



DECISION

Fair Work (Registered Organisations) Act 2009
s.94(1) RO Act—Withdrawal from amalgamation

Application by Grahame Patrick Kelly (D2022/10)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MASSON

SYDNEY, 21 FEBRUARY 2023

Application for withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union.

Introduction and background

[1] Grahame Patrick Kelly is a member of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and a member of the Central Council of the Mining and Energy Division (M&E Division) of the CFMMEU. The Central Council is the committee of management of the M&E Division within the meaning of s 6 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act). Mr Kelly is nominated as the representative constituent member for the purpose stated in and as required by reg 82(c) of the *Fair Work (Registered Organisations) Regulations 2009* (Cth).

[2] By his application made on 15 September 2022 and amended on 23 December 2022 (Application), Mr Kelly has applied to the Commission under s 94 of the RO Act for a secret ballot to be held to decide in relation to the amalgamated organisation, the CFMMEU:

- whether the constituent part formerly constituting the United Mineworkers' Federation of Australia (UMFA), which was deregistered on 10 February 1992 in connection with the formation of the CFMMEU, and remaining separately identifiable under the rules of the CFMMEU as the M&E Division (Constituent Part), should withdraw from the CFMMEU (Ballot); or
- in the alternative, whether the constituent part constituted by that part of the membership of the CFMMEU that would have been eligible for membership of the UMFA if it had not been de-registered on 10 February 1992 in connection with the formation of the CFMMEU (Alternative Constituent Part), should withdraw from the CFMMEU (Alternative Ballot).

[3] The Application was accompanied by the following:

- a copy of a resolution of the Central Council of the M&E Division authorising Mr Kelly to make the Application (as Annexure 1) and a copy of the written authorisations signed by the prescribed number of constituent members in respect of the Alternative Constituent Part (as Annexure 2);
- a written outline of the proposal for the Constituent Part to withdraw from the CFMMEU (as Annexure 3);
- a written outline of the proposal for the Alternative Constituent Part to withdraw from the CFMMEU (as Annexure 4);
- a copy of the name and rules proposed for the organisation to be registered once the proposed withdrawal from amalgamation of the Constituent Part, or the Alternative Constituent Part takes effect (as Annexure 5). The name proposed is the Mining and Energy Union (MEU);
- a copy of the name and altered rules for the amalgamated organisation, the CFMMEU, once the proposed withdrawal from amalgamation of the Constituent Part, or the Alternative Constituent Part takes effect (as Annexure 6);
- a Statement of Grahame Patrick Kelly dated 15 September 2022 (as Annexure 7) (Kelly Statement); and
- a Statement of Phillip John Pasfield dated 15 September 2022 (as Annexure 8) (Pasfield Statement).

[4] The amendment made on 23 December 2022 was to Annexures 5 and 6 of the Application. By correspondence from Mr Kelly's solicitors dated 16 February 2023, leave was sought to further amend Annexures 5 and 6 to the Application. The CFMMEU consents to the filing of the further amended Annexures 5 and 6 and we grant leave to Mr Kelly to so do.

[5] The Application contends that Mr Kelly would have been eligible for membership of the UMFA had it not been de-registered on 10 February 1992 and that he is entitled to make the Application in accordance with s 94(3) of the RO Act having been authorised to do so. Specifically, he is authorised by:

- the Central Council of the M&E Division, by a resolution passed on 14 September 2022 which, *inter alia*, authorised Mr Kelly to make the Application for the Ballot and the Alternative Ballot and nominated him as the representative constituent member for the purpose of the ballots; and
- the prescribed number of constituent members, being 2,496 constituent members (out of a total of 18,027 constituent members) who have signed written authorisations to that effect in relation to the Alternative Ballot.

