workplaces intensified with the introduction of the *Workplace Relations Act 1996* (Cth) and the subsequent *WorkChoices* amendments that took effect on 27 March 2006.[12] Both State and Federal awards continued to exist during this period of dramatic industrial relations change. However the awards played less of a role in recording the resolution of industrial disputes, but rather they formed part of a "safety net" of entitlements that underpinned the minimum terms and conditions of

[10] Plowman, D (1989) 'Forced March: The Employers and Arbitration' in S Macintyre and R Mitchell (eds), *Foundations of Arbitration*, (OUP, Melbourne), p 152.

[11] Stewart, A et al (2016) *Creighton & Stewart's Labour Law* (6th Ed), The Federation Press, Chpt 3.

[12] See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

employment in particular industries and occupations in respect of the making of any enterprise-based agreement.

Principles of interpretation of union eligibility rules

Union rules can often be characterised as either an "industry-based eligibility rule" or "vocational eligibility rule". Some union rules have a mixture of both.[13] The "vocational eligibility rule" is often a more straightforward legal endeavour which looks to coverage of particular vocations simply listed within union rules. For the purposes of an "industry-based eligibility rule" however, this is often a more difficult task. For instance, the "industry-based eligibility rule" often provides coverage for employees *"in or in connection with"* a particular industry. This requires a focus on the substantial character of the employer and its activities and industry(ies), accepting of course that the one employer may have more than one substantial character and be active in more than one industry.[14] Relevantly, the correct approach does not appear to involve a "whole company" approach: rather, the Court/Tribunal is concerned with the "substantial character" of the particular business activities of the employer in question as relevant to the particular dispute.[15] Further, actual employment of the employee (member) in the industry is a pre-requisite for obtaining coverage under the "industry-based eligibility rule", as the example provides in *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153 below.

The interpretation of union rules has featured significantly in the High Court since the inception of the CA Act in 1904. This paper can do no justice to distilling over 130 years of industrial jurisprudence on the construction of union rules.[16] However, for the sake of brevity in developing the thesis of this paper, the following propositions have been held relevant to the construction of union rules (and, in particular, eligibility rules):

- The words used are to be read in their "natural and ordinary sense",[17] harmoniously with the rest of the instrument in which they appear;[18]
- Associated with this, the Court/Tribunal should favour constructions that do not promote the possibility of demarcation disputes that may not otherwise arise;[19]

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[13] See for example the Australian Rail, Tram and Bus Industry Union rules detailed below. Rule 4(1)(ii) is an "industry-based eligibility rule" whereas rule 4(1)(iii) is a "vocational eligibility rule". Rule 4(1)(iv) is difficult to characterise as it appears to be partially industry-based and particularly vocational.

[14] See *Re GJE Pty Ltd* (2013) 232 IR 10 at [18]; *Re Railtrain Pty Ltd* [2016] FWCA 1385 at [33].

[15] See *Harnischfeger of Australia Pty Ltd v CFMEU* (2005) 152 IR 243 at [53]-[55] and [78]-[86].

[16] See generally Hon. J W Shaw QC, *Interpreting Trade Union Constitution Rules*, (1988) 62 ALJ 690, pp 692-694.

[17] *R v Cohen; ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577, p 580.

[18] *R v Gough; ex parte Municipal Officers' Association* (1975) 133 CLR 59.

[19] *R v Gough; ex parte Municipal Officers' Association* (1975) 133 CLR 59.

- It is appropriate to have regard to any industrial meaning or usage of the words used;[20]

- The words used are to be construed in accordance with their current denotation in light of relevant developments in the industry and can therefore change or take on more definition over time, which can include regard to evidence of the relevant industry understanding of terms as well as the meaning derived from awards, agreements and judgements of other courts;[21] and

- Awards may provide guidance concerning the meaning ascribed to terms in union eligibility rules.[22]

The introduction of Modern Awards as from 1 January 2010 ensured 122 industry and/or occupational based awards replaced some 1,500 decades old Federal and State awards. As detailed below, the award Modernisation process undertaken by the then Australian Industrial Relations Commission received numerous submissions from unions and employer associations concerning coverage of particular industry and/or occupational awards which sought to preserve the *status quo*. Through that process a number of unions provided submissions concerning historical coverage based on old Federal and State awards. The result however of the Modern Awards was a dramatic departure from previous arrangements whereby unions were no longer named as a "party" to a particular industry and/or occupational Modern Award.

The result is that Modern Awards no longer provide relevant detail about possible union coverage over particular industries or occupations. With unions no longer being named as a "party" to Modern Awards, this possibly opens up opportunities for ambitious unions to establish custom and practice of coverage over a particular group of workers in certain geographies, industries and/or occupations. With the lesser role Modern Awards play in interpretation of union rules a greater focus in accordance with the principles set out above is likely to fall on current meaning in light of relevant developments in the industry and can therefore change or take on more definition over time, which can include regard to evidence of the relevant industry understanding of terms.

