



FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work (Registered Organisations) Act 2009*  
s.158(1) RO Act - Application for change of name of organisation

### **Australian Federated Union of Locomotive Employees, Queensland Union of Employees** (D2010/5008)

SENIOR DEPUTY PRESIDENT  
RICHARDS

BRISBANE, 15 MARCH 2011

*Application for change of organisation's name – Regulation 124 of the RO Regulations – whether second notification of grounds to objection – whether new or additional grounds to the objection – whether submissions bearing on original grounds - whether discretion at s.158 confined or at large – comparison with Industrial Relations Act 1988 - s.19(1)(g) of the RO Act – Regulation 179 – scope to vary requirements of regulations – whether “special circumstances” - limitations on varying procedural Regulations - anachronism - whether name change undermines practical effect of eligibility rule.*

[1] The Australian Federated Union of Locomotive Employees, Queensland Union of Employees (“**AFULEQ**”) filed an application on 18 June 2010 seeking Fair Work Australia’s (“**FWA**”) consent to change its name to the Australian Federated Union of Locomotive Employees (“**AFULE**”). The Rail Tram and Bus Industry Union (“**RTBU**”), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (“**the RO Act**”) filed an objection to the AFULEQ’s application.

[2] For purposes of an application of this kind, the *Fair Work (Registered Organisations) Regulations 2009* (“**the RO Regulations**”) provide for the relevant procedural machinery.

[3] The RO Regulations relevantly state as follows:

#### ***121 Application for consent to change of name or alteration of eligibility rules of an organisation (s 158 (1))***

*(1) An organisation may apply to FWA for the consent of FWA under subsection 158 (1) of the Act to:*

- (a) change the name of the organisation; or*
- (b) alter the eligibility rules of the organisation.*

*(2) An application under sub regulation (1) must:*

- (a) be in the form set out in the Procedural Rules of FWA or in a form otherwise approved by the President; and*
- (b) set out:*
  - (i) if the application is for consent to change the name of the organisation — the proposed name and the reason for the proposal; or*

(ii) if the application is for consent to alter the eligibility rules of the organisation — the proposed alteration, the reason for the proposal and the effect of the proposal, in sufficient particularity to allow the proposal to be properly considered; and

(c) contain a declaration:

(i) that the change or alteration was made in accordance with the rules of the organisation; and

(ii) stating the action taken under those rules to make the change or alteration; and

(iii) verifying the facts stated in the application; and

(d) be lodged with FWA; and

(e) if the application is for consent to alter the eligibility rules of the organisation — be lodged with a copy of the rules that are proposed to be altered.

(3) If an application under sub regulation (1) is not in accordance with this regulation, the General Manager must tell the applicant how the application or statement does not comply with the regulation.

(4) An organisation that has a web site must publish on its web site a notice that it has lodged the application mentioned in sub regulation (1).

### **122 Notification of application for consent to change of name or alteration of eligibility rules (s 158)**

As soon as practicable after receiving an application under subregulation 121 (1), the General Manager must publish a notice in the Gazette stating that the application has been received.

[...]

### **124 Change of name or alteration of eligibility rules of organisation — objections (s 158)**

(1) Any interested organisation, association or person (the **objector**) may, no later than 35 days after a notice of the receipt of an application under subregulation 121 (1) (the **original application**) is published in the Gazette, lodge with FWA a notice of objection to the change of name, or the alteration of the eligibility rules, to which the original application relates.

(2) The notice of objection must:

(a) be lodged with FWA; and

(b) comply with the requirements of regulation 14.

(3) FWA may allow an objector to amend a notice of objection if:

(a) a further application is made; and

*(b) the objector satisfies FWA that the objector has further grounds for objection arising from the application mentioned in paragraph (a).*

*(4) Within 7 days after a notice of objection is lodged with FWA, the objector must serve a copy of the notice on the organisation that lodged the original application.*

*(5) An organisation:*

*(a) may, no later than 14 days after service on it under sub regulation (4) of a copy of the notice of objection, lodge with FWA, in answer to the objection, a written statement signed by an officer of the organisation authorised to sign the statement; and*

*(b) must, no later than 7 days after lodging a written statement under paragraph (a), serve a copy of the statement on the objector.*

### ***125 Change of name etc — hearing of application for consent (s 158)***

*(1) FWA, in dealing with an application under sub regulation 121 (1), must not:*

*(a) refuse to grant the application without giving the applicant an opportunity to be heard; or*

