



## Industrial Court of New South Wales

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Case Title: Health Services Union NSW

Medium Neutral Citation: [2014] NSWIRComm 10

Hearing Date(s): 9 December 2013

Decision Date: 21 March 2014

Jurisdiction: Industrial Court of New South Wales

Before: Walton J, President

Decision: The Court makes the following declaration:

That invalidities occurred in the management or administration of the Health Services Union NSW ('HSU NSW') for the financial years 1 October 2010 to 30 September 2011 and 1 October 2011 to 30 September 2012.

The Court makes the following orders pursuant to s 288(3) of the *Industrial Relations Act 1996*:

That upon the basis of such invalidities, the Court, being satisfied that the following orders do not do substantial injustice to HSU NSW or to any member or creditor of HSU NSW or to any person having dealings with HSU NSW, orders:

- (a) that by preparing, lodging and making available to members unaudited accounts for the period 1 October 2010 to 30 September 2011, HSU NSW is taken to have complied with s 282 of the *Industrial Relations Act 1996* and ss 508, 510, 517 and 518 of the *Industrial Relations Act 1991* in respect of the financial year 1 October 2010 to 30 September 2011; and
- (b) by preparing, lodging and making

available to members balance sheets for the period 1 October 2011 to 30 June 2012 and audited accounts for the period 1 July 2012 to 30 September 2012, HSU NSW is taken to have complied with s 282 of the *Industrial Relations Act 1996* and ss 508, 510, 517 and 518 of the *Industrial Relations Act 1991* in respect of the financial year 1 October 2011 to 30 September 2012.

The Court makes the following directions pursuant to s 288(4) of the *Industrial Relations Act 1996*:

HSU NSW shall lodge with the Industrial Registrar and make available to its members on its website copies of the following documents:

(a) the unsigned audited report prepared by BDO (NSW-Vic) Pty Ltd for the year ending 30 September 2011 which is annexure AL-2 to the affidavit of Andrew Lillicrap sworn 11 July 2013;

(b) the Balance Sheet and Profit & Loss Statement prepared by VJ Ryan & Co Pty Ltd for 30 June 2012 which are annexure AL-5 to the affidavit of Andrew Lillicrap sworn 11 July 2013; and

(c) the audited financial statements prepared by Nexia Court & Co for the period from 1 July 2012 to 30 September 2012 which is annexure AL-8 to the affidavit of Andrew Lillicrap sworn 11 July 2013.

Catchwords:

UNION RULES – irregularities – invalidities in management or administration of HSU NSW between October 2010 and September 2012 – application to declare invalidities – application for rectification orders – principles – invalidities in accounts and financial record keeping – discretion to rectify irregularities exercised – declaration, orders and directions made

Legislation Cited:

Industrial Relations Act 1991  
Industrial Relations Act 1996

Cases Cited:

Brown & Ors v Health Services Union & Ors [2012] FCA 644; (2012) 205 FCR 548  
Liquor, Hospitality and Miscellaneous Union,

New South Wales Branch [2006]  
NSWIRComm 244  
Master Builders' Association of New South  
Wales (No 3) [2010] NSWIRComm 39;  
(2010) 196 IR 70  
Newcastle Master Builders' Association  
[2007] NSWIRComm 57  
Seamens' Union of Australia New South  
Wales Branch [2001] NSWIRComm 151;  
(2001) 107 IR 90  
The Australian Workers' Union, New South  
Wales [2008] NSWIRComm 160

Texts Cited:

Category: Principal judgment

Parties: Health Services Union NSW (Applicant)

Representation

- Counsel: M Gibian of counsel (Applicant)

- Solicitors: Maurice Blackburn Lawyers (Applicant)

File number(s): IRC 609 of 2013

Publication Restriction:

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## JUDGMENT

- 1 By a further amended application (by draft orders filed on 18 December 2013 varying the relief sought in the amended application of 21 August 2013), the Health Services Union NSW ('HSU NSW') seeks a declaration, orders and consequential directions under s 288 of the *Industrial Relations Act 1996* ('the Act') with respect to invalidities in the management or administration of that Union between October 2010 and September 2012.
- 2 Notwithstanding that notice of these proceedings was given by public notice in two metropolitan newspapers and by email and post (on two

occasions) to the members of HSU NSW (by direction of the Court), there was no contradictor in the proceedings. In those circumstances, the Court issued directions resulting in the applicant adducing a substantial body of evidence in support of the application by affidavit.

- 3 Evidence was adduced by affidavit from the following persons: Andrew Lillicrap, Assistant Secretary-Treasurer of HSU NSW (four affidavits, the last of which was filed 18 December 2013 in response to questions raised by the Court); Dennis Robertson, Consultant to Western Woodley & Robertson, Chartered Accountants and Consultants; and Robert Mayberry, Chartered Accountant and Partner of Nexia Court & Co (again, whose affidavit was filed on 18 December 2013 in consequence of matters raised with the applicant by the Court).

### **The Relief Sought**

- 4 The declaration and orders sought by HSU NSW under s 288(3) of the Act were in the following terms:

1. A declaration that invalidities occurred in the management or administration of the Health Services Union NSW ("HSU NSW") for the financial years 1 October 2010 to 30 September 2011 and 1 October 2011 to 30 September 2012.

2. That upon the basis of such invalidities, the Court, being satisfied that the following orders do not do substantial injustice to the HSU NSW or to any member or creditor of HSU NSW or to any person having dealings with HSU NSW, orders:

- (a) that by preparing, lodging and making available to members unaudited accounts for the period 1 October 2010 to 30 September 2011, the HSU NSW is taken to have complied with s 282 of the 1996 Act and ss 508, 510, 517 and 518 of the 1991 Act in respect of the financial year 1 October 2010 to 30 September 2011; and

- (b) by preparing, lodging and making available to members balance sheets for the period 1 October 2011 to 30 June 2012 and audited accounts for the period 1 July 2012 to 30 September 2012, the HSU NSW is taken to have complied with s 282 of the 1996 Act and ss 508, 510, 517 and 518 of

the 1991 Act in respect of the financial year 1 October 2011 to 30 September 2012.