"Bargaining representatives" under the Fair Work Act system

The commencement of the FW Act on 1 July 2009 placed enterprise-based bargaining at the heart of the Federal industrial relations system. Coupled with this was the role "bargaining representatives" were to play in enterprise bargaining, namely unions and union officials representing employees in bargaining. Unions have sought to use enterprise bargaining as

[20] *R v Aird; ex parte Australian Workers' Union* (1973) 129 CLR 654, p 659.

[21] *Australian Human Resources Institute Pty Ltd v NTEIU* (2003) 128 IR 445 at [24]-[25]; *Co-operative Bulk Handling Ltd v AWU and WWFA* (1980) 32 ALR 541, p 547-548; *R v Williams; ex parte ABCE and BLF* (1982) 153 CLR 402, p 408. See also *AMWU v ResMed Ltd* [2014] FWCFB 3501 at [34(3) and (6)].

[22] *AMWU v ResMed Ltd* [2016] FWCFB 22 at [81].

a means to expand coverage and venture into "new turf".[23] The mechanisms within the FW Act can however operate in a way in order to limit this ambitiousness.

The primary provision dealing with qualification of "bargaining representatives" is within Part 2-4 "Enterprise Agreements" of the FW Act at section 176(3). It has been a contentious provision, subject to a number of cases concerning eligibility of a union or a union official to represent an employee during bargaining[24], and it provides the following:

> *"**176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements***
>
> *(1) the following paragraphs set out the persons who are bargaining representatives for a proposed enterprise agreement:*
>
> *(a) the employer that will be covered by the agreement is a bargaining representative for the agreement;*
>
> *(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:*
>
> *(i) the employee is a member of the organisation*
>
> *…*
>
> *(3) Despite subsections (1) and (2):*
>
> *(a) an employee organisation; or*
>
> *(b) an official of an employee organisation (whether acting in the capacity or otherwise);*
>
> *cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to the work that will be performed under the agreement."* [Emphasis added]

As a matter of construction, as to whether or not a union is *"entitled to represent the industrial interests"* of the employee to qualify as a "bargaining representative" and be afforded all the rights that flow from that, the statutory requirements of section 176(3) of the FW Act appears to involve the consideration of two separate questions:

1. Is the union in question entitled to represent the industrial interests of the member covered by the agreement?; and

[23] See for example *Douglas Heath v Gravity Crane Services* [2010] FWA 7751; *Technip Oceania Pty Ltd v Tracey* (2011) 215 IR 1; *Maritime Union of Australia; Mr Glenn Bale v Esperance Ports Sea and Land* [2014] FWC 3803.

[24] Legislative change to section 176(3) was also introduced in the *Fair Work Amendment Act 2012* (Cth) to make it clear that a union official cannot be a bargaining representative for an employee where the official's union is not itself entitled to represent the employee (whether in their private capacity or otherwise).

2. If it is, is it entitled to represent the member's industrial interests *"in relation to work that will be performed under the agreement"*?

This construction is consistent with the statutory language, consistent with the surrounding legislative context and consistent with authority. All three of these matters point to a construction of section 176(3) of the FW Act which gives the last component of the provision separate work to do as a further ground of limitation on the capacity of a union to be a "bargaining representative".

The explicit and direct purpose of the particular drafting of section 176(3) of the FW Act, was to focus attention to the particular work to be performed under the particular agreement, regardless of what may be the position elsewhere (within the business of the employer or otherwise). There is a logical reason for this: Parliament wanted to ensure that a union's ability to bargain for particular employees under a particular agreement (and then be covered by it), was limited to direct membership interest for those employees in that context. There is no other reason or purpose for these words to be specifically included in section 176(3) of the FW Act.

Language

It is plain that section 176(3) of the FW Act does not deal with union eligibility *simpliciter*. That is the substance of the first part of the provision. The second part of the provision imposes further constraint on its operation. Were it to be read otherwise, those additional words would have no work to do at all. Such a construction should be avoided.[25]

Context

The construction is wholly consistent with the legislative context. The FW Act uses the industrially ubiquitous phrase *"entitled to represent the industrial interests"* in a range of contexts. In almost all cases, it uses the term *simpliciter*, consistent with its well known meaning relating to union eligibility. That is, is the union in question entitled to represent the industrial interests of a particular employee or a particular group of employees, in the particular context?[26]

On the contrary, sections 174(3)(b), 176(3), 177(b)(i), 242(1)(b) and 244(3)(c) of the FW Act[27] all use the longer and more limiting form of expression, tying union eligibility to the actual work performed under the agreement/instrument in question.