*(b) grant the application without giving any objector who has complied with regulation 124 an opportunity to be heard.*

*(2) FWA must, to give the applicant and an objector mentioned in paragraph (1) (b) (the **objector**) an opportunity to be heard:*

*(a) fix a time and place for a hearing; and*

*(b) notify the applicant and the objector of the time and place so fixed.*

*(3) FWA may, at the time and place fixed for the hearing, give directions relating to the manner in which the hearing is to proceed and may:*

*(a) determine the matter without further delay; or*

*(b) adjourn the proceedings to a later day; or*

*(c) with the agreement of the applicant and the objector, determine the matter on a later day without a further hearing.*

**[4]** Section 158 of the RO Act makes provision for the change of the name of an organisation, and it reads as follows:

### ***158 Change of name or alteration of eligibility rules of organisation***

*(1) A change in the name of an organisation, or an alteration of the eligibility rules of an organisation, does not take effect unless:*

*(a) in the case of a change in the name of the organisation—FWA consents to the change under this section; or*

*(b) in the case of an alteration of the eligibility rules of the organisation:*

*(i) FWA consents to the alteration under this section; or*

*(ii) the General Manager consents to the alteration under section 158A.*

*(2) FWA may consent to a change or alteration in whole or part, but must not consent unless FWA is satisfied that the change or alteration has been made under the rules of the organisation.*

(3) *FWA must not consent to a change in the name of an organisation unless FWA is satisfied that the proposed new name of the organisation:*

- (a) is not the same as the name of another organisation; and*
- (b) is not as similar to the name of another organisation as to be likely to cause confusion.*

(4) *FWA must not consent to an alteration of the eligibility rules of an organisation if, in relation to persons who would be eligible for membership because of the alteration, there is, in the opinion of FWA, another organisation:*

- (a) to which those persons could more conveniently belong; and*
- (b) that would more effectively represent those members.*

(5) *However, subsection (4) does not apply if FWA accepts an undertaking from the organisation seeking the alteration that FWA considers appropriate to avoid demarcation disputes that might otherwise arise from an overlap between the eligibility rules of that organisation and the eligibility rules of the other organisation.*

(6) *FWA may refuse to consent to an alteration of the eligibility rules of an organisation if satisfied that the alteration would contravene an agreement or understanding to which the organisation is a party and that deals with the organisation's right to represent under this Act and the Fair Work Act the industrial interests of a particular class or group of persons.*

(7) *FWA may also refuse to consent to an alteration of the eligibility rules of an organisation if it:*

- (a) is satisfied that the alteration would change the effect of any order made by FWA under section 133 about the right of the organisation to represent under this Act and the Fair Work Act the industrial interests of a particular class or group of employees; and*
- (b) considers that such a change would give rise to a serious risk of a demarcation dispute which would prevent, obstruct or restrict the performance of work in an industry, or harm the business of an employer.*

(8) *Subsections (6) and (7) do not limit the grounds on which FWA may refuse to consent to an alteration of the eligibility rules of an organisation.*

(9) *Where FWA consents, under subsection (1), to a change or alteration, the change or alteration takes effect on:*

- (a) where a date is specified in the consent—that date; or*
- (b) in any other case—the day of the consent.*

(10) *This section does not apply to a change in the name, or an alteration of the eligibility rules, of an organisation that is:*

- (a) determined by FWA under subsection 163(7); or*
- (b) proposed to be made for the purposes of an amalgamation under Part 2 of Chapter 3 or Division 4 of Part 7 of Chapter 11; or*
- (c) proposed to be made for the purposes of a withdrawal from amalgamation under Part 3 of Chapter 3.*

[5] By way of background I note that the RTBU covers locomotive employees (particularly operators\drivers) across Australia. The AFULEQ is limited to the same class of employees who are employed in or in connection with the relevant kind of employment in Queensland.

[6] The principal concern of the RTBU (at least so far as it was particularised in the notice of objection of 12 August 2010 – which is discussed below) is that the proposed name change will convey the impression that the AFULEQ can provide coverage nationally, and to the detriment of the industrial interests of the RTBU.

[7] The AFULEQ purports to seek to change its name for a number of reasons. One of these is that the AFULEQ became a registered organisation on 6 November 2008 under the *Workplace Relations Act 2006* (“the WR Act”). The name of this organisation is identical to the name of its state counterpart, the Australian Federated Union of Locomotive Employees, Queensland Union of Employees, which is an association registered under the *Industrial Relations Act 1999 (Qld)* (“the Qld IR Act”). This creates a number of difficulties of an administrative nature and in relation to external compliance issues (such as right of entry and financial accounting obligations) as they relate to the apparent dual structure of organisation.