5 In the further amended application, and after oral submissions delivered on 9 December 2013 by Mr M Gibian of counsel on behalf of the applicant, directions were also sought pursuant to s 288(4) of the Act, as follows:

1. The HSU NSW lodge with the Industrial Registrar and make available its members on its website copies of the following documents:

(a) The unsigned audited report prepared by BDO (NSW-Vic) Pty Ltd for the year ending 30 September 2011 which is annexure AL-2 to the affidavit of Andrew Lillicrap sworn 11 July 2013;

(b) The Balance Sheet and Profit & Loss Statement prepared by VJ Ryan & Co Pty Ltd for 30 June 2012 which are annexure AL-5 to the affidavit of Andrew Lillicrap sworn 11 July 2013; and

(c) The audited financial statements prepared by Nexia Court & Co for the period from 1 July 2012 to 30 September 2012 which is annexure AL-8 to the affidavit of Andrew Lillicrap sworn 11 July 2013.

## Background

6 The background to the present application is, in some respects, notorious and is set out in considerable detail in the evidence in these proceedings, particularly in the affidavit of Mr Lillicrap filed 15 July 2013. A summary of that background was provided in Mr Gibian's written submissions and represents a useful starting point:

(a) The HSU NSW amended its rules in July 2010 to permit members of the HSU Victorian No1 and No 3 branches to become members of HSU NSW and to change the name of the union to HSUEast: see *Health Services Union* [2010] NSWIRComm 107

(b) The General Secretary of HSUEast was Michael Williamson and the Assistant Secretary was Peter Mylan. In around September 2011, allegations of misconduct, including financial impropriety were made in relation to Mr Williamson. Those allegations were

referred to the police and on 22 September 2011, Mr Williamson stepped down as General Secretary.

- (c) At least from around September 2011, the HSUEast Union Council became dysfunctional as a result of the Council being split between councillors from NSW and Victoria. Antagonism between the two groups has meant that the Union Council ceased to function effectively as the body responsible for the government, management and control of the affairs of the union.
- (d) On 22 September 2011, the HSUEast Union Council established an inquiry to review various matters, including the adequacy of governance arrangements and business practices of HSUEast, ensuring the appropriate level of transparency and scrutiny of financial and business information and policies and procedures for dealing with potential conflicts of interest and use of credit cards. The inquiry came to undertaken by Ian Temby QC and Dennis Robertson.
- (e) On 2 May 2011, the NSW Police raided the offices of HSUEast in Sydney and removed large amounts of documents and recording, including all documents and records relating to the financial affairs of the HSUEast as well as computers and other equipment.
- (f) In April and May 2012, applications were made by various parties to the Federal Court and the Industrial Court of NSW broadly seeking orders that the HSUEast (and the HSU East Branch of the federal union) had ceased to function effectively and for the appointment of an administrator.
- (g) On 21 June 2012, Flick J made orders declaring that the HSUEast has ceased to function effectively and that there are no effective means under the rules of the organisation by which it can be enabled to function effectively and appointing the Hon Michael Moore as Administrator. The orders further required the Administrator to take steps to demerge the NSW union from the Victorian No 1 and No 3 branches.
- (h) On 3 July 2012, Ian Temby QC and Dennis Robertson completed their report into the HSUEast following a detailed investigation of aspects of the financial affairs of the HSUEast and the internal systems and controls in place within the HSUEast and made a series of recommendations in relation to the administration of the union.
- (i) On 21 August 2012, the demerger of the HSUEast occurred. The union's name was restored to being the HSU NSW and the membership of HSU NSW was again limited to employees in New South Wales. In the following months, the assets of HSUEast

were distributed to the branches who held those assets prior to the creation of HSUEast in 2010.

- (j) In November 2012, elections were held for the HSU NSW. On 30 November 2012, new office-holders took office. Mark Sterrey was elected as President, Gerard Hayes as Secretary and Andrew Lillcrap as Assistant Secretary-Treasurer.

7 In the aforementioned judgment of Flick J in *Brown & Ors v Health Services Union & Ors* [2012] FCA 644; (2012) 205 FCR 548, his Honour recounted further historical features which have some relevance in this matter, as follows (at [1] to [4] and [61]):

1 There has in recent times been considerable disruption and publicity in respect to the activities of what has been identified as the “*Health Services Union*” or the “*HSU*”.

2 More accurately, what is being referred to is a state-registered industrial organisation and an autonomous branch of a federally-registered union. Little distinction has been publicly drawn between the state-registered HSUEast union and the federally-registered HSU East Branch. HSUEast (“the State Union”) is an organisation of employees registered under the *Industrial Relations Act 1996* (NSW) (“the *State Industrial Relations Act*”). The HSU East Branch (“the Federal Branch”) is a branch of the Health Services Union. The Health Services Union (“the Federal Union”) is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (“the *Commonwealth Registered Organisations Act*”).

3 The considerable media attention that has attended the activities of the Federal Branch and the State Union may be traced back to at least September 2011. On 10 September 2011 it was widely publicised that Ms Katherine Jackson had referred allegations of corruption levelled at Mr Michael Williamson (the Secretary of the State Union and the Federal Branch as well as the President of the Federal Union) to the New South Wales Police.

4 The unhappy events in which both the Federal Branch and the State Union have been embroiled have ultimately led (*inter alia*) to a number of proceedings commenced both in this Court and the Industrial Court of New South Wales.

...

61 For the purposes of the present proceedings, and subject to one reservation, all parties (at least initially) tendered an *Agreed Statement of Facts*. That *Agreed Statement of Facts* provided in relevant part as follows:

## Background to the Union

1. The following facts are agreed for the purposes of the proceedings.
2. To the extent that it may be relevant, there is not agreement between the parties as to the cause of, and responsibility for, the fact that the HSU Branch and HSUeast have ceased to function effectively.

...

## Dysfunction

The HSU East Branch and HSUeast have ceased to function effectively.