Authority

This is also the construction which appears to have been accorded to section 176(3) of the FW Act by the Federal Court of Australia[28] and the Fair Work Commission (**FWC**).[29] In each

[25] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, p 382.

[26] See for example, various provisions in Part 3-4 (right of entry), and sections 156G(2), 160(2), 302(3), 320(3) and 364(b) of the FW Act.

[27] Also see the definition of "relevant employee organisation" in section 12 of the FW Act.

[28] See *ResMed Ltd v AMWU* [2015] FCA 360 at [57]; *ResMed Ltd v AMWU* [2015] FCAFC 195 at [4].

judgement, the Court/Tribunal has highlighted the distinction between the more ubiquitous phrase *"entitled to represent the industrial interests"* and the composite phrase in section 176(3) of the FW Act and noted that the relevant question in any case is not union eligibility *simpliciter*. Both criteria must be met for the union to qualify under section 176(3) of the FW Act.

Example

The question is begged: why was this limb of section 176(3) of the FW Act necessary? The answer may be that whether one is considering "industry-based eligibly rules" or "vocational eligibility rules", there will inevitably be scenarios where an employee could be a member of a relevant union (generally), but not in any way related to the work to be performed under the particular agreement. An example in the "vocational eligibility rule" context is a person employed as a boilermaker by an employer, but performing electrical or carpentry work under the particular agreement in question. Why should the Australian Manufacturing Workers' Union be able to bargain for and represent that "member", when they are performing electrical or carpentry work? An example in an "industry-based eligibly rule" context is an employer's business which is clearly in one particular industry, but where under the particular agreement in question, the work is fundamentally different or of a completely different nature. Ordinarily, the union in question would have no capacity whatsoever to represent an employee of an employer in the industry covered by the agreement, but because the employer's business is more generally in that union's industry-based rule, the union could represent those workers.

The application of section 176(3) of the FW Act was recently tested in *Re Railtrain Pty Ltd* [2016] FWCA 1385. This was subsequently appealed in *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153. The FWC at first instance seemed to adopt this construction of section 176(3) of the FW Act as detailed above, at least implicitly.[30] The Full Bench remained silent on the correct approach to the construction of section 176(3) of the FW Act. However the case demonstrates how ambitious unions can use enterprise bargaining as a means to enter "new turf" (expand coverage) in circumstances where union rules may change or take on more definition over time in light of relevant developments in the industry, which can include regard to evidence of the relevant industry understanding of terms. It was conceded by Roe C at first instance and affirmed by the Full Bench that the role of Modern Awards now play a lesser role in the interpretation of union eligibility rules, but the FWC will look to submissions of unions during the Award Modernisation process in order to understand the custom and practice of union coverage in the Modern Award era.[31] The construction of section 176(3) of the FW Act as detailed above is fundamental to ensuring unions do not use the bargaining process in order to encroach on "new turf" and seek to develop a custom and practice by way of enterprise agreement coverage of a workforce leading to a common understanding of the meaning of their rules (over time) in order to expand into new industries or occupations.

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[29] See *Uniting Church in Australia Property Trust t/as Blue Care and Wesley Mission Brisbane v Queensland Nurses' Union of Employees* [2014] FWCFB 1447 at [38]-[39].

[30] See *Re Railtrain Pty Ltd* [2016] FWCA at [14]-[15].

[31] See *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153 at [33].

Case study: *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153

Railtrain Pty Ltd (**Railtrain**) is a multi-disciplinary rail maintenance, construction, operations and consultancy company which also provides labour hire in the rail industry across Australia. Railtrain does not own any trains, does not run any trains and operates no trains (the closest is providing locomotive drivers). In January 2016, Railtrain commenced a process of replacing its enterprise agreements that covered employees in the Pilbara region of Western Australia, for both construction and maintenance and operations work, and which were approaching their nominal expiry date. The two replacement enterprise agreements were:

- *Railtrain Pty Ltd Rail Construction Pilbara Enterprise Agreement 2016* [2016] FWCA 560 (**Construction Agreement**); and
- *Railtrain Pty Ltd Rail/Civil Maintenance & Operations Pilbara Enterprise Agreement 2016* [2016] FWCA 1385 (**Maintenance & Operations Agreement**).

Both replacement enterprise agreements have now been approved by the FWC and have commenced in operation.

Union coverage issues in the Pilbara region

Railtrain and its employees engaged in bargaining for the Construction Agreement without any delays or concerns raised by the employees, with the relevant employees conclusively voting in favour for approval of the Construction Agreement on 15 January 2016, and it was subsequently approval by the FWC on 29 January 2016.

When the Maintenance & Operations Agreement entered the final stages of the bargaining process, the Australian Rail, Tram and Bus Industry Union (**ARTBIU**) asserted the right to represent a single rail maintenance worker who would be performing work covered by the enterprise agreement on the basis that he was a member of the union. Railtrain disputed the ARTBIU's entitlement to represent the industrial interests of the union member and declined to deal with the ARTBIU during bargaining.