[6] As to the Constituent Part, the Application contends that:

- it had previously constituted the registered organisation known as the UMFA which was deregistered in connection with the amalgamation under Division 7 of Part IX of the *Industrial Relations Act 1988* (Cth) (IR Act) between the “ATAIU and BWIU Amalgamated Union” and UMFA which took effect on 10 February 1992 (1992 amalgamation);
- the amalgamated organisation formed by the 1992 amalgamation is presently the CFMMEU;
- Division 7 of Part IX of the IR Act is a predecessor law as defined in s 93 of the RO Act;
- the Application in respect of the Ballot meets the requirements of s 94(1)(a) of the RO Act; and
- the Constituent Part is a “separately identifiable constituent part” under subparagraphs (a) and/or (c) of the definition of “separately identifiable constituent part” in s 93 of the RO Act because the Constituent Part had a substantial identity as UMFA and remains separately identifiable under the rules of the CFMMEU as the M&E Division.

[7] As to the Alternative Constituent Part, the Application contends that:

- it became part of the amalgamated organisation now known as the CFMMEU as a result of the 1992 amalgamation;
- the Application in respect of the Alternative Ballot meets the requirements of s 94(1)(a) of the RO Act; and
- the Alternative Constituent Part is a “constituent part” under subparagraph (b)(i) of the definition of “constituent part” in s 93 of the RO Act.

[8] As the Application for the Ballot and for the Alternative Ballot relies on the 1992 amalgamation, the Application does not meet the requirement in s 94(1)(c) of the RO Act — that an application be made before the period of 5 years after the amalgamation occurred has elapsed. Mr Kelly therefore relies on s 94A(1) of the RO Act, which provides that despite s 94(1)(c), the Commission may accept an application under s 94 after the end of the period referred to in s 94(1)(c), if satisfied, having regard to the matters set out in s 94A(2), that it is appropriate to accept the application. The matters in s 94A(2) are:

- whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record;

- the likely capacity, of the organisation that the constituent part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members.

[9] A workplace or safety law is defined in s 93(1) of the RO Act as meaning any of the following:

- the RO Act;
- the *Fair Work Act 2009* (Cth) (FW Act);
- the *Federal Safety Commissioner Act 2022* (Cth) (which Act was entitled the *Building and Construction Industry (Improving Productivity) Act 2016* prior to 6 February 2023) (BCII Act);
- the *Work Health and Safety Act 2011* (Cth); and
- a State or Territory OHS law (within the meaning of the FW Act).

[10] Mr Kelly contends that we should be satisfied that it is appropriate to accept the Application lodged outside of the time prescribed by s 94(1)(c) of the RO Act having regard to the extensive record of the CFMMEU not complying with workplace laws, the negligible contribution of the Constituent Part, or the Alternative Constituent Part, to the CFMMEU's record and the capacity of the proposed new organisation to promote and protect the economic and social interests of its members.

[11] The CFMMEU initially opposed the acceptance of the Application under s 94A(1) of the RO Act and raised some additional jurisdictional objections. Mr Kelly and the CFMMEU each filed submissions and some witness statements. For the CFMMEU this occurred on 11 October 2022 when the CFMMEU lodged submissions in relation to the acceptance of the Application under s 94A(1) and statements of Ms Jessica Dawson-Field, Mr Malcolm McDonald, and Mr Noel Washington.

[12] On 18 October 2022 the Applicant filed submissions in reply and a statement of the M&E Division's National Legal Officer, Mr Jack Patrick. A second witness statement of Mr Kelly was filed on 26 October 2022.

[13] The CFMMEU initially opposed the late acceptance of the Application on the grounds that s 94A(3) of the RO Act does not apply because the Constituent Part has contributed to the CFMMEU's record of non-compliance with workplace and safety laws, and in all the circumstances it is not appropriate, within the meaning of s 94A(1), to accept the Application. The CFMMEU accepted that "*insofar as the Constituent Part is said to be the M&E Division, the evidence discloses a capacity to promote and protect the economic and social interests of its members*", however it took a different view in relation to the Alternative Constituent Part. The CFMMEU contended that the Alternative Constituent Part was not the same as the M&E Division and there is no evidence which could satisfy us that the Alternative Constituent Part would receive, under a s 109 order, the assets of the M&E Division, nor material to identify

which officers and staff of the M&E Division would become part of the newly-registered organisation.