17. The facts set out below apply equally to the HSU East Branch and HSUeast, except where otherwise stated.
18. References below to the Executive Committee and Union Council are references to those bodies in each of the HSU East Branch and HSUeast. References to the Union are references to the HSUeast and HSU East Branch collectively.
19. On 22 September 2011 Michael Williamson took leave from his role as General Secretary of the HSU East Branch and HSUeast following allegations of misconduct including financial impropriety.
20. Since around September 2011, the Executive Committee and the Union Council have been split along partisan lines broadly reflecting State divisions. Antagonism between the two groups has meant that these bodies have ceased to function effectively as the bodies responsible for the government, management and control of the affairs of the Union.
21. The Union Council and the Executive Committee are not presently able to operate in a way which enables them to:
  - (a) oversee financial management of the HSU East Branch and HSUeast;
  - (b) draw accurate accounts of the finances of the HSU East Branch and HSUeast;
  - (c) effectively conduct business at meetings of the HSU East Branch and HSUeast.
22. The HSU East Branch and HSUeast have not implemented effective financial control measures.

23. The governing bodies of the HSU East Branch and HSUeast have not been able to conduct their business in an orderly and timely way.
24. Meetings of the governing bodies of the HSU East Branch and HSUeast have been disrupted and in some cases abandoned.
25. Since at least September 2011, meetings of the Union Council have been disorderly and disruptions have prevented the orderly and proper transaction of business.
26. Votes on contentious issues since at least September 2011 have been split between delegates who reside in New South Wales and delegates who reside in Victoria, with very few delegates voting inconsistently with that pattern.
27. Officers of the HSU East Branch and HSUeast are deflected and distracted from the pursuit of the industrial interests of their members.
28. Elected representatives from New South Wales have since September 2011 either ceased to attend, or have attended less frequently, the Victorian offices of the HSU East Branch.
29. The resources of the HSU East Branch and HSUeast have been diverted away from representing industrial issues of members.
30. Final recruitment decisions in Victoria must be authorised by the General Secretary of the HSU East Branch and HSUeast, who is New South Wales based.
31. The rate of resignations of members of the Union has significantly increased since September 2011.
32. The HSU and HSUeast have been suspended from their respective affiliations with the ACTU, Unions NSW and the Victorian Trades Hall Council. Adverse publicity, to which those actions added, has damaged the reputations of both the HSU and HSUeast.
33. Various members, mostly from NSW, have called on members of the Executive Committee to stand-down and for an administrator to be appointed in their stead
34. The issues affecting the HSU East Branch and HSUeast have had a negative impact on the ability of other branches of the HSU to operate effectively
35. The Union has been unable to effectively investigate complaints and allegations of misconduct made in respect of officers.

36. On 23 September 2011 the Union Council of HSUEast resolved that an Independent Panel of Experts review and investigate certain matters in connection with HSUEast.

37. The HSU East Branch and HSUEast have failed to put controls and procedures in place to ensure accountability and proper governance in relation to the expenditure of members' funds including the failure to prepare and implement:

- (a) a procurement policy;
- (b) tenders for large supply agreements;
- (c) contracts for large supply agreements;
- (d) pricing comparisons;
- (e) a formal purchase order system;
- (f) a credit card policy;
- (g) budgetary controls;
- (h) payment controls; and
- (i) segregation of duties.

38. It is necessary for an administrator to be appointed in order to allow (a) imposition of proper fiscal controls; and (b) orderly management and operation of the HSU East Branch and HSUEast.

The one reservation is that Mr Williamson did not agree to paragraphs [19], [22] and [37].

8 His Honour's conclusions and ultimate orders are also instructive in the present matter and are set out below at [186] to [193]:

186 The content of the *Agreed Statement of Facts* most probably meant that from the outset the appointment of an administrator was inevitable. But the basis upon which those facts had been agreed has been independently considered. Both the Federal Branch and the State Union are dysfunctional and there are no means under the rules whereby that situation can be remedied or addressed.

187 Declarations should be made in accordance with s 323 of the *Commonwealth Registered Organisations Act* and s 290B of the *State Industrial Relations Act*.

188 The discretion to "*approve a scheme*" should be exercised. The form and content of the scheme received considerable attention during the course of the hearing. Tentative views were expressed on 7 June 2012 with a view to focussing the attention of the parties upon particular aspects of the scheme which it was considered warranted particular attention. It is appropriate that a scheme as finally proposed by the parties on 8 June 2012 should be approved and approved in the form set out in Appendix 1 of these reasons.

189 Notwithstanding the terms of the scheme to be approved, it has been considered prudent to separately make orders in respect to the appointment of the administrator and the vacation of all offices.

190 The oral submissions advanced by Ms Jackson on her own behalf on Friday 8 June 2012 only reinforce the conclusion reached that:

the Honourable Michael Moore should be appointed as administrator; and

it is appropriate that all offices, including those held by Ms Jackson, be vacated.

Even if the fact that her submissions in respect to the administrator went well beyond the evidence and the basis upon which the Court and all the other parties had to that point proceeded is left to one side, those submissions only underlined the need for the administrator to be a person who was fiercely independent of the parties and a person with expertise in resolving what may well be complex factual disputes in a highly charged and “*factionally*” divided context. Her submissions, albeit to a lesser extent, also underlined the prudence of the administrator being able to exercise his powers free of any of the influence of prior occupants of any office.

191 Any of the parties are at liberty to have the proceedings relisted if agreement cannot be reached as to an appropriate order as to costs. If there be agreement between all parties as to costs, proposed orders are to be forwarded to Chambers on or before 5 July 2012.

192 It is regrettable that the present reasons for decisions are of such length. The factual issues in dispute were, for the most part, within a narrow compass. But it has been nevertheless considered of importance that a matter which has attracted such attention be fully set forth and the approach of the Court explained in full. It has been considered of importance to ensure that the issues be seen to have been independently considered by the Court – rather than any conclusion be perceived as but an endorsement of what most of the parties wanted to be achieved.

