PAINT MANUFACTURING INDUSTRY CASE[1]

(The Federated Miscellaneous Workers Union of Australia v The National Union of Storeworkers, Packers and Allied Workers & Dulux Australia)

1. *Introduction*

A professed aim of the federal government is to make Australia's workforce more productive, flexible and internationally competitive.[2] This desire is reflected in the new Industrial Relations Act 1988 (Cth) (hereinafter called 'the Act'), with its focus on developing industry based unions[3] to replace the existing craft based structures. The union movement, of its own accord, is also moving towards industry-based unionism. The A.C.T.U. plans to amalgamate the present 300-plus unions to 20 mega-unions along industry lines.[4]

The Australian Industrial Relations Commission (hereinafter called 'the Commission') has been vested with broad-ranging powers under s. 118 of the Act, to resolve demarcation disputes. It has demonstrated its willingness to use these powers to make orders for single union coverage at individual enterprises[5] thus increasing efficiency at these workplaces. In the *Paint Manufacturing Industry* case, the Commission has expanded its role significantly, awarding single union coverage across an industry, rather than just individual enterprises. This decision is a source of concern to the A.C.T.U., as it allows employers, through the aegis of the Commission, to force union rationalization on the employers' terms.[6]

2. *History of Section 118*

Section 118 is one of the Hancock Report[7] inspired alterations to the old Conciliation and Arbitration Act 1904 (Cth) (hereinafter called 'the Act'). Section 118 replaced s. 142A of the old Act as the mechanism for dealing with demarcation disputes by making orders as to the rights of unions[8] to represent particular groups or classes of workers. Section 142A itself was inserted upon recommendation of the Sweeney Report[9] in 1974.[10] S. 118(3)(a) is largely based on the old s. 142A(1).[11] S. 118(3)(c) is largely based on the old s. 142A(2)(a).[12] S. 118(3)(b) is a new section. It

1 (1990) Print J4165. Australian Industrial Relations Commission, 31 August 1990, Munro J.

2 Carew, E., *Keating* (1st ed. 1988) 199.

3 *E.g.*, the registration provisions in s. 189(1)(d) and s. 189(3). The rules for eligibility in s. 204.(4) and the community of interest test for amalgamations in s. 239(2).

4 ACTU, *Future Strategies for the Union Movement* (1987) para 5.1.8.

5 *FIA v. Comalco Aluminium and ors* (1989) Print J0381 (The *Southern Aluminium* case).

6 *Age* (Melbourne), 15 October 1990.

7 Cth, *Report by the Committee of Enquiry into Australian Industrial Relations Law and Systems* (1985) (commonly referred to as the Hancock Report).

8 Note that the Act speaks of 'organizations' rather than unions or employer groups. S. 4(1) defines an 'organization' as 'an organization registered under this Act', and the registration provision s. 189, restricts registration to two groups; an 'association of employers' or an 'association of employees'.

9 Cth, *Report of the Committee of Inquiry on Co-ordinated Industrial Organizations* (1974) (commonly referred to as the Sweeney Report).

10 Trew, J. L., Shaw, J. W. and McCarry, G. J., *Federal Industrial Law* (1988) 2879.

11 S. 118(3) [Orders of the Commission] Without limiting the powers of the Commission in relation to demarcation disputes, the Commission may, for the purpose of preventing or settling a demarcation dispute, but subject to sub-section 202(3), make one or more of the following orders:
(a) an order that an organization of employees shall have the right, to the exclusion of another organization or organizations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organization;
(b) an order that an organization of employees that does not have the right to represent under this Act the Industrial interests of a particular class or group of employees shall have that right;
(c) an order that an organization of employees shall not have the right to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organization.

12 S. 142A(2)(a) was introduced by the Fraser government in 1977. In no reported case has an order been made under s. 142A(2)(a).

gives the Commission the power to grant coverage of a particular group of employees even if the union did not previously have the right to represent the particular group. As a consequence, by exercising its powers under s. 118(3)(c), the Commission can alter the eligibility rule of a union, so as to expand its coverage. Immediately prior to the enactment of the Act, the government stated that the s. 118 powers would expend the Commission's role, allowing the Commission 'to change union rules permanently, to give effect to its decisions.'[13]

3. *Section 118 in operation*

There are two main conditions that a s. 118 order need satisfy: first, that the powers are exercised in 'the public interest'[14], and secondly that the Commission have regard to any *agreement* that deals with the right of a union to represent a particular class of employees.[15]

Though these two requirements are important in delimiting the boundaries of the Commission's s. 118 powers, the Commission's self-imposed criteria for making orders under s. 118 are likely to be as, if not more, important than the legislative principles in determining the practical operation of the s. 118 orders.