[14] The CFMMEU also raised other jurisdictional objections (Objections) directed to whether the Application had been validly made under s 94 of the RO Act. Specifically, the CFMMEU contended that:

- the M&E Division did not, within the meaning of s 94(1)(a), become part of the CFMMEU as a result of an amalgamation; and
- it does not admit that Mr Kelly has been authorised by the prescribed number of constituent members, because after having made reasonable enquiries, it does not know the truth of the allegation.

[15] During the hearing of the Application on 20 December 2022, we were advised that Mr Kelly and the CFMMEU had agreed on a process for the amendment of the rules proposed by Mr Kelly, the withdrawal of the Objections noted above, and an agreed submission as to how the parties wish for the Commission to deal with the outstanding issues. In summary the agreement involved:

- the respective rules proposed by Mr Kelly for the MEU and CFMMEU to be amended in a way agreed between the parties;
- subject to the Commission being satisfied that the proposed rules meet the requirements of s 95A of the RO Act, the CFMMEU will withdraw the Objections; and
- Mr Kelly making submissions that an order should be made under s 100 for a ballot in the terms sought in the Application.

[16] Mr Kelly sought and was granted leave to amend the Application¹ to file new documents noted earlier replacing Annexures 5 and 6 (and subsequently on 16 February 2023 to further amend those annexures). The parties also agreed on procedural steps for progressing the Application. We acceded to the procedural path jointly proposed.² This includes the following steps:

- (1) The issue of an interlocutory decision concerning whether to accept the Application under s 94A.
- (2) The expression of an opinion as to whether, for the purposes of s 100(1)(ba), the material accompanying the application (as amended in the agreed terms) complies with the requirements of s 95A.
- (3) The conduct of a final hearing (listed for 1 March 2023) to determine whether we are satisfied as to the matters in s 100(1)(a), (b) and (c) such as to permit an order to be made that that a secret ballot be conducted to decide whether the Constituent Part, or the Alternative Constituent Part, should withdraw from the CFMMEU.

[17] The first two of the above procedural steps are undertaken in this decision (noting that step (2) essentially requires the making of a provisional finding rather than a decision in the proper sense). In relation to the first procedural step, we proceed upon the basis that the issue to be determined is whether we consider, for the purpose of s 94A(1), it is appropriate to accept Mr Kelly's application having regard to:

- whether the CFMMEU has a record of not complying with workplace or safety laws and any contribution of the Constituent Part, or the Alternative Constituent Part, to that record; and
- the likely capacity, of the organisation that the Constituent Part, or the Alternative Constituent Part, is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members;

subject to the proviso that s 94A(3) requires us to decide it is appropriate to accept the application if we consider that the CFMMEU has a record of not complying with workplace or safety laws but the Constituent Part, or the Alternative Constituent Part, has not contributed to that record.

[18] Neither party ultimately contended, nor do we consider, that the acceptance of an out-of-time application pursuant to s 95A requires a determination as to whether the condition for a valid application contained in s 94(1)(a), namely that the relevant constituent part must have become part of the relevant organisation as a result of an amalgamation under Part 2 of the RO Act or a predecessor law, is satisfied. Section 100(1)(a) makes it apparent that the Commission's satisfaction that the application was validly made under s 94 (which will include satisfaction as to s 94(1)(a)) is a precondition for the making of a ballot order. That indicates that the issue is to be dealt with as part of the Commission's final determination of an application that has been received and, to the extent necessary, accepted under s 94A. Accordingly, we will deal with the issue raised by s 94(1)(a) as part of the third procedural step identified above.

Whether to accept the Application under s 94A

[19] To recap, the Constituent Part to which the application relates is said to be that which formerly constituted the UMFA, was deregistered on 10 February 1992 in connection with the formation of the CFMMEU and remains separately identifiable under the rules of the CFMMEU as the M&E Division. The Alternative Constituent Part identified by the Application is said to be constituted by that part of the membership of the CFMMEU that would have been eligible for membership of the UMFA if it had not been de-registered on 10 February 1992 in connection with the formation of the CFMMEU.