#### DECLARATIONS AND ORDERS

193 The Court makes the following Declarations and Orders:

1. A declaration under section 323(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) that the HSU East Branch of the Health Services Union has ceased to function effectively and that there are no effective means under the rules of the organisation by which it can be enabled to function effectively.
2. A declaration under section 290B of the *Industrial Relations Act 1996* (NSW), that HSUEast has ceased to function effectively

and that there are no effective means under the rules of the organisation by which it can be enabled to function effectively.

3. An order under section 323(2) of the *Fair Work (Registered Organisations) Act 2009* (Cth), that the scheme attached as Appendix A be approved in relation to the HSU East Branch of the Health Services Union.

4. An order under section 290B(8) of the *Industrial Relations Act 1996* (NSW) that the scheme attached as Appendix A be approved in relation to HSUeast.

5. An order that the Honourable Michael Francis Moore be appointed administrator of the HSU East Branch of the Health Services Union under the scheme approved in order 3 above.

6. An order that the Honourable Michael Francis Moore be appointed administrator of HSUeast under the scheme approved in order 4 above.

7. An order that all offices in the HSU East Branch of the Health Services Union of Australia, identified in Annexure A to Appendix A, be vacated.

8. An order that all offices in HSUeast, identified in Annexure B to Appendix A, be vacated.

9. An order that, in the event of any difficulty arising in the course of the implementation of the Scheme, the Administrator, the Applicants or any person represented in the proceeding shall have liberty to apply on 72 hours written notice.

- 9 The final report produced by Mr Ian Temby QC and Mr Dennis Robertson was adduced in evidence in these proceedings as an annexure to the affidavit of Mr Robertson. Mr Robertson gave a brief description of the preparation and publication of the report together with some further background to these proceedings in the following parts of his evidence:

In the course of compiling the Temby/Robertson Report, we undertook a comprehensive analysis of the internal systems and controls of the NSW registered Union (HSU East) up to and including 30 May 2012. In many respects, our investigation had many similar traits to an audit albeit without the verification of financial reports.

During our investigation, Mr Temby and I were given access to material including; accounting and financial records (including source documents), certain contracts, Minutes of the Union Council.

We also spoke to and/or corresponded with a number of key personnel from the HSU East including as the President, Assistant Secretary, Chief Financial Officer, Librarian and the Union's (then) Auditor.

On 30 April 2012, Mr Temby and I provided the HSU East Union Councillors with our preliminary report. On 3 July 2012, 3 July

2013, we provided our final report to Mr Moore, who had by then been appointed as an Administrator of the Union. Annexed hereto and marked "DR-2" is a copy of the report ("Temby/Robertson Report").

Chapter 1 of the Temby/Robertson Report sets out the relevant facts surrounding the engagement of Mr Temby and myself. Appendix 1 sets out a short biography of both me and Mr Temby. Chapters 2 to 5 deal with specific matters pertaining to the engagement of certain third parties by HSU East.

Chapters 6 to 10 of the Temby Robertson Report deal with internal Governance matters such as nepotism/cronyism, benefits paid to officials/ employees, procurement practices, and governance measures.

Our recommendations are found on pages 3 to 6 of the report.

It was widely reported in the media that in 2 May 2012, the NSW Police raided the offices of the HSU NSW in Pitt Street Sydney. I am aware both from media reports and from my own enquiries within the HSU NSW whilst I was preparing the Temby/Robertson report, that the NSW Police removed a considerable amount of financial and other material including computers, payment invoices, bank statements, cheque book butts, deposit books, invoices for expenses, credit card statements and supporting documents. To the best of my knowledge, the bulk of these documents have not been returned.

I am aware that on 21 June 2012, which was prior to the finalisation of the Temby Robertson Report, Justice Flick of the Federal Court made orders declaring all of the elected positions in HSU East and the HSU East Branch of the HSU vacant, appointing the Honourable Michael Moore as administrator of both unions and approving a Scheme which set out various tasks Mr Moore was to perform.

I am aware that as a result of the orders of Justice Flick, key management personnel of the HSU East such as the General Secretary, the Assistant Secretary and the Union Council ceased to hold office as at 21 June 2012.

I am aware that one of the elements of the Scheme approved by Justice Flick was to demerge the HSU East (and the HSU East Branch). I am also aware that in or about 12 August 2012, Mr Moore entered into a Deed Poll that affected the demerger. I have been provided with a copy of the Deed Poll. ("Deed Poll"). The document is annexed hereto and marked "DR-3".

The Deed Poll apportioned and distributed assets and liabilities of the HSU East and the HSU East Branch of the Federal Union to give effect to the orders of Justice Flick which was to for all intents and purposes to restore the branches of the Federal Union and the NSW Union to the position they were before the merger in 2010.

I have been advised and verily believe that the demerger duly occurred. As a result, the NSW Union no longer has members from Victoria, the Rules of the HSU East were amended and the name of the union was changed to Health Services Union NSW.

Following the Appointment of Mr Moore and the finalisation of the Temby/ Robertson Report, I provided assistance to Mr Moore regarding the appointment of new auditors for the HSU East and HSU East Branch as then auditors; BDO Audit (NSW-Vic) Pty Limited had ceased trading. I also gave him advice on governance and financial matters generally.

- 10 The Deed Poll referred to in Mr Robertson's evidence was exhibited as an annexure to the affidavit of Mr Lillicrap filed on 13 September 2013.
  
- 11 The final relevant background consideration concerns the action taken by the Administrator of HSU NSW, the Honourable Michael Moore, on 30 October 2012. On that occasion, Mr Moore wrote to the NSW Industrial Registrar identifying that the Union had not finalised audited accounts for the financial year ending 30 September 2011 and for the period 1 October to 30 June 2012 (corresponding to the financial periods referred to in the orders sought by the applicant). The Administrator sought to be exempted from that requirement on the ground that attempting to complete audited accounts for those periods would be of little value and uneconomic. It may be remembered that, by the time of so writing, the judgment of Flick J had been delivered, the Deed Poll had been executed and the demerger had been undertaken.
  
- 12 By letter dated 3 December 2012, the Industrial Registrar advised the Administrator that he had no power to grant an exemption from the requirement that financial accounts of industrial organisations be audited and made the following suggestion:

You may wish, however, to consider making application to the Industrial Court for orders under section 288 of the Industrial Relations Act 1996 validating invalidities that have been identified in the preparation, distribution, audit and adoption of the accounts. Where validation orders are made, the Court may give such ancillary and consequential directions as it considers appropriate.