The coverage clause of the Maintenance & Operations Agreement importantly provided:

> *"**2. PARTIES BOUND AND APPLICATION OF AGREEMENT***
>
> *2.1 This Agreement shall cover:*
>
> *(a) Railtrain Pty Ltd (ACN 145 155 666) (**Employer**);*
>
> *(b) the Employees of the Employer employed in the classifications contained in Clause 6 - Classifications and Base Rates of Pay of this Agreement when engaged in rail operations and maintenance works on resources project sites in the Pilbara Region (**Employees**).*
>
> *'Pilbara Region' means the region defined by Schedule 1 to the Regional Development Commissions Act 1993 (WA) comprising of the following local government districts: Shire of Ashburton, Shire of East Pilbara, Shire of Roebourne and the Town of Port Hedland."*

It is interesting to note that if the scope clause of the Maintenance & Operations Agreement was not as specific and was broader to cover an area outside of the Pilbara region, then there may have been a greater likelihood of the ARTBIU establishing coverage, because at least part of the work may not have been considered exclusively within the "mining industry". Employers in this regard need to be strategic about proposed agreement coverage, taking into account other requirements of the FW Act in relation to "fairly chosen".[32]

After conducting a successful ballot with the majority of employees in favour of approval, Railtrain applied to the FWC on 1 February 2016 for approval of the Maintenance & Operations Agreement. The following day the ARTBIU filed a Form F18 "Statutory declaration of employee organisation etc." which, amongst other things, asserted that the ARTBIU had been a bargaining representative for the Maintenance & Operations Agreement, and provided notice that it would apply to the FWC for an order that it be covered by the enterprise agreement once approved.

Railtrain objected to the ARTBIU being covered by the Maintenance & Operations Agreement. Although the ARTBIU rules permit it to represent rail industry workers generally, Railtrain's position was that the relevant industrial interests of any Railtrain employee in the Pilbara region were limited to relevant work under existing enterprise agreements which exclusively cover rail operations and maintenance works on resources project sites in the Pilbara region – which was the mining industry, not the rail industry.

The ARTBIU rules pertaining to membership eligibility relevantly state (**Rules**):

> *"(1) The following shall be eligible to become members of the Union:-*
>
> *(i) permanent or casual employees, including persons training for employment, in the tramway services of Australia and motor omnibus services and trolley bus services and light rail services run in conjunction therewith or controlled thereby, and also employees of the State Transit Authority of New South Wales, the Public Transport Corporation of Victoria, the State Transport Authority of South Australia, the Metropolitan Transport Trust Tasmania, the Brisbane City Council and the Metropolitan (Perth) Passenger Transport Trust and any Commonwealth, State or Local Government, in tramway or motor omnibus or trolley bus or light rail services together with such other persons whether employed in the industry or not who at any time when training for employment or working in the tramway, trolley bus, motor omnibus or light rail services have been admitted as members and who continue that membership.*
>
> *Provided nothing in this paragraph (i) shall permit the Union to enrol as members persons employed in the States of Victoria, Queensland, Tasmania and Perth as clerks, ticket examiners, depot starters, assistant depot starters or inspectors; and*
>
> *(ii) <u>an unlimited number of employees employed in or in connection with the Railway and Tramway industry or industries</u> governed and controlled directly by the Governments of the Commonwealth of Australia and the State of Queensland, New South Wales, Victoria,*

[32] See section 186(3) of the FW Act.

South Australia, Western Australia and Tasmania, or indirectly by such Governments, or any of them through Commissioners, Boards, Managers, Directors, or other means, and also all railway systems in the Commonwealth of Australia owned and controlled by private persons or companies, and the Secretary and/or any employee of the Railway Institute established by or under the direction or with the approval of the Commissioners, Boards, Managers, Directors or other controlling authorities of any of the railway systems in the Commonwealth of Australia; and

(iii) *(a) an unlimited number of railway employees (adult or junior, male or female) who become and remain members of the Union and persons who while being members of the Union retire from the railway industry upon the ground of ill health or having reaching retiring age and whose membership has not been terminated pursuant to these Rules;*

(b) for the purposes of sub-paragraph (iii)(a) above, "Employee" or "Railway Employee" means any officer or employee employed by any Railway Department and also any officer or employee employed in any railway system in the Commonwealth owned or controlled by private persons in corporations other than officers in a supervisory position employed at an annual rate of salary and shall include the Secretary or any employee of any Railway Institute established by or under the direction or with the approval of the Railway Commissioner or other controlling authority of any railway system in the Commonwealth and "Railway industry" has a corresponding meaning; and