[8] The inclusion of the words “Queensland Industrial Union of Employees” in the name of the state counterpart of the federal AFULEQ is a condition of registration under the Queensland IR Act. It is therefore not possible to excise those words from the name of the State association. The inclusion of such words is not a condition of registration as an organisation under the RO Act.

[9] Rule 4(2) of the AFULEQ’s Rules provides that the organisation shall only be eligible to represent members employed within Queensland.

### **Fair Work (Registered Organisations) Regulations 2009**

[10] Before proceeding further, it is necessary to ensure that the mandatory procedural steps required to be taken by the AFULEQ as the applicant and the RTBU as the objector have been discharged in accordance with the RO Regulations.

[11] Sub regulations 121(1)(a) and 121(2)(a) of the RO Regulations require the AFULEQ to have made application and to have done so on a Form conforming to FWA’s procedural rules. The AFULEQ made such an application on the prescribed Form on 18 June 2010.

[12] Sub regulation 121(2)(b) of the RO Regulations requires that the AFULEQ must have set out the nature of the name change and the reasons therefore. The completed Form and attached declaration provided such information.

[13] Sub regulation 121(2)(c)(i) of the RO Regulations requires that the AFULEQ provide a declaration that the change of name was made in accordance with the Rules of the organisation. The declaration attached to the application so declares. The declaration was signed by the State Secretary of the AFULEQ and was duly witnessed.

[14] Sub regulation 121(2)(c)(ii) of the RO Regulations requires that the declaration set out the action taken to make the change to the name of the organisation. Paragraph 2 of the

declaration provided by the AFULEQ, along with attachments GS-1 through to GS-7 (inclusive), set out the actions taken by the AFULEQ in these regards. In so doing, the declaration also verifies the facts as stated for the purposes of sub regulation 121(2)(c)(iii) of the RO Regulations.

[15] Sub regulation 121(2)(e) of the RO Regulations requires that a copy of the rules that are proposed to be altered be provided along with the application for consent to the change of name of the organisation. A copy of these rules were provided with the application to FWA. Attachment GS-2 to the above mentioned declaration comprised such a set of rules.

[16] Sub regulation 121(4) of the RO Regulations requires the AFULEQ to publish on its website notice of its application for consent to change its name. A search reveals that the AFULEQ has published such a notice on its website and a screen dump of that notice is retained on file.

[17] Regulation 122 of the RO Regulations requires the General Manager of FWA to provide for the gazettal of the application as soon as practicable after receipt of the application. The General Manager so provided on 14 July 2010 (Commonwealth of Australia Gazette No GN 27, 14 July 2010).

[18] Sub regulation 124(1) of the RO Regulations allows for objections to be made within 35 days of the gazettal of the application. The RTBU's Notice of Objection (under Form 58) was made on 12 August 2010. The gazettal took place on 14 July 2010. The objector's notice is therefore compliant with the requirements of sub regulation 124(1) of the RO Regulations.

[19] Sub regulation 124(2) of the RO Regulations sets out that the objection to the application for FWA's consent must be made to FWA and conform to Regulation 14 of the RO Regulations. The objection was lodged with FWA on the date cited above (12 August 2010).

[20] Regulation 14 of the RO Regulations reads as follows:

***14 Content of notices of objections lodged with FWA***

*A notice of objection lodged with FWA must:*

- (a) state the name and address of the organisation, association or person lodging the notice of objection (the **objector**); and*
- (b) state the grounds of objection; and*
- (c) set out the particulars of each ground of objection; and*
- (d) briefly state the facts the objector relies on for each ground of objection.*

[21] The notice of objection lodged by the RTBU meets each of the four requirements of Regulation 14 of the RO Regulations. In respect of Sub regulation 14(a), I observe that s.8 of the RO Act defines an organisation as being an organisation that is registered under the RO Act. No question arises that the RTBU is an organisation for the RO Act's purposes and has the status to make the objection it has.

[22] Sub regulation 124(3) of the RO Regulations sets out that the notice of objection may be amended subject to a further application being made and the objector satisfying FWA that the objector has further grounds for objection arising from the further application.

[23] It appears that a further notice of objection was received by FWA from the RTBU on 7 January 2011. That application sought leave to canvass a broader objection on more general grounds permitted by the terms of s.158(3) of the Act than the original notice of objection made on 12 August 2011. This matter concerned essentially whether FWA is narrowly confined by the words in s.158(3) of the RO Act, which is discussed below.