## Issues in the Proceedings

- 13 Whilst this background outlines labyrinthine processes to rectify the ills of HSU East, the present proceedings have a much narrower compass. The immediate origins of the present application lie in the exchange of correspondence between the Administrator and the NSW Industrial Registrar and concern specifically issues as to the management and administration of the HSU NSW *vis á vis* the preparation of accounts and, in particular, the preparation and provision of auditors' reports between 1 October 2010 and 30 September 2012. Nonetheless, the background indicates that great care needs to be taken in considering an application and in making, if appropriate, orders rectifying any irregularities.

## The Applicable Legislation

- 14 Division 10 of Pt 4 of Ch 5 of the Act contains provisions dealing with the validation of invalidities that have occurred in the management or administration of an organisation, elections or appointments in an organisation or alterations to the rules of an organisation. Section 288 provides:

**288 Commission may make orders in relation to consequences of invalidity**

(1) An organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Commission for the determination of the question whether an invalidity has occurred in:

- (a) the management or administration of the organisation, or
- (b) an election or appointment in the organisation, or
- (c) the making or alteration of the rules of the organisation.

(2) On an application under subsection (1), the Commission may make such determination as it considers appropriate.

(3) If, in a proceeding under subsection (1), the Commission determines that an invalidity of a kind referred to in that subsection has occurred, the Commission may make such order as it considers appropriate:

- (a) to rectify the invalidity or cause it to be rectified, or
- (b) to negative, modify or cause to be modified the consequences in law of the invalidity, or
- (c) to validate any act, matter or thing rendered invalid by or because of the invalidity.

(4) Where an order is made under subsection (3), the Commission may give such ancillary or consequential directions as it considers appropriate.

(5) The Commission must not make an order under subsection (3) without satisfying itself that such an order would not do substantial injustice to:

- (a) the organisation, or
- (b) any member or creditor of the organisation, or
- (c) any person having dealings with the organisation.

(6) The Commission may determine:

- (a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under this section, and
- (b) whether and how the notice, summons or rule should be given or served and whether it should be advertised in any newspaper.

(7) This section applies:

- (a) to an invalidity whenever occurring (including an invalidity occurring before the commencement of this section), and
- (b) to an invalidity occurring in relation to an association before it became an organisation.

15 In broad terms, Ch 5 of the Act concerns the regulation of organisations and, in particular, the registration and governance of industrial organisations, including with respect to rules, duties and liabilities of officers, record keeping and accounts and audits.

16 Division 8 of Pt 3 of Ch 5 concerns accounts and audits. Section 282 is in the following terms:

#### 282 Regulations

(1) The Regulations may make provision for or with respect to the accounts and audit of industrial organisations.

(2) Any such regulations may deal with any of the matters dealt with in Chapter 8 of the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth in connection with the accounts and

audit of organisations registered under that Act. The regulations may adopt the provisions of that Chapter, with or without modification.

(3) Until any such regulations are made, the provisions of Subdivision 2 of Division 8 of Part 3 of Chapter 5 of the *Industrial Relations Act 1991* (and the regulations under those provisions) apply to a State organisation as regulations made under this Division.

17 No regulations have been made for the purposes of s 282(1) of the Act and, accordingly, the relevant provisions of Subdiv 2 of Div 8 of Pt 3 of Ch 5 of the *Industrial Relations Act 1991* ('the 1991 Act') applied to HSU NSW (and other state organisations), during the period to which the application is directed, as if those provisions were regulations made under the Act.

18 It follows that regulations have not been made, in this respect, under the Act since its inception nearly eighteen years ago. That would not seem an entirely satisfactory situation given the significance of the regulation of industrial organisations and, as this case demonstrates, the great importance of a detailed regulation of their accounts. This is not to suggest that the 1991 Act does not include a scheme for such regulation but that the bringing into existence the contemporary form of regulation under the Act may be a matter about which the legislature should give attention.

19 The relevant provisions of Subdiv 2 of Div 8 of Ch 5 of the 1991 Act are as follows:

508. Organisations to keep proper accounting records

(1) An organisation must keep:

(a) accounting records that correctly record and explain the transactions and financial position of the organisation, including such records as are required by the regulations; and

(b) its accounting records in a manner that will enable accounts and statements to be prepared from them under section 510; and

(c)  
its accounting records in a manner that will enable the accounts of the organisation to be conveniently and properly audited under this Subdivision.

510. Organisations to prepare accounts etc.

(1) As soon as practicable after the end of each financial year, an organisation:

(a)  
must cause to be prepared, from the accounting records kept by the organisation under section 508 (1) in relation to the financial year, those accounts and other statements, in relation to the financial year, that are prescribed by the regulations; and

(b)  
must include in the accounts (other than accounts prepared in relation to the first financial year of the organisation to which this Subdivision applies) the relevant figures from the accounts prepared by the organisation, under this subsection, in relation to the preceding financial year.

513. Auditors of organisations

(1) An organisation must ensure that there is an auditor of the organisation at any time when an auditor is required for the purposes of the operation of this Subdivision in relation to the organisation.

514. Powers and duties of auditors

(1) An auditor of an organisation must inspect and audit the accounting records kept by the organisation in relation to each financial year and must, within the period prescribed by the regulations after the end of the year, make a report in relation to that year to the organisation.

517. Copies of report and audited accounts to be provided to members and presented to meetings

(1) An organisation must provide free of charge to its members:

(a)  
a copy of the report of the auditor in relation to the inspection and audit of the accounting records kept by the organisation in relation to a financial year; and

(b)  
a copy of the accounts and other statements prepared under section 510 to which the report relates.

...