[20] The CFMMEU accepted that it has a record of not complying with workplace or safety laws. That record involves a large number of civil penalty contraventions of the FW Act and the BCII Act, and is set out in detail in the Pasfield Statement.³ The CFMMEU's record of contraventions is almost exclusively (but not entirely) the result of conduct by the Construction and General Division or its officials. As a consequence, the CFMMEU has been described by courts as a "*recidivist organisation*"⁴ and its conduct as "*astounding... disgraceful and*

shameful”,⁵ “*deplorable*”,⁶ and the CFMMEU’s continued defiance indicates that it regards the penalties previously imposed as an “*acceptable cost of doing business*”.⁷ It is difficult to describe the CFMMEU’s record as anything other than extensive.

[21] As to any contribution of the Constituent Part to that record, Mr Kelly accepts that the Constituent Part and the Alternative Constituent Part have contributed to the CFMMEU’s record of non-compliance. But he says that, by comparison to the CFMMEU’s overall record, that contribution has been minimal and insignificant. We accept on the material before us that the contribution to the CFMMEU’s record by the Constituent Part and the Alternative Constituent Part is minimal, both in a numeric sense and having regard to the nature of the contraventions.

[22] We should indicate for completeness that to the extent the CFMMEU earlier submitted that any orders made by the Commission under s 418 of the FW Act are to be considered under s 94A(2)(a) of the RO Act, that submission is rejected. When the Commission makes an order under s 418 of the FW Act, it has not made a determinative finding of non-compliance with the FW Act. Rather, the Commission has conducted an evaluative assessment as to whether it “*appears*” (by reaching a state of satisfaction) that industrial action by one or more employees or employers that is not, or would not be, protected industrial action is “*happening*”, “*threatening, impending or probable*” or “*is being organised*”. There is a clear distinction between determining the existence of a jurisdictional fact grounded in the holding of an opinion or state of satisfaction and one grounded in whether that state of affairs actually or as a matter of fact exists.

[23] Because there has been a contribution to the CFMMEU’s record by the Constituent Part and the Alternative Constituent Part, albeit a minimal one, s 94A(3) of the RO Act does not operate to compel us to accept the Application.

[24] We consider that both the fact and extent of the CFMMEU’s record of not complying with workplace or safety laws and the minimal contribution to that record by the Constituent Part and the Alternative Constituent Part weigh substantially in favour of a conclusion that it is appropriate to accept the Application under s 94A(1).

[25] We turn next to the likely capacity, of the organisation that the Constituent Part or the Alternative Constituent Part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members. The Constituent Part (or the Alternative Constituent Part) is proposed to be registered as the MEU when the withdrawal from amalgamation takes effect. Mr Kelly proposes that the MEU will, to the extent possible, maintain the status quo as it currently exists in the M&E Division. The Kelly Statement sets out the following matters relevant to our assessment:

- As of 31 December 2021, the M&E Division had a total of 21,146 members.
- Rule 27(iii) of the Rules of the CFMMEU provides that each Division shall have autonomy in relation to its funds and property. This has meant that the M&E Division has had the control and exclusive use of the funds and property which are attached to the M&E Division. Further, M&E Divisional Rule 12(ii) provides

for autonomy for each District Branch of the M&E Division in respect of property owned or acquired by the District Branch.