The attitude of the Commission towards demarcations, based on representational grounds rather than efficiency needs, has been tough-minded. In the first application of its s. 118 powers, in the *Southern Aluminium* case, the Commission removed the potential for efficiency reducing demarcation disputes to occur by making an order for single-union coverage at the plant in question, agreeing with the employer that 'one registered organization of employees representing production employees'[16] would 'create a multiskilled and flexible workforce'.[17] The Commission was willing to use its s. 118 powers to force single-union coverage at the work-place.

4. *A.C.T.U. Policy*

A.C.T.U. policy, on the other hand, envisages three types of unions. This tri-union policy allows for 'principal' unions, 'significant' unions and 'other' unions[18] to be formed in each industry. The 'principal' and 'significant' unions are to form 'single bargaining units'. Thus under A.C.T.U. policy there is room for more than one union at a workplace.

At an enterprise level, the Commission's rigourous single-union approach to removing efficiency-impeding demarcations and the A.C.T.U.'s tri-union policy are not necessarily in conflict. It is possible not to have any efficiency reducing demarcations at each enterprise in an industry, whilst still having three unions operating in the industry as a whole. The real conflict, as the *Paint Manufacturing Industry* case shows, occurs when the Commission widens its focus from the enterprise to the industry level, by implementing a single union policy across a whole industry.

For example, an application of s. 118 powers to force the establishment of single union industries has particularly severe ramifications for craft-based unions, because, by definition, their membership straddles many different industries. Under the A.C.T.U. plan, although it may be unlikely for a craft-based union to become a 'principal' union in any given industry, it would have some hope of a continued existence in the industry as a 'significant' union. But a spate of adverse single union s. 118 rulings could see a craft-based union slowly disintegrate, as its membership is hived off to other unions.

5. *The Facts*

The paint industry is dominated by three manufacturers: Dulux, Taubmans and Wattyl. These three employers account for about 70% of the employment in the industry. Only two unions had a presence in the industry. The F.M.W.U. was the dominant union with almost three times as many member in the industry as the N.U.W.

13 Trew, J. L., Shaw, J. W. and McCarry, G. J., *Federal Industrial Law* (1988) 2877.
14 S. 90 of the Act.
15 S. 118(4) of the Act.
16 The *Southern Aluminium* case, 72.
17 The *Southern Aluminium* case, 71.
18 *Australian Financial Review* (Sydney), 7 August 1990.

In July 1989, the major employers drew up a list of demarcation issues, which the two unions were required to address, as a condition precedent to gaining the second tier wage increase available under the 1989 National Wage Case principles.

The unions did not work together to address the demarcation matters, because of 'the unavailability or non-participation of the N.U.W. representatives'.[19] In fact only the F.M.W.U. responded to the employers' grievances. The F.M.W.U. provided the employers with a plan for the resolution of the demarcation matters, in March 1990.

At the Dulux site in Rocklea Queensland, trouble was brewing. Initially the F.M.W.U. was the dominant union at the Rocklea site. Yet the N.U.W. managed to enrol all the F.M.W.U. members, with a promise from the Dulux Rocklea Operations Manager of an increase in pay for all workers if a single union site could be formed. This (N.U.W.) single union site was formed on 27 April 1990, and the N.U.W. and Dulux entered into a site agreement soon after.

The F.M.W.U. leadership was upset at losing its Rocklea members in this way and sought a s. 118 order from the Commission to settle the demarcation dispute. Clearly, no actual demarcation dispute existed. Since the F.M.W.U. no longer had members at Rocklea, it could not be in dispute with the N.W.U. at Rocklea. Yet Munro J. found that a *threatened*[20] demarcation dispute existed, encompassing the other manufacturing sites around Australia, at which the N.U.W. and F.M.W.U. both had members. This was based on the ruling in the *Southern Aluminium* case, in which the 'Full Bench indicated that the scope for the jurisdiction based upon prevention of a demarcation dispute derives from s. 118.'[21]

6. *Arguments*

Three parties made submissions to Deputy President Justice Munro. They were the F.M.W.U. the N.U.W. and the main employer representative, the Australian Paint Manufacturing Federation (A.M.P.F.).