(5) Subject to subsection (6), an organisation must cause the report, accounts and other statements referred to in subsection (1) to be presented:

(a)  
within the period prescribed by the regulations (in this section called "the specified period" )---to a general meeting of the members of the organisation or a meeting of the committee of management of the organisation; or

#### 518. Reports etc. to be lodged with Industrial Registrar

(1) An organisation must, within the period prescribed by the regulations after the meeting referred to in section 517 (5) or (6) (whichever is applicable) lodge with the Industrial Registrar:

(a)  
copies of the report, accounts and other statements presented to the meeting; and

(b)  
a certificate by the secretary, or other officer prescribed by the regulations, of the organisation that the documents lodged are copies of the documents presented to the meeting.

### Applicable Principles

20 The relevant principles for the determination of applications under s 288 of the Act are now well settled: see *Re Seamens' Union of Australia New South Wales Branch* [2001] NSWIRComm 151; (2001) 107 IR 90 at [25] to [30]; *Liquor, Hospitality and Miscellaneous Union, New South Wales Branch* [2006] NSWIRComm 244 at [13]; *Re Newcastle Master Builders' Association* [2007] NSWIRComm 57 at [19] to [25]; *The Australian Workers' Union, New South Wales* [2008] NSWIRComm 160 at [25] to [26]; and *Re Application by Master Builders' Association of New South Wales (No 3)* [2010] NSWIRComm 39; (2010) 196 IR 70 at [33] to [35].

21 In *Liquor, Hospitality and Miscellaneous Union, New South Wales Branch*, the Court summarised the relevant principles as follows, at [13]:

13 The principles applicable to applications of this kind were considered by this Court in *Re Seamens' Union of Australia New South Wales Branch* [2001] NSWIRComm 151 (18 July 2001) in which the Court undertook a detailed review of the applicable authorities. Mr Nolan also referred the Court to two other authorities: *Australian Liquor, Hospitality and Miscellaneous Workers Union, New South Wales Branch* [1999] NSWIRComm 217 (delivered by Hungerford J ex tempore on 11 May 1999) and *Merchant Service Guild of Australia, Queensland Branch, Union of Employees* [2005] QIRComm 191 (delivered by Linnane VP ex tempore on 17 November 2005). Having considered these authorities, the applicable principles can be summarised as follows:

(a) Section 288 of the Act requires the Court to firstly consider, as a jurisdictional prerequisite, whether an invalidity has occurred in relation to the matters described in s288(1)(a), (b) or (c) of the Act;

(b) the terms of s288(3) encompass any order rectifying the invalidity declared by the Court, negating and modifying the consequences in law of the invalidity and validating acts so that, in an appropriate case, the circumstances arising from the invalidity can be "put right" and the legal consequences of those circumstances changed;

(c) the discretion residing in the Court to declare such an invalidity is wide;

(c) in considering whether to exercise that discretion, the Court must have regard to the objects of the Act and orders that are made to enable the organisation to function and operate effectively and legally will assist in achieving these objects, in particular, the object in s3(d) of the Act. Other relevant factors include the circumstances in which the invalidity arose and the actions taken upon becoming aware of the invalidity;

(d) the discretion conferred under s288(3) of the Act is extended by the provisions of s288(4) which permits the Court, in circumstances where an order is made under s288(3), to give such ancillary or consequential directions as it considers appropriate; and

(e) the discretion of the Court is, however, constrained by s288(5), which prevents the Court from making an order pursuant to s288(3) unless the Court first satisfies itself that such an order would not do a substantial injustice to the organisation, any member or creditor of the organisation, or any person having dealings with the organisation.

- 22 The applicant submitted that the term “invalidity” is defined in a non-exhaustive manner in s 284 of the Act to include a “nullity” and has been defined in very broad terms. I accept this submission based, as it is, upon the judgment of Wright J in *Re Newcastle Master Builders’ Association* at [22].
- 23 Further, the concept of an invalidity includes the circumstance in which an organisation has failed to lodge accounting records or other financial statements with the Industrial Registrar in accordance with the requirements of the Act: *Re Musicians’ Union of New South Wales* [2008] NSWIRComm 133 at [46]; *The Australian Workers’ Union, New South Wales* at [29] and *Master Builders’ Association of New South Wales (No 3)* at [38] and [44] to [46].

#### **Did Invalidities Occur in the Management or Administration of HSU NSW?**

- 24 The evidence discloses that for the period 1 October 2010 to 30 September 2011 and 1 October 2011 to 30 June 2012 HSU NSW failed to meet the financial record keeping standards and reporting obligations under the Act (as derived from the provisions of the 1991 Act), as follows:

(1) HSU NSW was unable to maintain accounting records in a manner that enabled the accounts of the organisation to be conveniently and properly audited for the purposes of s 508(1)(c) or ensure that proper accounts were prepared for the purposes of s 510(1) of the 1991 Act.

(2) HSU NSW was unable to ensure that a final auditor’s report was prepared and, consequently, unable to provide a copy of the auditors reports to members for the purposes of s 517(1), present an auditor’s report to a general meeting of members or the committee of management for the purposes of s 517(5) or lodge a copy of the auditor’s report for the purposes of s 518(1) of the 1991 Act.

- 25 As the Administrator made clear to the Industrial Registrar, accounts were completed and audited by HSU NSW for the three month period 1 July to 30 September 2012.
- 26 However, whilst the actions of the Administrator in obtaining these partially audited accounts are commendable, the taking of that step did not constitute full satisfaction of the statutory requirements for the production of audited accounts because the rules of the organisation for the requisite period operated for a financial year from 1 October to 30 September. In the result, the partially audited accounts for a three month period did not constitute satisfaction of the statutory reporting requirements, although their completion does bear upon the exercise of the Court's discretion in making remedial orders.
- 27 It follows that the invalidities in the second financial period concern the whole of the financial year ending in 2012 prescribed by the HSU NSW's rules, namely, 1 October 2011 to 30 September 2012.
- 28 I consider that HSU NSW has established that the failures or irregularities as described above, constitute invalidities in the management or administration of the organisation for the purposes of s 288(1)(a) of the Act for the periods 1 October 2010 to 30 September 2011 and 1 October 2011 to 30 September 2012. A declaration should be made in those terms.
- 29 It might be noted at this juncture that, for the purposes of the consideration of the relief sought by the applicant, in his affidavit of 18 December of 2011, Mr Lillicrap deposed that he caused a copy of the audited accounts for HSU NSW for the partial financial year 1 October 2012 to 30 June 2013 to be lodged with the Industrial Registrar.