- The M&E Division has effectively operated as an autonomous union within the formally registered amalgamated union, the CFMMEU. There has been a practical separation from the other Divisions, such that (other than at the National Office level) there has been minimal, or no shared resources, personnel, offices or industrial campaigns involving the M&E Division and other Divisions of the CFMMEU.
- The M&E Division is a reporting unit for the purposes of the RO Act. Mr Kelly is responsible for ensuring that, amongst other things, the M&E Division lodges its annual financial returns with the Registered Organisations Commission.
- Each District Branch of the M&E Division is also a reporting unit for the purposes of the RO Act.
- The M&E Division and the District Branches recorded a surplus of income over expenditure for the 2021 reporting year. The combined surplus of the M&E Division and its District Branches for reporting year 2021 was \$14,345,726. Further, the net asset position is \$132,833,900.
- As of 31 December 2021, the M&E Division had 26 full-time equivalent employees at the Divisional level.
- The employees attached to the M&E Divisional Office comprise administrative staff, legal professionals and support staff, finance and economics professionals, communications professionals and organisers. These employees work under the supervision of the General President and/or General Secretary of the M&E Division.
- Each of the District Branches (other than the Tasmanian District Branch) have full time and/or part-time officials and employees. Given the variations in the membership size of the District Branches, the number of officials and employees in each Branch varies widely. However, the two biggest District Branches by membership numbers (the Queensland and Northern Mining and NSW Energy Districts) each have a large number of full-time personnel, including lawyers, industrial officers, accountants and administrative staff.
- As of the 2021 reporting period, there were a total of 62.11 full time equivalent employees employed by the District Branches, including elected officials.
- The M&E Division has extensive real property interests throughout Australia, including Nymboida House. Nymboida House is a 12-level commercial office building in the central business district of Sydney. In addition, the M&E Division (primarily through its District Branches) has property interests in locations as diverse as Brisbane, Cessnock, Wollongong, Mackay, Broken Hill, Tom Price, Morwell, Blackwater, Moranbah, Lithgow and Collie.

- The M&E Division also has substantial investments in various financial instruments which are summarised in the financial reports annexed to the Kelly Statement.
- The M&E Division does not hold any property or financial instruments in joint ownership with any other Division or a reporting unit of any Division of the CFMMEU.
- In approaching the application for a withdrawal ballot, it is intended, to the extent possible, to reflect the status quo in relation to the assets, eligibility rules, membership and practical operation of the M&E Division as an autonomous part of the CFMMEU.
- As to the structures and operation of the proposed MEU, it is proposed that these will be largely identical to the current structures and operation of the M&E Division. This is reflected in the fact that the existing M&E Division rules are the basis for the proposed MEU Rules with some proposed changes. It is proposed that there will exist under the MEU the essential architecture of the previous M&E Division, with a Central Council, a Central Executive, District Branches reflecting the existing District Branches, Lodges reflecting the existing Lodges, all of which is recorded and facilitated by a comprehensive transitional rule.

[26] None of this is now contested by the CFMMEU, we accept it, and we consider that the proposed registered organisation, the MEU whether constituted by the Constituent Part or the Alternative Constituent Part as when the withdrawal from the amalgamation takes effect will likely function effectively as a registered organisation, and will likely continue to promote and protect the economic and social interest of its members as the M&E Division has historically done. This conclusion also weighs in favour of a conclusion that it is appropriate to accept the Application under s 94A(1) of the RO Act.

[27] Taking into account these matters and having regard to the object of Part 3 in s 92 of the RO Act, we consider that it would be appropriate to accept the Application, both in relation to the Constituent Part and the Alternative Constituent Part as the case requires, and we exercise our discretion to do so.

Section 100(1)(ba) — whether material accompanying the Application complies with the requirements of s 95A

[28] Further amended Annexure 5 to the Application is the proposed rules of the new organisation, titled “Rules of the Mining and Energy Union and its District Branches” (Proposed MEU Rules). Further amended Annexure 6 is the proposed altered rules for the CFMMEU, which would be named the “Construction, Forestry and Maritime Employees Union” when the proposed withdrawal takes effect (Proposed CFMEU Rules). The Proposed MEU Rules and the Proposed CFMEU Rules are relied upon in respect of the Application for both the Ballot and the Alternative Ballot.

[29] Section 100(1)(ba) of the RO Act provides that the Commission must order a vote taken by secret ballot of the constituent members to decide whether the constituent part of the amalgamated organisation should withdraw from the organisation if satisfied that the material required by s 95A complies with the requirements of that section. Section 95A provides:

95A Proposed names and rules

- (1) The application must also be accompanied by:
 - (a) a statement of the name, and a copy of the rules, proposed for the organisation (the *new organisation*) that the constituent part is to be registered as when the withdrawal from amalgamation takes effect; and
 - (b) a statement of the name, and a copy of the alterations of the rules, proposed for the amalgamated organisation when the withdrawal from amalgamation takes effect.
- (2) The name proposed for the new organisation must not be the same as the amalgamated organisation, or so similar to the name of the amalgamated organisation or any other organisation as to be likely to cause confusion.
- (3) The name proposed for the amalgamated organisation must reflect the withdrawal of the constituent part.
- (4) The eligibility rules of the new organisation:
 - (a) must, as far as practical, reflect the application of the eligibility rules of the amalgamated organisation in relation to the constituent part immediately before the application was made; and
 - (b) must not have the effect of making a class of individuals eligible for membership of the new organisation if that class would not have been eligible for membership of the constituent part immediately before the application was made.
- (5) The eligibility rules of the amalgamated organisation as proposed to be altered must, as far as practical, avoid an overlap with the eligibility rules of the new organisation.
- (6) Whether eligibility rules have the effect required by subsections (4) and (5) may be determined by examining the organisational and administrative arrangements for the amalgamated organisation before the application was made.
- (7) If the applicant has insufficient information to prepare the statement and alterations mentioned in paragraph (1)(b), the applicant may request the General Manager or the Commissioner to:

- (a) give the applicant all information in the possession of the General Manager or the Commissioner, as the case requires, that may be relevant in the preparation; or
 - (b) direct the amalgamated organisation to give the applicant all information in the possession of the organisation that may be relevant in the preparation.
- (8) The General Manager or the Commissioner may provide that information, or direct the amalgamated organisation to provide that information.
- (9) The amalgamated organisation must comply with a direction of the General Manager or the Commissioner under subsection (8).

Civil penalty: 100 penalty units.

- (10) The FWC may allow statements of name, or rules or alterations of rules, to be amended by whoever filed them with the FWC.
- (11) If the FWC is not satisfied that a proposed name complies with subsection (2) or (3), or that proposed rules or alterations of rules comply with subsection (4) or (5), the FWC must order the making of any amendments the FWC considers are needed for compliance with the subsection.

[30] The names proposed for the new organisation, the “Mining and Energy Union” to be registered when the withdrawal from amalgamation takes effect, and the amalgamated organisation, the “Construction, Forestry and Maritime Employees Union” at that time, are set out in the Proposed MEU Rules and the Proposed CFMEU Rules. These proposed rules are annexed to the Application. There is therefore compliance with s 95A(1)(a) and (b).

[31] The name proposed for the new organisation, the “Mining and Energy Union” is different from the name of the amalgamated organisation, and it is not so similar to the name of the amalgamated organisation, or any other organisation as to be likely to cause confusion. There is no other organisation registered under the RO Act carrying the word “Mining” in its name. “Energy” appears in the name of the “Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia” but we consider that the names of the respective organisations are clearly distinguishable and not so similar as to be likely to cause confusion. The requirement in s 95A(2) is met.

[32] In respect of the withdrawal of both the Constituent Part and the Alternative Constituent Part, the Application proposes (as earlier stated) that the name for the amalgamated organisation will become the “Construction, Forestry and Maritime Employees Union” when the withdrawal from amalgamation takes effect. The proposed name will reflect the withdrawal of the Constituent Part insofar as it removes the references to both “mining” and “energy” from the current name of the amalgamated organisation. In respect of the Alternative Constituent Part, although the energy component of the membership of the M&E Division will not withdraw from the CFMMEU as a consequence of any ballot we might order, s 95A(3) does not have the effect of requiring that the word “Energy” remain in the name of the amalgamated organisation. We consider that the proposed removal of “Mining” from the name is sufficient to reflect the

withdrawal of the Alternative Constituent Part, regardless of whether “Energy” remains in the name or not. The requirement in s 95A(3) is met.