[24] On its face, the RO Act is prescriptive about the circumstances in which amended notices of objection can be made. There having been no further application which gives rise to new or amended objections, leave cannot be granted to amend the notice of objection.

[25] It is not immediately clear what a further application might refer to, though I suspect it may allude to an application under s.25 of the RO Act, by which an Applicant association might seek leave to change its name or amend its rules in order to comply with the RO Act's requirements. Such amendments, advanced through a "further application", might well give reasonable cause for an objector to file new grounds to its original notice of objection.

[26] That said, the circumstances of this matter require some closer attention. Having filed the Notice of Objection of 7 January 2011, it appears (from an undated file notation by an FWA administrative employee) that the RTBU contacted FWA and sought to characterise the material lodged with the Notice as a submission in relation to the Notice of Objection as filed on 12 August 2010 and not as a new Notice of Objection based on new grounds. The document attached to the Notice of Objection of 7 January 2011 was headed "Outline of Submissions for the Objector".

[27] The Notice of Objection filed on 12 August 2010 stated that the ground of the objection was that:

"...the proposed new name of the organisation is so similar to the name of the Australian Rail Tram and Bus Industry Union as to be likely to cause confusion."<sup>1</sup>

[28] The particulars and facts relied upon by the RTBU as an Objector were put as follows:

"The RTBU is the long established organisation of employees in the rail industry throughout Australia and in particular covers locomotive employees including operators/drivers. The AFULEQ is limited to that class of employees employed in or in connection with Queensland employment. The proposed new name conveys the impression and will convey the impression that the AFULE can operate beyond Queensland to the detriment of the industrial interests of the RTBU."<sup>2</sup>

[29] The AFULEQ filed its Response to Notice of Objection on 24 August 2010. This response was directed at the above particulars put forward by the Objector.

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<sup>1</sup> Notice of Objection filed 12 August 2010.

<sup>2</sup> Notice of Objection filed 12 August 2010.

**[30]** The Outline of Submissions filed by the RTBU on 7 January 2011 as an attachment to the Notice of Objection of that same date raised a number of issues, including the following (in summary):

- i. The proposed new name conveys the impression that the AFULEQ can operate beyond Queensland to the detriment of the industrial interests of the RTBU;
- ii. A Full Bench of the Australian Industrial Relations Commission (“AIRC”) in *Re s.18(b) RAO Schedule - Application for registration by an association of employees Australian Federated Union of Locomotive Employees, Queensland Union of Employees* [2008] AIRCFB 362 made clear the registration of the AFULEQ was conditional upon its eligibility rule being confined to Queensland;
- iii. The proposed new name of the AFULEQ sought to undermine the practical effect or impact of the finding of the Full Bench (see PN29 of [2008] AIRCFB 362);
- iv. The principal basis for the RTBU’s objection is that the new name of the organisation is so similar to the name of the RTBU as to be likely to cause confusion;
- v. In determining whether any such confusion is likely to arise, FWA may take into account wider concerns than the narrowly confined words of s.158(3) of the RO Act;
- vi. Section 158 of the RO Act vests a discretion in FWA to approve a change of name of an organisation contingent upon three conditions initially being established; they being the change of name occurred under the rules of the organisation; the name is not the same as another organisation and the name is not so similar to the name of another organisation as to be likely to cause confusion;
- vii. Once having established the specific obligations under s.158(2) of the RO Act and s.158(3) of the RO Act, FWA has a discretion to consider other matters such as “industrial comity and adherence to an organisation’s rules”;
- viii. In this latter regard, the RTBU submitted that there was evidence of the AFULEQ having encouraged the establishment of an “AFULE NSW Branch”;
- ix. Adopting the approach of looking at the entirety of the proposed named change along with its constituent elements, the word “locomotive” in the title of the AFULEQ and the proposed new name (the AFULE) was likely to cause confusion with the RTBU for reason that the RTBU has Locomotive Divisions within its organisation;
- x. The “impression” which the proposed name change conveys – which is to suggest the organisation can recruit members nationally – will create confusion with the RTBU and its existing and potential members.

**[31]** In its submissions filed on 31 January 2011, the AFULEQ contended that I should decline to grant permission for the RTBU “to amend its notice of objection” as the submissions “introduce additional grounds of objection”. The RTBU had not met the conditions (as stipulated at Regulation 124(3) of the RO Regulations) required to be satisfied before FWA might allow for an amended notice of objection. The primary requirement of

Regulation 124(3) of the RO Regulations is that the Applicant, the AFULEQ in this case, has introduced new matters.