(iv) *an unlimited number of persons employed in the Railway Train Running Industry including Locomotive Drivers, Electric Train Drivers, Firemen, Electric Helpers, Chargemen and Cleaners, Packers and Trimmers, Wash-out Men, Wash-out Men's Assistants, Motor Drivers and any other worker engaged in and about the working or management of or incidental to any Steam Locomotive or Motor driven by electricity or other power used on any Railway;*

Provided that, except as provided in Sub-Rule 4(3), 12(3) and 12(4), a person shall only be eligible to remain as a member while he/she continues to meet one or other of the eligibility criteria specified in the foregoing paragraphs." [33]
[Emphasis added]

The hearing was held on 29 March 2016 before Roe C. The ARTBIU sought to argue that that "industry-based eligibility" Rule 4(1)(ii) "*an unlimited number of employees employed in or in connection with the Railway and Tramway industry or industries… all railway systems in the Commonwealth of Australia owned and controlled by private persons or companies…"* was broad enough to capture members who performed work on private mining rail systems located in the Pilbara region – something that had never been tested before. The member's work was not in the tramway industry. It therefore begged the central question, was the member's work in the "railway industry".

[33] Rules of the Australian, Rail, Tram and Bus Industry Union, Rule 4(1).

As detailed below, this work has historically through a number of State (WA) demarcation awards been covered by other unions such as the Australian Workers' Union (**AWU**) and the Construction, Forestry, Mining and Energy Union (Mining Division) (**CFMEU**). For reasons which are still not clear, the ARTBIU sought to upset decades of established coverage in the Pilbara region by arguing for a construction of its Rules which was wholly inconsistent with the common understanding, which was likely to do nothing other than create a demarcation dispute.

Railtrain contended that the substantial character of the relevant business here, being that operated by labour hire services in the Pilbara region, could not be described as *"in or in connection with"* the *"railway and tramway industry"* or either of them in either the public or private sector. More relevantly, Railtrain argued that the work was not in the "railway industry" as it is plainly in the mining industry, according to everyone in every context. Every rule of construction set out above, supported such an outcome. Railtrain submitted that in the context of the Rules as a whole, and having regard to the principles identified above, the ordinary, industrially recognised meaning of "railway industry" does not include the specific sections of geographically and operationally isolated, purpose built rail track used only for the specific purpose of iron ore mining in the Pilbara region.[34]

On 30 March 2016 Roe C decided the case in favour of Railtrain, holding that the ARTBIU was not entitled to represent the industrial interests of any persons in relation to work that was covered by the Maintenance & Operations Agreement, and therefore the ARTBIU itself could not be covered.[35]

In relation to the construction of section 176(3) of the FW Act, Roe C held that:

> *"[15] I do not consider it helpful to construct two separate tests as suggested by Railtrain. Union eligibility rules are of either an occupational or industry character. If the rule is of an occupational character then a person might be eligible to join a union because of their usual occupation but they may be employed by an employer to perform work which does not include that occupation. In such circumstances the union would not be eligible to be a bargaining representative because it would not be entitled to represent the industrial interests of the employee in relation to the work that will be performed.*
>
> *[16] Where the union rule is of an industry nature then it is the industry of the employer which will determine eligibility. If the industry of the employer falls within the eligibility rule then it follows that the union will be entitled to represent the industrial interests in relation to the work that will be performed by the employee. However, it is possible for an employer to be in more than one industry. The industry or industries of the employer in relation to the work covered by a particular Agreement might be different from the industry or industries of the same employer covered by a different Agreement. For example, maintenance employers performing work for the mining industry are in some cases engaged in the Mining Industry, in some cases they are*

[34] See CFMEU Submissions to AIRC regarding Priority List: AM2008/1 at [42].

[35] See section 176(3) of the *Fair Work Act 2009* (Cth).

engaged in the Manufacturing or Maintenance Industry and in other cases they are engaged in both industries."

Roe C's reasoning in relation the proposed two test approach to section 176(3) of the FW Act is somewhat at odds. In reading the first sentence of paragraph [15] of the decision, it appears that Roe C rejects the two test approach, however his reasoning following from that seems to implicitly adopt the two test approach.[36] The Full Bench on appeal unfortunately did not deal directly with the correct construction of section 176(3) of the FW Act and whether the two test approach is the proper application required by the section.

Importantly, after examining the Rules in light of the principles set out above, Roe C went on to provide the following:

"[28] It is self evident that the Member worked performing maintenance work in or in connection with a railway system that is owned and controlled by a private company which is located within the Commonwealth of Australia. However, I am satisfied that unless Railtrain is engaged in the Railway Industry in respect to the work covered by the Agreement, the RTBU is not eligible to be a bargaining representative for the Member.

[29] Railtrain submit that the work is in the mining industry not the railway industry.