(i) *F.M.W.U.*

The F.M.W.U. put forward two proposals. First it argued that the Commission should make a s. 118(3) order to give the F.M.W.U. exclusive coverage of the paint industry. Secondly it argued that if a s. 118(3) order was not made for the whole industry, it should at least be made for the Rocklea site in the F.M.W.U's favour. The remaining sites should be dealt with in a manner depending upon the ratio of N.U.W.:F.M.W.U. members, with some sites becoming exclusive F.M.W.U. workplaces and some remaining joint sites.

(ii) *A.M.P.F.*

The A.M.P.F. argued for *single union companies*. It proposed that Dulux be made an exclusive N.U.W. company, and the other manufacturers be made exclusive F.M.W.U. companies, again using s. 118.

(iii) *N.U.W.*

The N.U.W. argued for no change. It argued that demarcation disputes could be accommodated by using 'flexible working arrangements at the demarcation interface'.[22] Further, even if union rationalization had to occur, the proper course was to follow A.C.T.U. policy, rather than by the imposition of single union sites by the Commission.[23]

The N.U.W. is a craft-based union, formed by the amalgamation of the Storeman & Packers and

19 *Paint Manufacturing Industry* case, 7.
20 This expanded definition of an industrial dispute is found in s. 4(1) and is based on the preventative limb of the labour power; s. 51(XXXV) of the Constitution.
21 *Olex Cables v. N.U.W. & F.I.A.* (1990) Print F5566 (The *Olex Cables* case).
22 *Paint Manufacturing Industry* case, 6.
23 *Ibid.* 28.

the Rubber & Allied Workers unions. One month before this dispute in another s. 118 case, the N.U.W. was excluded from representing workers involved in shipping depots.[24] Thus the potential for the N.U.W. to have its membership further reduced was clear to the N.U.W. leadership, who argued that A.C.T.U. policy rather than the Commission should determine their representational rights.

7. *The Decision*

Munro J. adopted the F.M.W.U.'s primary argument, and granted the F.M.W.U. exclusive coverage for the whole paint industry. The Commission has stated that it will look 'to an overall assessment of the facts and circumstances'[25] and it is therefore instructive to look at the criteria used by the Commission in exercising its s. 118 powers.

(i) *Rights of workers to be represented by organisation of their own choice*

Munro J. quoted the Full Bench in the *Southern Aluminium* case:

> The use that might be made by the Commission of its powers under s. 118, in settling or preventing demarcation disputes, to rationalize industrial representation and, where appropriate, establish single or limited union representation at an enterprise has to be carefully balanced with the *rights of existing employees to be represented by the organization of their choice* [my emphasis]. There may be situations where the latter consideration will prevail over the former but each instance when an order might be made under s. 118 will ultimately have to be assessed having regard to the circumstances of the particular case.[26]

Munro J. stated that the N.U.W. members regard the N.U.W. as an 'institution which is a significant part of the work, social and perhaps political sub-culture in which they operate.'[27] Nevertheless he refused to allow members of the N.U.W. the right to continue to belong to the N.U.W. suggesting that the F.M.W.U. was a large and well-resourced union, which could protect the interests of the employees 'in much the same way as the N.U.W. does'.[28] Munro J. went on to praise the F.M.W.U. for being 'generally more responsive to employer need'.[29]

Justice Munro's comments represent a reversal of Riordan J.'s views in *Re FJ Walker Foods Pty Ltd*[30] that the wishes of the relevant employees should be given 'far greater weight' than the wishes of the employer. Here, the converse is true. The employer's wishes have clearly been given 'far greater weight' than the employees'. The wishes of the N.U.W. workers at Rocklea have been ignored.