[32] I am satisfied that the RTBU's submissions of 7 January 2011 represent a departure from the terms of its Notice of Objection filed on 12 August 2010 or otherwise demonstrate additional grounds of objection. It is items vii - ix above that mostly appear to me to agitate new grounds.

[33] Regulation 179 of the RO Regulations reads as follows:

***179 Proceedings before FWA***

*(1) In any proceedings before FWA, FWA may exempt a person from compliance with a procedural requirement under the Act or these Regulations if FWA is satisfied there are special circumstances.*

*(2) An exemption under subregulation (1) may be granted:*

- (a) absolutely; or*
- (b) subject to conditions.*

*(3) Failure to comply with a procedural requirement for proceedings before FWA does not render the proceedings void but the proceedings may be:*

- (a) set aside, either wholly or in part, as irregular; or*
- (b) amended; or*
- (c) otherwise dealt with as and how FWA thinks fit.*

[34] In matters of procedure, FWA may exempt a person from compliance where there are "special circumstances".

[35] In *Australian Community Services Employers Association, Queensland Union of Employers* [2008] AIRC 592 I adopted the following approach to exercising the discretion under Regulation 179 of the RO Regulations:

**DID ACSEA MAKE AN APPLICATION FOR LEAVE UNDER S.25 OF THE RAO SCHEDULE TO ALTER ITS RULES?**

[31] Section 25(1) of the RAO Schedule states in part that:

"The Commission may, on the application of an association applying to be registered as an organisation, grant leave to the association, on such terms and conditions as the Commission considers appropriate, to change its name or to alter its rules [...]."

[32] The discretion to grant leave is subject to an application being made by the applying association, in this instance, to alter its rules.

[33] How is an application made in this regard?

[34] Regulation 27 of the RAO Regulations reads as follows:

“An application by an association under section 25 of the RAO Schedule to change its name or alter its rules must, unless the Commission otherwise directs, be:

(a) in the form set out in the Rules of the Commission or in a form otherwise approved by the President; and

(b) lodged in the Industrial Registry.”

[35] Regulation 27 of the RAO Regulations stipulates, subject to a direction by the Commission, that an application for leave under s.25 of the RAO Schedule must be made in the form set out in the *Australian Industrial Relations Commission Rules 2007* (“the AIRC Rules”) and lodged in the Registry.

[36] Currently there is no form set out in the AIRC Rules, the RAO Regulations or the WR Regulations relevant to an application for leave under s.25 of the RAO Schedule.

[37] In such circumstances an association would be required by Rule 5(2) of the AIRC Rules to utilise Form R59, which is a form of general application when no other form exists.

[38] ACSEA did not apply to alter its rules by way of filing a Form R59 in the Registry. ACSEA instead “applied” in transcript during the hearing.

[39] Regulation 179 of the RAO Regulations reads as follows:

“179 Proceedings before Commission

(1) In any proceedings before the Commission, the Commission may exempt a person from compliance with a procedural requirement under the RAO Schedule or these Regulations if the Commission is satisfied there are special circumstances.

(2) An exemption under sub regulation (1) may be granted:

(a) absolutely; or

(b) subject to conditions.

(3) Failure to comply with a procedural requirement for proceedings before the Commission does not render the proceedings void but the proceedings may be:

(a) set aside, either wholly or in part, as irregular; or

(b) amended; or

(c) otherwise dealt with as and how the Commission thinks fit.”

[40] In my view the circumstances invoke the Commission’s jurisdiction under Regulation 179(3)(c) of the RAO Regulations.

[41] I have decided that ACSEA ought not be required to make an application to alter its rules by way of Form R59. To decide otherwise would be to put ACSEA to unnecessary costs and further delay.

[42] Instead, I think fit to accept the application as having been made and having been lodged in the Registry in effect by way of the application made at the hearing and as preserved in the transcript of these proceedings and as otherwise recorded in this decision.

[43] I am empowered to so exempt ACSEA from the procedural requirement in Regulation 27 of the RAO Regulations absolutely by way of Regulation 179 of the RAO Regulations.

[36] In this instance, special circumstances arose because there was no prescribed form that ACSEA could have utilised to effect its application, there were no objectors to ACSEA's application, and any obligation to utilise a ubiquitous AIRC Form would have caused delay and additional transaction costs to the Applicant association.