[33] Section 95A(4)(a) requires that the eligibility rules of the new organisation as far as practical reflect the application of the eligibility rules of the amalgamated organisation in relation to the constituent part. We accept, as Mr Kelly and the CFMMEU have submitted, the first occurrence of the word “*application*” in s 95A(4)(a) indicates that the subsection is not only concerned with eligibility as reflected in the rules of the amalgamated organisation, but also how that eligibility has been applied within the organisation. Section 95A(6), which provides that whether the new organisation’s eligibility rules have the effect required by s 95A(4) “*may be determined by examining the organisational and administrative arrangements of the amalgamated organisation before the application was made*”, is consistent with and gives contextual support to this construction. Therefore, a consideration of whether the eligibility rules in the Proposed MEU Rules comply with the requirement in s 95A(4)(a) involves both the proper construction of the CFMMEU’s rules in relation to the Constituent Part or the Alternative Constituent Part and the practices adopted in respect of eligibility immediately before the Application was made. Section 95A(4)(b) requires consideration of whether the eligibility rules in the Proposed MEU Rules have the effect of making a class of individuals eligible for membership of the MEU that would not have been eligible for membership of the Constituent Part or the Alternative Constituent Part.

[34] The eligibility rules of the MEU are found in Proposed MEU Rules 2(A)-2(I). MEU Rule 2(A) deals with the coverage of the MEU in the coal and shale industries. It appears to be based on CFMMEU Rule 2(D) which has as its genesis the UMFA’s eligibility rule and was included in the rules of the amalgamated organisation when the 1992 amalgamation with the UMFA took effect. The difference between Proposed MEU Rule 2(A) and CFMMEU Rule 2(D) is the inclusion of the limitations or exceptions in Proposed MEU Rules 2(A)(i) and 2(A)(ii). When Proposed MEU Rule 2(A) is read with Rules 2(A)(i) and 2(A)(ii), Rule 2(A) appears to confirm the existing coverage arrangements as between the M&E Division and the other divisions or parts of the CFMMEU. There is no dispute between Mr Kelly and the CFMMEU that the eligibility rules in the Proposed MEU Rules reflect the existing organisational and administrative arrangements within the amalgamated organisation for the allocation of members within the amalgamated organisation. We accept the agreed position.