[30] Railtrain submit that the RTBU is not a party to other similar agreements. Railtrain point to submissions made during the process of creating the Rail Industry Award 2010 and Mining Industry Award 2010. Railtrain submit that the RTBU did not seek to assert an interest in the Mining Award or to assert that the private railway systems in the Pilbara were covered by the Rail Award. I am satisfied that the exclusions in the Rail Industry Award and the inclusions in the Mining Industry Award ensure that the work of Railtrain in the Pilbara is covered by the Mining Industry Award or the Manufacturing and Associated Industries and Occupations Award and not the Rail Industry Award. The RTBU supported the relevant exclusions from the Rail Industry Award for private mining railway systems and their inclusion in the Mining Industry Award.

[31] I accept the submission of Railtrain that the history of award coverage is relevant to the proper interpretation of union rules. (AMWU v ResMed [2016] FWCFB 22 at paragraph 81) This is because Awards were historically based upon industrial disputes which were in turn linked to union eligibility. The connection has been weakened under current legislation but the history is still relevant. The exclusion of private mining railway systems which are not interconnected and or available for general use has been a feature of relevant rail awards for many years. The inclusion of such private mining railway systems in the mining industry has also been a feature of relevant mining awards for many years.

[32] The RTBU has not sought to assert that it has a right to cover employees of FMG, Rio Tinto or BHP who operate or maintain their private mining railways in the Pilbara. They have effectively accepted that they operate in the Mining Industry. The RTBU argued that those companies like Railtrain who are

[36] See *Re Railtrain Pty Ltd* [2016] FWCA at [33].

contracted by FMG, Rio Tinto or BHP to do that work are in a different situation. The RTBU argue that they operate in the Rail Industry and not the Mining Industry."

In conclusion, after considering all of the uncontested evidence by Railtrain, Roe C importantly held that:

> *"[33] I am satisfied that Railtrain generally operates in the Rail Industry. However, the Agreement is in the Mining Industry and or the Manufacturing/Maintenance Industry and that part of Railtrain's operations covered by the Agreement are confined to the Mining Industry and or the Manufacturing/Maintenance Industry. I am therefore not satisfied that the RTBU is entitled to represent the industrial interests of the Member in relation to work that will be performed under the agreement."*

One of the most important aspects of was Roe C's finding that the work that would be performed under the Maintenance & Operations Agreement – consistent with the second limb of the two test approach in section 176(3) of the FW Act – was properly regarded as being in the mining industry for the purpose of union coverage, and not in the rail industry. As a result, the ARTBIU was not entitled to represent the "industrial interests" of the employee in relation to the work that will be performed under the Maintenance & Operations Agreement. This largely had to do with the uncontested evidence of Railtrain relating to mining industry work in the Pilbara region as well as the submissions provided by the CFMEU during the Award Modernisation process including the following:

> "[R]*ailways in the Pilbara* [are] *regarded as part of the mining rather than the railways industries…*"[37]

It was not the subject of contention in this case that the ARTBIU has never represented workers of the type in question in this case, on mining projects in the Pilbara region. It has always been the "turf" of the CFMEU and the AWU. The ARTBIU has accepted this, and accepted it during the Award Modernisation process.[38] Indeed, the CFMEU in the Award Modernisation process referred to an agreed position between the CFMEU, AWU and ARTBIU with respect to mining projects in the Pilbara region not being in or associated with the rail industry.[39]

Appeal by ARTBIU

On 14 April 2016 the ARTBIU lodged a notice of appeal to the Full Bench of the FWC (**FWCFB**) on what can fairly be summarised as a single ground: namely, that, contrary to Roe C's conclusion, the work to be performed under the Maintenance & Operations Agreement by its solitary (and then former) member is work performed in the "railway

[37] CFMEU Submissions to ARIC Regarding Priority List", (undated, AM2008/1), [42].

[38] See ARTBU Award Modernisation Submissions: AM2008/9 – Rail Industry Award June 2008; ARTBU Award Modernisation Submissions: AM2008/9 – Rail Industry Award July 2008.

[39] See Paragraphs 28 and 42 of the CFMEU Submissions to AIRC regarding Priority List: AM2008/1; paragraph 3.4 of the Modern Mining Award Pre-Drafting Outline of Submissions of the CFMEU; Rail Industry Pre Drafting Outline of Submissions of the CFMEU.

industry", thus qualifying it to act as his bargaining representative for the Maintenance & Operations Agreement. As a result, the ARTBIU argued that Roe C was obliged to make a note in his decision approving the Maintenance & Operations Agreement that the RTBU was covered by the agreement and his failure to do so meant that he acted outside of his jurisdiction.

The FWCFB was comprised of O'Callaghan SDP, Bull DP and Williams C and was heard in Perth on 10 May 2016. The FWCFB first considered whether permission to appeal should be granted in the matter. In finding that permission should not be granted, the FWCFB held that it was not satisfied that absence of a note providing that the ARTBIU is covered by the agreement represents a form of inherent unfairness or manifests an injustice to the employees covered by the Maintenance & Operations Agreement primarily because of the fact that it did not currently have a single member engaged under the Maintenance & Operations Agreement.