[37] What are the special circumstances attaching to the instant case?

[38] No reasons were advanced at the hearing or thereafter (where such an opportunity was expressly provided for in the context of Regulation 179 of the RO Regulations) that satisfy the precondition that is necessary to the exercise of the discretion to exempt compliance with the procedural requirement of the RO Regulations. That is, FWA was not taken to any circumstances for the advancement of new and further grounds for objection, let alone any "special circumstances".

[39] On this basis, I am not able to exercise the discretion in Regulation 179 of the RO Regulations because I am disempowered from doing so.

[40] I should add that I have doubt, in any event, that Regulation 179 of the RO Regulations might be utilised to allow an objector to avoid compliance with Regulation 124(3) of the RO Regulations.

[41] It appears to me that Regulation 124(3) of the RO Regulations is of a particular character. That is, Regulation 124(3) of the RO Regulations stipulates that FWA may only exercise a power to amend a notice of objection subject to two preconditions being in existence at the same time:

- (3) *FWA may allow an objector to amend a notice of objection if:*
  - (a) *a further application is made; and*
  - (b) *the objector satisfies FWA that the objector has further grounds for objection arising from the application mentioned in paragraph (a).*

[42] Regulation 124(3)(a) of the RO Regulations requires a factual situation to have been in existence: a further application must have been made. Regulation 124(3)(b) of the RO Regulations requires FWA to be satisfied the grounds advanced are indeed "further grounds" which arise from the "further application". As I explained above, this is likely to be a reference to an application under s.25 of the RO Act.

[43] In the ordinary course, an exemption from a procedural requirement might extend to facilitating an outcome that would otherwise been permissible but for a formal requirement, such as the requirement to lodge a particular form or to provide notice in the prescribed manner. The matters that are required by Regulation 14 of the RO Regulations are a case in point. It was matters of this kind that informed my approach in [2008] AIRC 592, which I have cited above.

[44] But here, I am invited to exercise my discretion under Regulation 179 of the RO Regulations to set aside compliance with a more complex Regulation (that being Regulation 124(3) of the RO Regulations) than a mere procedural requirement of the kind discussed above.

[45] It appears to me that where a Regulation under the RO Act makes FWA's power to act under that Regulation subject to certain prescribed preconditions being met, FWA must act cautiously before it sets that requirement aside under s.179 of the RO Regulations. This is particularly so in the current circumstances in which the preconditions of Regulation 124(3) of the RO Act have not been discharged for all practical purposes, or where there is no mere formality standing in the way of the objector realising its objective (as there was in the case of my decision in [2008] AIRC 592).

[46] That said, the limitation on FWA's power to accept an amended Notice of Objection might appear to be anachronistic, particularly given that the tribunal functions in the setting of procedural fairness. Indeed, as I mentioned at the time of the hearing itself, it is common that matters will arise along the way in determining an application such as this which are not set out in the Notice of Objection, but which are, in effect, objections to which an Applicant association must respond. Regulation 124(3) of the RO Regulations appears based on a particularly rigid view of the modern determinative process.

[47] In the event, I am wrong in any of the above regards, and given that I have heard the parties on all the issues raised in relation to this application at the hearing and by further submissions thereafter, I will give my views nonetheless as to grounds agitated by the RTBU in the discussion below in relation to the requirements of s.158 of the RO Act. This may give some small comfort to the Objector - the RTBU.

[48] That all said, I will now return to considering the various requirements of the RO Regulations.

[49] Sub regulation 124(4) of the RO Regulations requires that the objector, the RTBU, serve a copy of the notice on the AFULEQ within 7 days after a notice of objection is lodged with FWA.

[50] The AFULEQ has given evidence in these proceedings that the RTBU conformed with the requirements of sub regulation 124(4) of the RO Regulations.

[51] Sub regulation 124(5) of the RO Regulations provides that the AFULEQ may lodge with FWA, in answer to the objection, a written statement signed by an officer of the organisation authorised to sign the statement. This statement must be lodged no later than 14 days after service on it under sub regulation 124(4) of the RO Regulations of a copy of the notice of objection. The AFULEQ must, no later than 7 days after lodging such a written statement, serve a copy of the statement on the objector.

[52] Such a response by the AFULEQ was provided on 24 August 2010.

[53] The RTBU gave evidence in these proceedings that the AFULEQ served that response on that organisation within the requisite time period.