(ii) *Position of agreements*

As noted above, the Commission is required to have regard to any relevant agreement[31] dealing with the coverage rights of a union. The ambit of this provision is very broad. The Commission must have regard to *any* agreement affecting *any* union's coverage rights over *any* group of employees. The agreement could be between two or more unions or between employers and unions. Even A.C.T.U. policy on union rationalization would be covered, as it represents an inter-union agreement affecting representational rights. Despite the broad ambit, the Commission has given very little weight to a certain class of agreement. The Commission has viewed agreements negotiated between employers and unions outside the auspices of the Commission unfavourably. Munro J. approved the comments of the Full Bench in the *Southern Aluminium* case:

> Speaking more generally, if agreements are negotiated privately over time between an employer and one organization of employees and publicly unveiled shortly before or as part of proceedings in which orders may be made under s. 118 then disputes may well be created and not prevented.

24 *Association of Employers of Waterside Labour v. W.W.F. & N.U.W.* (1990) Print J3618 (The *Container Terminals* case).
25 *Paint Manufacturing Industry* case, 29.
26 *Ibid.* 19.
27 *Ibid.* 36.
28 *Ibid.* 37.
29 *Ibid.* 33.
30 *Re FJ Walker Foods Pty Ltd* (1987) 24 I.R. 253.
31 Section 118(4) of the Act.

Munro J. held that the site agreement was 'struck in association with a unilateral membership changeover'[32] and thus should be regarded with caution. Also unions at other sites were likely to press for a flow-on of the conditions under the Rocklea site agreement. Disputation would be thus likely to increase rather than decrease if the Commission recognized the agreement. Whether the Commission will give more weight to other types of agreements (specifically A.C.T.U. policy) is discussed below.

(iii) *Behaviour of the parties — Clean Hands?*

Clearly, Munro J. was unhappy with the behaviour of the N.U.W. prior to and during the dispute. The N.U.W. was held to be responsible for the fact 'that twelve months after proposals for elimination of demarcation practices were made, the unions are at loggerheads.'[33] Munro J. found further that the N.U.W. had manipulated 'expectations of a pay increase'[34] in order to induce the F.M.W.U. members at Rocklea to join the N.U.W.

This reasoning is similar to that of Deputy President Polites in the *Container Terminals* case, where he excluded the N.U.W. because 'the N.U.W. has used its membership in the depots to impose secondary boycotts upon employers in other industries'.[35] In these cases, the general behaviour of the N.U.W. was relevant. The Commission seems to be implementing an equivalent to the equitable doctrine of 'clean hands'. The behaviour of the parties is to be taken into account.

(iv) *Single union industry preferred*

Munro J. held that the development of single union sites minimized demarcation problems and disputation. Single union industries are even more likely to prevent demarcation disputes, and since the Act encouraged the formation[36] of industry-based unions, Munro J. held that single industry unions should be formed in preference to single union sites.[37] Thus, the A.M.P.F.'s submission for single union companies was dismissed. Similarly, the N.U.W.'s proposal was dismissed as being unworkable. It would do nothing to prevent future demarcation disputes; only defer them.

(v) *Role of the A.C.T.U.*

The A.C.T.U. is accorded a special position under s. 118. Under s. 118(2)[38], the Commission may consult with the A.C.T.U. about the timing of the exercise of the powers. The government envisaged that s. 118(2) would give the Commission a 'discretion to allow the A.C.T.U. to attempt to settle disputes before exercising its own powers.'[39] Theoretically, this gives the A.C.T.U. time to settle any problems through its own mechanisms, and according to its own policy, by delaying the hearing date in the Commission. However in this case, the A.C.T.U. was not given the opportunity to alter the hearing date.[40]

Furthermore, Munro J. was indifferent to the fact that the F.M.W.U. had breached A.C.T.U. policy by notifying the Commission of a dispute before exhausting the mechanisms of the A.C.T.U. As Munro J. stated, 'I am willing to draw any adverse inference against the F.M.W.U. for failing to settle the matter through the A.C.T.U.'[41]

Thirdly and perhaps most importantly, Munro J. questioned the usefulness of the A.C.T.U. tri-union policy, in circumstances where a demarcation dispute exists, by caustically noting that, '[t]o