The FWCFB went on to find that, in any event, there was no error on the part of Roe C in his interpretation of the ARTBIU rules. They held that:

> *"[33] Notwithstanding a broad application of the ARTBIU rules, we think it must follow from the established custom and practice, endorsed by the ARTBIU, that it accepts that these rules do not provide for coverage of employees who are engaged in mining activities in the Pilbara. Indeed, the position adopted by the ARTBIU in the Award Modernisation process with respect to both the Rail Industry Award and the Mining Industry Award clearly indicates that the ARTBIU regarded the rail transportation of material between mines in Western Australia and ports, when conducted on railways owned and operated on behalf of mining companies were not part of the railway industry. This position is reflected in the provisions of the Railway Industry Award 2010. The position now argued by the ARTBIU appears to be substantially at odds with the limitations on its own rules which it has consistently acknowledged.*
>
> *[34] Consequently, and substantially because of these commitments made by the ARTBIU, we see no obvious error in the position adopted by the Commissioner to the effect that the ARTBIU was not entitled to represent the industrial interests of its member such that the conditions of s.176(3) were met. Had the ARTBIU historically adopted or established a different position with respect to coverage of employees in the Pilbara, we, together with the Commissioner, may well have reached a quite different conclusion."* [Emphasis added]

Importantly, in light of the interpretation principles above, upon consideration of the established custom and practice of representation in the Pilbara region, endorsed by the ARTBIU through the Award Modernisation process (with respect to the *Rail Industry Award 2010* and *Mining Industry Award 2010*), it was apparent to the FWCFB that the ARTBIU accepted that its own rules do not provide for coverage of employees who are engaged in *"rail transportation of material between mines in Western Australia and ports, when conducted on railways owned and operated on behalf of mining companies"*. The FWCFB held that this forms part of the mining industry, not the "railway industry", and that the position now advanced by the ARTBIU appeared to be substantially at odds with the limitations on its own rules which it has consistently acknowledged.

The FWCFB held that it was not satisfied that the ARTBIU had established error on the part of Roe C or that, in the absence of any such established error, permission to appeal should be granted, and the Appeal was dismissed on that basis.

Significance of Appeal

Railtrain maintained that work on the Pilbara railways has historically been covered by either the CFMEU or the AWU. Locomotive drivers in the Pilbara region have traditionally been represented by the CFMEU and other rail workers by the AWU. This position no doubt accords with other stakeholders' experience and understanding of the orthodox approach to union coverage for rail workers in the Pilbara region.

The finding of the FWCFB (upholding Roe C's decision) is significant because it serves to prevent the ARTBIU from using the enterprise bargaining process from encroaching on long-standing industrial arrangements for the representation of locomotive drivers and rail workers in the mining industry in the Pilbara region. The pattern of coverage established between the CFMEU and AWU has emerged from a long tradition of tension between those two unions on the issue. Introducing the ARTBIU – through the use of enterprise bargaining – into the mix would undoubtedly result over time in disputes over union demarcation not seen for many years in the Pilbara region.

The FWCFB adopted the relevant principles of union eligible rule interpretation and sought to focus on the custom and practice of union coverage in respect of the Pilbara region. In the absence of relevant awards denoting union coverage in the Pilbara region in relation to rail workers and locomotive drivers, it was open to the FWCFB to consider the submissions made by unions in the Award Modernisation process was able to evidence the custom and practice of union coverage in respect of the Pilbara region.

The FWCFB in this circumstance looked to section 176(3) of the FW Act in order to limit the ARTBIU's attempts to use the bargaining process to encroach on "new turf" to represent rail workers and locomotive drivers in the Pilbara region which has a long and settled industrial history. However the FWCFB noted that *"Had the ARTBIU historically adopted or established a different position with respect to coverage of employees in the Pilbara, we, together with the Commissioner, may well have reached quite a different conclusion"*.[40] The role of section 176(3) of the FW Act has demonstrated its critical function in curtailing ambitious unions from using the bargaining process to rapidly develop a custom and practice of representing members in geographical, industry or occupational areas that they have not traditionally been.