### **Section 158 of the Fair Work (Registered Organisations) Act 2009**

[54] For the purposes of s.158 of the RO Act, FWA is vested with a discretion (at s.158(2) of the RO Act as set out above) to consent to the name change. This discretion is to be exercised subject to various preconditions being satisfied. I will firstly address the various preconditions.

[55] Pursuant to s.158(2) of the RO Act, FWA may only consent to a change of name where the change of name has been in accordance with the rules of the applicant organisation – the AFULEQ.

[56] As I have set out above in relation to the requirements of sub regulation 121(2)(c)(ii) of the RO Regulations, the applicant organisation provided a declaration setting out the action taken to make the change to the name of the organisation. Paragraph 2 of the declaration provided by the AFULEQ, along with attachments GS-1 through to GS-7 (inclusive), set out the actions taken by the AFULEQ in these regards. In so doing, the declaration also verified the facts as stated for the purposes of sub regulation 121(2)(c)(iii) of the RO Regulations.

[57] These same facts are sufficient to discharge the requirement of s.158(2) of the RO Act, because they set out in detail the manner in which the change of name of the organisation was given effect under the organisation’s rules. Little purpose would be served by me replicating that process in writing for the purposes of this decision; the facts are a matter of record.

[58] Pursuant to s.158(3) of the RO Act, FWA must not consent to a change in the name of an organisation unless FWA is satisfied that the proposed new name of the organisation:

(a) is not the same as the name of another organisation; and

(b) is not so similar to the name of another organisation as to be likely to cause confusion.

[59] No claim can be made, and no claim by the RTBU is made, that the proposed new name of the organisation is the same as the name of another organisation or the objector’s organisation.

[60] However, the objector does contend that the name change is so similar to its organisation so as to be likely to cause confusion. The principal contention in this regard is that the name change in so far as it removes reference to Queensland, conveys the impression that AFULEQ operates beyond Queensland and to the detriment of the industrial interests of the RTBU as the objector. The wider argument in this regard is that the change of name “seeks to undermine the practical effect” of the essential requirement of the AFULEQ’s registration as a transitionally registered association, and subsequently as an organisation,

which was the preservation of its eligibility rule as it was immediately before its registration as a transitionally registered association<sup>3</sup>.

[61] The RTBU also contends (though for the above reasons not within the confines of the Notice of Objection) that s.158(2) of the RO Act preserves a general discretion for FWA not to approve the application. To this end, the RTBU argues that the language of s.158(2) of the RO Act had changed significantly from the language of s.204(3) the *Industrial Relations Act 1988* (“**the IR Act**”), which read:

*(3) A designated Presidential Member shall not consent to a change in the name of an organisation unless the Presidential Member is satisfied that the proposed new name of the organisation:*

- (a) is not the same as the name of another organisation; and*
- (b) is not so similar to the name of another organisation as to be likely to cause confusion.*

[62] Section 204(3) of the IR Act, by including the mandatory language “shall not consent unless...” did not allow for the exercise of discretion on the part of the then AIRC. According to the RTBU, the current language of s.158(2) of the RO Act, however, vests FWA with a general discretion to refuse the application in addition to other specific obligations under s.158(2) of the RO Act and s.158(3) of the RO Act.

[63] The RTBU argues that the issue that should bear on FWA’s general discretion is that the AFULEQ has encouraged the establishment of a NSW Branch, and the change of name is an element in a wider agenda by the AFULEQ to give an impression it can recruit members outside of the geographical confines of its eligibility rule. That is, the AFULEQ is not acting in accord with its own eligibility rule.

[64] The AFULEQ would have me read s.158 of the RO Act narrowly, and upon satisfaction of the textual requirements of s.158(2) and s.158(3) of the RO Act it contends I must approve the change of name of the organisation. To do otherwise would be to act contrary to, or else go beyond the requirement s.19(1)(g) of the RO Act as it relates to requirements for registration of an organisation. In this regard, s.19(1)(g) of the RO Act, which stipulates the criteria for registration of an organisation, states that an association may apply for registration as an organisation if and only if:

*“the association does not have the same name as that of an organisation or a name that is so similar to the name of an organisation as to be likely to cause confusion.”*

[65] It appears to me that s.158(3) of the RO Act focuses attention relevantly upon the name of the organisation for which a change is sought. Section 158(3) of the RO Act obligates FWA to consider each of the discrete words of the name change proposed, those words in any combination, along with the name change itself read as an integrated description of the organisation in contrast to any other organisation with which there might be a potential for confusion of identity.