32 *Paint Manufacturing Industry* case, 41.
33 *Ibid.* 23.
34 *Ibid.* 39.
35 *Ibid.* 24.
36 N. 3, *supra*
37 *Paint Manufacturing Industry* case, 34.
38 Section '118(2) [Advice] The Commission may seek advice from an appropriate peak council about the timing of the exercise of any of the Commission's powers in relation to a demarcation dispute.'
39 Trew, *et al.*, *op. cit.* 2877.
40 *Ibid.* 9.
41 ACTU, 'Demarcation Disputes under the Industrial Relations Act' (1989) *ACTU Industrial Information Services* Pt 7, 6.

give weight to the policy as a sensible solution in such circumstances would be at the expense of recognising the problems sought to be remedied in these proceedings'.

Thus, in Munro J.'s view, the A.C.T.U. tri-union policy does not represent a 'sensible solution' to demarcation problems. Given that this policy *is* the A.C.T.U.'s mechanism for dealing with demarcation problems, Munro J.'s comment stands as an indictment of the policy. Munro J.'s statement, when viewed with the refusal by his Honour to allow the A.C.T.U. to defer the hearing, and the subsequent refusal by his Honour to censure the F.M.W.U. for breaching A.C.T.U. policy suggests that he is both distancing himself from the A.C.T.U. and setting up the Commission as an alternative to the A.C.T.U. Union rationalization through the Commission on an *ad hoc* basis, rather than by the A.C.T.U. method, appears to be his Honour's preferred route.

8. *Reaction by the N.U.W. and F.M.W.U.*

The F.M.W.U. was pleased with the decision. The federal secretary of the F.M.W.U. Mr Jeff Lawrence said the decision showed 'a union can't body-snatch 70 people and get away with it'.[42] The N.U.W. on the other hand refused to accept the decision. The federal secretary of the N.U.W. Mr Greg Sword described the decision as 'outrageous' and 'provocative'.[43] He said that there would be 'enormous turmoil'[44] as a result of the decision. He was right. The paint industry in Sydney was closed down for a week, while in Melbourne, N.U.W. workers at Dulux's Clayton plant struck for a fortnight in protest at the decision. Plainly, these members of the N.U.W. do not share Munro J.'s view that the F.M.W.U. will look after their interests 'in much the same way as the N.U.W. does'.[45]

The N.U.W. has not relied on industrial remedies alone. It has instituted an appeal to the Full Bench, based on two grounds: first, that A.C.T.U. policy should have been accorded more respect and second that the order was not in 'the public interest', in that the order has caused more disruption than it has solved. On the second of November, the Full Bench granted leave to appeal, and has set a date for December 1990.

9. *The Amendments*

At the time of writing, the Industrial Relations Amendment Act 1990 (Cth) (hereinafter referred to as the 'amending Act'), has just passed the second reading stage. The amending Act deals largely with union amalgamations,[46] but it also alters s. 118, by repealing[47] the present s. 118 and substituting two new sections, s. 118 and s. 118A. The proposed s. 118A contains all the substantive provisions of the present s. 118(3). Thus the orders the Commission can make under s. 118(3) of the Act will still be able to be made under s. 118A of the amending Act.

The substituted provisions are different from the present s. 118 in two key respects, Firstly, the need for the Commission to find a 'demarcation dispute' as a condition precedent to the exercise of its powers is removed.[48] That is, the Commission can use its s. 118A powers to make orders, upon application of a union, an employer or the Minister, without any of the parties having to demonstrate that a demarcation dispute, whether actual or threatened, exists.[49]

Secondly, the Commission, when exercising its powers under the new s. 118A, is forced to consider whether it should consult with appropriate peak councils. Further, the Commission is not restricted to seeking advice simply on the timing of its powers, it may consult generally.[50] The ambit