Observations and future reform

Free from the "shackles" of being named as a party in awards, ambitious unions are using the new enterprise agreement regime to expand their coverage into new industries and occupations. The approach taken by some unions is to establish a track-record of agreement coverage over workers in "new turf" in order establish a common understanding by way of custom and practice of coverage over a particular groups of workers in certain locations, industries and/or occupations. With the lesser role Modern Awards play in

[40] See *ARTBIU v Railtrain Pty Ltd* [2016] FWCFB 3153 at [34].

interpretation of unions eligibility rules, a greater focus in accordance with the principles set out above is likely to fall on current meaning in light of relevant developments in the industry and union rules can therefore change or take on more definition over time, which can include regard to evidence of the relevant industry understanding of terms. The two test approach in section 176(3) of the FW Act has a critical role to play in ensuring unions can only represent employees in bargaining where they are entitled to represent the "industrial interests" of that employee and *"in relation to the work that will be performed under the agreement"*. Employers need to be prudent in strategically considering the scope of agreements in order to limit exposure to possible claims by unions that they are entitled to be "bargaining representatives" in circumstances where they have never played a role in a particular industry or occupation before. Employers need to be cognisant of historical union coverage and look to preserve those well established lines of demarcation through strategic industrial relations in order to avoid the possibility of introducing a foreign union into a particular geography, industry or occupation. Employers who fail to take these strategic considerations into account only serve to expose themselves to costly demarcation disputes between competing unions.

There have been recent announcements concerning possible union mergers between the Maritime Union of Australia (**MUA**) and the CFMEU at a national level.[41] There is also rumoured that other transport/logistics industry-based unions may also contemplate merging with the MUA and CFMEU. Serious concerns in relation to mergers such as this that provide a single union the ability to possibly control an entire supply-chain – particularly in the mining industry (mine/rail/port) – are beyond ventilation within the remit of this paper. At the time of writing this paper the MUA currently have proceedings before the FWC alleging they are entitled to represent the industrial interests of crane operators, doggers and riggers on Barrow Island at the Gorgon LNG Facility.[42] It is concerning in the context of a proposed merger between the MUA and CFMEU that moves are now being made by the MUA to cover these types of workers that are most akin to CFMEU coverage. The first step will be through right of entry precedents and then targeting contractors through enterprise bargaining to cement their claim of coverage (custom and practice, common understanding). This no doubt forms part of a grander plan for the MUA in the context of the CFMEU merger to establish a custom and practice of covering offshore crane operators, doggers and riggers in the offshore oil and gas industry in pursuit of a larger claim of coverage of those employees working on offshore oil and gas platforms – which have historically been covered by the AWU. This scenario presents a significant offshore demarcation dispute the size and magnitude Australia has never seen before. It will only serve to further demonstrate Australia is a risky place to do business and distract necessary investment in oil and gas projects costing Australia and jobs at a time the industry needs it most. [43]

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[41] Maritime Union of Australia, 'Principles for Amalgamation', 10 March 2016, available at http://www.mua.org.au/principles_for_amalgamation

[42] See *MUA v Toll Energy Logistics Pty Ltd; Kellogg Joint Venture Gorgon* (RE2016/540), Perth, Commissioner Cloghan, 3 October 2016, transcript available at: https://www.fwc.gov.au/documents/documents/transcripts/20161003_re2016540.htm

[43] Note the preconditions for a "representational order" under section 134 of the *Fair Work (Registered Organisations) Act 2009* (Cth) effectively require a demarcation dispute to be threated or occurring before any application can be made.

In light of this, there is a serious need to undertake a "union rule modernisation process" that would seek to modernise the ambiguous and often deliberately confusing union eligibility rules to create clear lines of coverage along geographical, industry and occupational lines in order to avoid costly union demarcation disputes. This process could be suitably undertaken by a body like the proposed Registered Organisations Commission (**ROC**), over a set period of time.[44] It is likely that most coverage issues could be resolved between unions by consent, in a similar display of maturity between unions shown through Award Modernisation. Any contests for coverage, such as offshore crane operators, doggers and riggers would be contested before the ROC in a civil manner that would not involve the threat or existence of costly demarcation disputes costing projects lost time and money. This function would also be consistent with the "representational orders" powers under the *Fair Work (Registered Organisations) Act 2009* (Cth). The powers of the ROC in the context of union rules and mergers would also be complementary to any absolutely necessary function the ROC must be empowered to undertake in relation to approval of union mergers by way of a "public interest test" as recently suggested by the Minister for Employment.[45]

[44] The "union rule modernisation process" would also seek to (amongst other things) develop a common set of replaceable rules similar to the *Corporations Act 2001* (Cth) (**Corps Act**) that would apply to all unions to create similar standards in regards to conduct of elections, duties/accountability of union officials and financial transparency (along with appropriate civil and criminal penalties akin to the Corps Act), beyond what is currently provided in the *Fair Work (Registered Organisations) Act 2009* (Cth). See also the 79 recommendations handed down in Volume 5 of the Final Report of the Royal Commission into Trade Union Governance and Corruption.

[45] See Minister for Employment, Policy Statement, 'The Coalition's Commitment to Fairness and Transparency in Workplaces', 17 July 2016, available at https://www.liberal.org.au/latest-news/2016/06/17/coalitions-commitment-fairness-and-transparency-workplaces.