## Should Orders be made Rectifying the Invalidities?

- 30 The discretion residing in the Court, in the event that a declaration of an invalidity is made, is broad, although is constrained in two important respects. First, the discretion must be exercised having regard to the objects of the Act and with a view to enabling an organisation to function and operate effectively and legally. Secondly, the discretion is specifically restrained by the requirements of s 288(5) such that the Court may not make an order unless satisfied that such an order would not do a substantial injustice to the organisation, any member or creditor of the organisation or any other person having dealings with the organisation.
- 31 HSU NSW placed considerable reliance upon the immediate history of the organisation and, in particular, its dysfunctional character in order to establish a basis for the rectification of the aforementioned invalidities. Those submissions, to which I will return in one moment, have some considerable force, but need to be balanced against the fact that that dysfunction existed in a period of the Union's history which could be described, if a generous approach was taken, as 'chequered'. As such, very great care needs to be taken to ensure that the requirements of the Act regarding the financial regulation of organisations are strictly applied, particularly by reference to the requirements of s 288(5). Notwithstanding the stringencies of this approach, I consider that Mr Gibian, on behalf of HSU NSW, has established, on the evidence, a proper basis for the exercise of the Court's discretion to make an order rectifying the invalidities earlier declared in this judgment. The following extract from counsel's submissions establishes a compelling basis for the exercise of the Court's discretion in this respect:

(a) The inability of the HSU NSW to comply with the obligation to prepare accounts capable of being audited and to lodge and make available audited accounts arose from truly extraordinary circumstances affecting the union. In particular, the HSUeast became dysfunctional under its former leadership in the period after September 2011 as set out in the judgment of Flick J in *Brown & Ors v Health Services Union & Ors* (2013) 205 FCR 548.

The agreed statement of facts in those proceedings included, for example (at [61]):

20. Since around September 2011, the Executive Committee and the Union Council have been split along partisan lines broadly reflecting State divisions. Antagonism between the two groups has meant that these bodies have ceased to function effectively as the bodies responsible for the government, management and control of the affairs of the Union.

21. The Union Council and the Executive Committee are not presently able to operate in a way which enables them to:

- (a) oversee financial management of the HSU East Branch and HSUeast
- (b) draw accurate accounts of the finances of the HSU East Branch and HSUeast;
- (c) effectively conduct business at meetings of the HSU East Branch and HSUeast.

22. The HSU East Branch and HSUeast have not implemented effective financial control measures.

23. The governing bodies of the HSU East Branch and HSUeast have not been able to conduct their business in an orderly and timely way.

24. Meetings of the governing bodies of the HSU East Branch and HSUeast have been disrupted and in some cases abandoned.

25. Since at least September 2011, meetings of the Union Council have been disorderly and disruptions have prevented the orderly and proper transaction of business.

26. Votes on contentious issues since at least September 2011 have been split between delegates who reside in New South Wales and delegates who reside in Victoria, with very few delegates voting inconsistently with that pattern.

(b) The dysfunction in the operation of the HSUeast prevented it attending to the completion of audited accounts for the financial year from 1 October 2010 to 30 September 2011. In addition, the offices of the HSUeast were raided by the NSW Police on 2 May 2012 and a considerable amount of financial and other material was removed, including computers, payment invoices, bank statements, cheque book butts, deposit books, invoices for expenses, credit card statements and supporting documents. The removal of that documentation has impeded the capacity of the HSU to complete audited accounts for the financial years from 1 October 2010 to 30 September 2011 and from 1 October 2011 to 30 September 2012 at a later time.

(c) Despite the inability of the HSU to prepare and make available final audited accounts for the period from 1 October 2010 to 30 September 2012, members of the HSU have access to and been

provided with considerable information as to the financial affairs of the HSU in that period, including as follows:

(i) For the financial year running from 1 October 2010 to 30 September 2011, a financial report was prepared by the HSUEast's then auditors, BDO Audit (NSW-Vic) Pty Ltd (which has subsequently ceased trading). The financial report indicates that the audit had been completed for the year ending 30 September 2011, but was not signed off by the auditors because it was not approved and adopted by the Union Council as a result of the dysfunction affecting the union at the time. In the professional opinion of Mr Robertson, the 2011 Financial Report provides relevant information to members about the financial state of the union at the time. The investigations undertaken by Ian Temby QC and Mr Robertson did not disclose any material mistakes in the 2011 Financial Report.

(ii) In relation to the period from 1 October 2011 to 30 June 2012, the Administrator engaged an independent firm of accountants, VJ Ryan & Co Pty Ltd. VJ Ryan prepared a Balance Sheet and Profit and Loss Statement in relation to HSUEast and the HSUEast Branch. Although not complete and audited financial accounts, in the professional opinion of Mr Robertson, the 2012 Financial Statements have value to members in that they were prepared by an independent party being a professional firm of accountants and provide independent information as to the financial state of the union as at 30 June 2012.

(iii) In relation to the period from 1 July 2012 to 30 September 2012, the Administrator issued tenders for the provision of external audit services and, on 21 November 2012, Nexia Court & Co was appointed as auditor. Nexia was unable to produce an audit for the period from 1 October 2011 to 30 June 2012 as a result of the non-availability of records and the inability to access key management personnel. However, Nexia produced an audit report on 28 March 2013 with respect to the period from 1 July 2012 to 30 September 2012 and setting out the financial position of the HSU NSW as at 30 September 2012. For the period from 1 July 2012 to 30 September 2012, the audit report is certified as satisfying the requirements of s 510 of the 1991 Act.

(iv) In addition, the financial affairs and operations of the HSU NSW in the period from 2010 to 2012 have been subject of extraordinary investigations and inquiries by various bodies. In particular, Ian Temby QC and Dennis Robertson undertook a comprehensive analysis of the internal systems and controls within the then HSUEast, including having access to accounting and financial records (including source documents), certain contracts and

minutes of the Union Council. Mr Robertson described the investigation undertaken by himself and Ian Temby QC as having many similar traits to an audit albeit without the verification of financial reports. The final report was completed on 3 July 2012 and has been made available to members.