42 *Australian Financial Review* (Sydney), 3 September 1990.
43 *Ibid.*
44 *Ibid.* 5 September 1990.
45 *Paint Manufacturing Industry* case, 37.
46 Industrial Relations Amendment Act 1990 (Cth), s. 15.
47 *Ibid.* s. 10.
48 Industrial Relations Amendment Act 1990 (Cth), s. 10, reads in part, 's. 118A(1) Subject to subsection 202(3), the Commission, may, on application of an organization, an employer or the Minister, make the following orders: . . .' Compare this with the Act, s. 118(3) '. . . the Commission may, for the purpose of preventing or settling a demarcation dispute, but subject to subsection 202(3), make one or more of the following orders . . .'
49 Analagous to s. 142A of the old Act in this respect.
50 Industrial Relations Amendment Act 1990 (Cth), s. 10, reads in part, 's. 118A(2) In considering whether to make an order under subsection (1), the Commission:

of any consultation with the A.C.T.U. would obviously include the A.C.T.U.'s own policy on union representation. Thus, this amendment envisages a corporatist approach to the issue of union representation at the workplace, with the A.C.T.U. being more closely bound up in the Commission's decision making process.

Munro J.'s rejection of the A.C.T.U.'s 'significant' and 'principal' union policy indicates that an adoption of a corporatist approach to the new consultative power is no certainty. Whether Munro J.'s approach is to be followed by his fellow Presidential Members awaits a Full Bench decision.

10. *Conclusions and the Future*

The Industrial Relations Commission has in the *Paint Manufacturing Industry* case advanced the process of union rationalization in two ways. First, in the paint industry it has instituted single union representation, thus overcoming the inefficiencies present under the previous dual representation system. The Commission has shown that it is willing to overlook the rights of employees to be represented by the organization of their own choice, the efficacy of privately negotiated agreements and the role of the A.C.T.U. when exercising its s. 118 powers.

More importantly, Munro J. has in the *Paint Manufacturing Industry* case signalled to both employers and the union movement that the Commission is no longer content to allow the A.C.T.U. inspired rationalization to continue so slowly. Munro J. has distanced himself from the A.C.T.U. approach to union rationalization. His Honour has demonstrated his willingness to form single union industries, in conflict with A.C.T.U. policy.

Certainly the A.C.T.U. has responded to the *Paint Industry Manufacturing* case, by stepping up the pace of its own programme for union rationalization. The union movement is worried that rationalization may occur, in future, on the employers' terms using s. 118.[51]

Whether that fear is justified is not certain. The new amendments to the Act are in conflict with Munro J.'s approach. The amendments attempt to pull the Commission and the A.C.T.U. closer together, while Munro J. has sought to assert the Commission's powers, independently of the A.C.T.U.. The Commission's approach to the amendments will be instructive. Mr Ian Macphee[52] suggests that the Commission will adopt a corporatist approach to its powers. According to him, s. 118A may well prove to be the mechanism by which Mr Bill Kelty's[53] union-amalgamation plan is bedded down, with the Commission working as an adjunct to the A.C.T.U.[54] Mr John Howard[55] predicts a similar result, suggesting that s. 118A will make it 'almost impossible [for the Commission] to grant single union coverage without A.C.T.U. approval.'[56]

Despite all the attention, particularly from the media, that the A.C.T.U.'s plans for amalgamation and award-restructuring have received, it may well be that they will be eclipsed by one section in the Industrial Relations Act. A section that ostensibly deals with demarcation disputes but actually operates as a de-facto union rationalization provision, and after the amendments are passed will operate as a union rationalization on employers' terms. On the other hand, s. 118A may be the actual mechanism by which Mr Kelty's grand plan is implemented. It is with the Commission. Only time will tell if the *Paint Manufacturing Industry* case represents a time-bomb ticking beneath the A.C.T.U.'s union amalgamation plan, or simply a small hurdle to be cleared by Mr Kelty in his conquest to restructure Australian unionism.

STUART WOOD*

(a) must consider whether it should consult with appropriate peak councils that are representative of organizations representing employees or organizations representing employers; and
(b) may consult with appropriate peak councils;'
Compare with s. 118(2) of the Act, n. 38 *infra*.

51 *Age* (Melbourne), 15 October 1990.

52 Formerly Minister for Industrial Relations in the Fraser government.

53 National Secretary ACTU.

54 Macphee, I., 'Patterns for Industrial Relations in the 1990's: Decentralising from within the Centralised system.' *5th Foenander Lecture*, Melbourne University, 23 October 1990.

55 Shadow Minister for Industrial Relations.

56 *Australian Financial Review* (Sydney), 5 September 1990.

* Law/Science Student, University of Melbourne. I would like to thank Graham Smith for all his help in writing this casenote.