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<sup>3</sup> See [2008] AIRCFB 362, 7 May 2008 and [2008] AIRCFB 786, 30 October 2008.

[66] FWA must not approve a change of name unless it is satisfied the change of name has been made under the rules of the applicant organisation (which is a matter about I have disposed of above) and that the proposed change of name is not the same as the name of another organisation and (or) is not so similar to the name of another organisation as to be likely to cause confusion.

[67] FWA has no power to consent to a change of name of an organisation unless the above conditions are satisfied.

[68] However, s.158(2) of the RO Act states that:

*“FWA may consent to a change in whole or in part [...]”* [my emphasis]

[69] Despite the language of the provision having changed over time, it does not appear to me that the statute has moved from a mandatory requirement (under s.204(3) of the IR Act) to a general discretion under s.158(2) of the Act.

[70] The Explanatory Memorandum to the WR Act is silent on the change in language, which occurred in the passage of that legislation in 1996.

[71] It appears to me that taken in its context s.158(2) of the Act extends a limited discretion to FWA, not a general discretion.

[72] The language of the statute does not, in my view, suggest a statutory discretion which is at large or couched in general terms. The auxiliary verb “may”, in the context of s.158(2) of the RO Act, extends a limited discretion to FWA to grant the application in whole or part (once it is established that the change of name was made in accordance with the applicant organisation’s rules, the proposed name is not the same as the name of any other organisation, and if there is any similarity between the proposed name and that of an existing organisation, that no confusion is likely to be caused).

[73] The discretionary auxiliary verb does not operate outside of this confined framework to allow FWA a power to consider matters extraneous to than those stipulated in s.158 of the RO Act.

[74] If it did, then FWA might refuse an application for a change of name even though the requirements of s.158(2) of the RO Act and s.158(3) of the RO Act had been satisfied, in that the name change had been made in accordance with the organisation’s rules, was not the same as any other organisation’s name, nor so similar that it was likely to cause any confusion. The structure of the section does not appear to me to contemplate such an outcome. As Counsel for the AFULEQ contended, such an outcome also would be disharmonious with the operation of s.19(1)(g) of the RO Act.

[75] What then of the conditions precedent to the exercise of the discretion (as I have found it to be) at s.158(2) of the Act?

[76] Having dealt with s.158(3)(a) of the RO Act above, in my view, for the purposes of s.158(3)(b) of the RO Act, the name change as sought is not so similar to that of the RTBU so that it raises the likelihood of confusion. The language of the name change as sought, neither in its components or full phrasing gives rise to any association with the RTBU. The fact that

the term “locomotive” is present in the name change and is reflected in Divisions of the RTBU also raises no issue, just as it raised no issues in relation to s.19 of the RO Act at the time the organisation was registered and the RTBU was an objector.

[77] I add that it is unchallenged in this matter that the eligibility rule of the Applicant organisation has not been changed and the organisation’s industrial coverage is limited. It is only able to recruit eligible members employed in or in connection with Queensland. The name of the organisation if changed is not able to affect the limitation of the eligibility clause under the organisation’s rules. There is no application to that effect, and no such change has been sought to that end in accordance with the AFULEQ’s rules, in any event.

## CONCLUSION

[78] The requirements of s.158(3) of the RO Act have been met.

[79] Accordingly, for the purposes of s.158(1) and s.158(2) of the RO Act, I will exercise my discretion to consent in whole to the application to change the name of the AFULEQ.

[80] Section 158(9) of the RO Act reads as follows:

*“Where FWA consents, under subsection (1), to a change or alteration, the change or alteration takes effect on:*

*(a) where a date is specified in the consent—that date; or*

*(b) in any other case—the day of the consent.”*

[81] Section 158(10) of the RO Act reads:

*“This section does not apply to a change in the name, or an alteration of the eligibility rules, of an organisation that is:*

*(a) determined by FWA under subsection 163(7); or*

*(b) proposed to be made for the purposes of an amalgamation under Part 2 of Chapter 3 or Division 4 of Part 7 of Chapter 11; or*

*(c) proposed to be made for the purposes of a withdrawal from amalgamation under Part 3 of Chapter 3.”*

[82] Section 158(10) of the RO Act is not relevant to this application.

[83] Accordingly, for purposes of s.158(9)(a) of the RO Act, FWA’s consent to change the name of the AFULEQ will come into effect on 23 March 2011.



SENIOR DEPUTY PRESIDENT

*Appearances:*

*Ms Hartigan* of Counsel for the Applicant

*Mr Nolan* of Counsel for the Objector

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