(v) Finally, in accordance with the judgment of Flick J in the Federal Court proceedings, the Administrator took steps to effect the demerger of the HSUEast from the Victorian branches. Following the demerger, the Administrator facilitated the identification of the assets and liabilities of the HSUEast and executed a deed poll dated 21 August 2012 distributing the identified assets and liabilities of the HSUEast to the HSU and the two Victorian branches. The deed poll identified the assets and liabilities of the HSU NSW going forward and the assets and liabilities distributed to the Victorian branches.

(d) The evidence supports the conclusion that no useful purpose would be served in the HSU NSW attempting to obtain a final auditor's report for the two financial years ending 30 September 2011 and 30 September 2012 in accordance with Australian Auditing Standard ASA 315. The opinion of Mr Robertson and of Nexia is that the preparation of final audited accounts for the period from 1 October 2010 to 30 September 2012 is not now practically achievable for reasons including the following:

(i) Key management personnel of the HSUEast during the period, including the then General Secretary, Assistant Secretary, Financial Controller and Purchasing Officer and no longer employed by the union and unlikely to co-operate with an auditor.

(ii) Source documents and financial records of the HSUEast were seized by Police on 2 May 2012 and the union no longer has access to documents, including computers, payment invoices, bank statements, cheque book butts, deposit books, invoices for expenses, credit card statements and supporting documents.

(iii) The structure and membership of the HSUEast has changed very substantially as a result of the demerger of the HSU NSW from the Victorian branches and assets and liabilities have been distributed and may not now be able to be tracked down for the purposes of an audit.

(e) The opinion of Mr Robertson and Nexia is that, if an attempt was made for complete a final audit for the period from 1 October 2010 to 30 September 2012, an auditor would at best be able to produce an opinion on the veracity of the financial statements that was highly qualified and, in effect, a disclaimer of opinion. An extremely qualified audit would be of little utility and no benefit to members of the HSU in addition to the financial reports that have

already been prepared for the period from 1 October 2010 to 30 September 2012.

(f) An attempt to now obtain an auditor's report for the period from 1 October 2010 to 30 September 2012 is also likely to consume substantial resources of the HSU NSW. Although it is extremely difficult to estimate the costs of such an exercise, Mr Robertson expresses the opinion that the costs to the union is unlikely to be less than \$100,000 and may be significantly higher. It is undesirable for that amount of the funds of the members of the HSU be devoted to an exercise that is unlikely to produce any greater clarity in relation to the HSU's financial affairs than is currently available.

(g) In addition, the HSU NSW has published notice of its application and these proceedings and no member or creditor or the union or other person dealing with the union has made complaint or taken any step to oppose the making of the orders sought. In circumstances in which substantial information is available to members in relation to the financial affairs of the HSU NSW between 2010 and 2012, no substantial injustice would be caused to any member, creditor or person dealing with the union as a result of the making of the orders sought.

32 In my view, there are four factors which warrant the exercise of discretion in favour of the making of the orders sought by the applicant:

- (1) The factors referred to in the previous paragraph;
- (2) The application arises out of an initiative by the Administrator to rectify the affairs of HSU NSW and a recommendation by the Industrial Registrar with respect to the same;
- (3) The evidence reveals that the organisation has actively sought, from at least 1 July 2012, to rectify financial and recording irregularities and to comply with its statutory financial obligations;
- (4) The order will facilitate the restoration of HSU NSW as an organisation functioning legally and effectively.

33 Further, the orders do not result in a substantial injustice to the organisation, any member or creditor of the organisation or any person having dealings with the organisation for the purposes of s 288(5) of the Act.

- 34 For more abundant caution and to ensure transparency of the affairs of HSU NSW, I will also make consequential directions pursuant to s 288(4) of the Act.

### **Declaration, Orders and Directions**

- 35 The Court makes the following declaration:

That invalidities occurred in the management or administration of the Health Services Union NSW ('HSU NSW') for the financial years 1 October 2010 to 30 September 2011 and 1 October 2011 to 30 September 2012.

- 36 The Court makes the following orders pursuant to s 288(3) of the *Industrial Relations Act 1996*:

That upon the basis of such invalidities, the Court, being satisfied that the following orders do not do substantial injustice to HSU NSW or to any member or creditor of HSU NSW or to any person having dealings with HSU NSW, orders:

- (a) that by preparing, lodging and making available to members unaudited accounts for the period 1 October 2010 to 30 September 2011, the HSU NSW is taken to have complied with s 282 of the *Industrial Relations Act 1996* and ss 508, 510, 517 and 518 of the *Industrial Relations Act 1991* in respect of the financial year 1 October 2010 to 30 September 2011; and
- (b) by preparing, lodging and making available to members balance sheets for the period 1 October 2011 to 30 June 2012 and audited accounts for the period 1 July 2012 to 30 September 2012, the HSU NSW is taken to have complied with s 282 of the *Industrial Relations Act 1996* and ss 508, 510, 517 and 518 of the *Industrial Relations Act 1991* in respect of the financial year 1 October 2011 to 30 September 2012.

37 The Court makes the following directions pursuant to s 288(4) of the Act:

HSU NSW shall lodge with the Industrial Registrar and make available to its members on its website copies of the following documents:

- (a) the unsigned audited report prepared by BDO (NSW-Vic) Pty Ltd for the year ending 30 September 2011 which is annexure AL-2 to the affidavit of Andrew Lillicrap sworn 11 July 2013;
- (b) the Balance Sheet and Profit & Loss Statement prepared by VJ Ryan & Co Pty Ltd for 30 June 2012 which are annexure AL-5 to the affidavit of Andrew Lillicrap sworn 11 July 2013; and
- (c) the audited financial statements prepared by Nexia Court & Co for the period from 1 July 2012 to 30 September 2012 which is annexure AL-8 to the affidavit of Andrew Lillicrap sworn 11 July 2013.

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