[35] Proposed MEU Rule 2(B) is sourced from CFMMEU Rule 2(E), which was included in the rules of the CFMMEU when the amalgamation between the Federated Engine Drivers’ and Firemen’s Association of Australasia (FEDFA) and the CFMEU on 23 September 1992 took effect. The rules are not identical. The difference between Proposed MEU Rule 2(B) and CFMMEU Rule 2(E) is the inclusion of the limitations or exceptions in Proposed MEU Rules 2(B)(a)(i)-(iii) and Proposed MEU Rules 2(B)(b)-(e). Members who are enrolled under CFMMEU Rule 2(E) are attached to either the M&E Division or the Construction and General Division depending on the work they perform. The inclusion of the limitations or exceptions in Proposed MEU Rules 2(B)(a)(i)-(iii) and Proposed MEU Rules 2(B)(b)-(e) make clear which members are entitled to be members of the MEU under Proposed MEU Rule 2(B) as opposed to the CFMEU. Mr Kelly and the CFMMEU contend, and we accept, that these limitations or exceptions reflect the existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[36] Proposed MEU Rule 2(C) reflects CFMMEU Rule 2(G) and appears to be substantively the same as CFMMEU Rule 2(G) with changes to cross-referencing having been made. CFMMEU Rule 2(G) was included as a result of the decision in *Construction, Forestry, Mining and Energy Union - re Eligibility for membership*.⁸ We accept, as Mr Kelly and the CFMMEU contend, that Proposed MEU Rule 2(C) confirms the existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[37] Proposed MEU Rule 2(D) is sourced from CFMMEU Rule 42(iii)(a), which was included in the CFMMEU Rules as a result of the amalgamation with the UMFA. The first paragraph of Proposed MEU Rule 2(D) is identical to CFMMEU Rule 42(iii)(a). The second paragraph includes a limitation or exception which Mr Kelly and the CFMMEU contend, and we accept, serves to reflect and confirm existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[38] Proposed MEU Rule 2(E) is limited to Queensland and is sourced from existing CFMMEU Rule 2(O). That rule is a state-based eligibility rule included in the rules of the amalgamated organisation as a result of the “uplifting” of the eligibility rules of a counterpart State registered organisation in Queensland under s 158 of the RO Act.⁹ The difference between Proposed MEU Rule 2(E) and CFMMEU Rule 2(O) is that only those aspects of CFMMEU Rule 2(O) which concern the M&E Division have been included in Proposed MEU Rule 2(E). Proposed MEU Rule 2(E)(a) is sourced from CFMMEU Rule 2(O) - Section B; the former FEDFA’s eligibility rule, following FEDFA’s amalgamation with the CFMEU on 23 September 1992. CFMMEU Rule 2(O) - Section B replicates CFMMEU Rule 2(E) in respect of Queensland. We accept, as Mr Kelly and the CFMMEU contend, that Proposed MEU Rule 2(E)(a) explains which members are entitled to join the MEU under Proposed MEU Rule 2(E)(a) by including limitations or exceptions to reflect and confirm existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[39] Proposed MEU Rule 2(F) is limited to New South Wales and is sourced from existing CFMMEU Rule 2(P). That rule is a state-based eligibility rule included in the rules of the amalgamated organisation as a result of the “uplifting” of the eligibility rules of a counterpart State registered organisation in New South Wales under s 158 of the RO Act.¹⁰ However, only those aspects of CFMMEU Rule 2(P) which pertain to the M&E Division have been included in Proposed MEU Rule 2(F). Proposed MEU Rule 2(F)(e) is sourced from CFMMEU Rule 2(P)(F) which replicates CFMMEU Rule 2(E) in respect of New South Wales. We accept, as Mr Kelly and the CFMMEU contend, that Proposed MEU Rule 2(F)(e) explains which members are entitled to join the MEU under Proposed MEU Rule 2(F)(e) by including limitations or exceptions to reflect and confirm existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[40] Proposed MEU Rule 2(G) is limited to Western Australia and is sourced from existing CFMMEU Rule 2(Q) which is a state-based eligibility rule included in the rules of the amalgamated organisation as a result of the “uplifting” of the eligibility rules of a counterpart State registered organisation in Western Australia under s.158 of the RO Act.¹¹ Proposed MEU Rule 2(G) and CFMMEU Rule 2(Q) differ in that only those aspects of CFMMEU Rule 2(Q) pertaining to the M&E Division have been included in Proposed MEU Rule 2(G). Proposed MEU Rule 2(G)(a) is sourced from CFMMEU Rule 2(Q)(5) which substantively replicates CFMMEU Rule 2(E) in respect of Western Australia. We accept, as Mr Kelly and the

CFMMEU contend, that Proposed MEU Rule 2(G)(a) explains which members are entitled to join the MEU under Proposed MEU Rule 2(G)(a) by including limitations or exceptions to reflect and confirm existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU.

[41] Proposed MEU Rule 2(H) is substantively the same as existing CFMMEU Rule 2(J). This rule deals with the eligibility of independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be eligible for membership of the MEU. We accept that it serves to confirm existing coverage arrangements as between the M&E Division and other Divisions or Parts of the CFMMEU. Proposed MEU Rule 2(I) is substantively the same as existing CFMMEU Rules 2(H) and 2(J) which contain limitations on the eligibility in respect of particular named employers in Queensland and Tasmania.

[42] Having regard to the analysis of the Proposed MEU Rules above it is apparent that for the purposes of the requirement in s 95A(4)(a) of the RO Act, insofar as it operates upon the Application for the Ballot, Proposed MEU Rules 2(A) to 2(I) will reflect the application of the eligibility rules of the CFMMEU in relation to the Constituent Part immediately before the application was made. And for the purpose of s 95A(4)(b), in respect of the Constituent Part, Proposed MEU Rules 2(A) to 2(I) will not in our view have the effect of making a class of individuals eligible for membership of the MEU who would not have been eligible for membership of the Constituent Part immediately before the application was made.

[43] Turning to the Alternative Constituent Part, it is, as earlier noted, constituted by that part of the membership of the CFMMEU that would have been eligible for membership of the UMFA if it had not been de-registered on 10 February 1992 in connection with the formation of the CFMMEU. The proposed eligibility rules in respect of the Application insofar as it relates to the Alternative Ballot are the same as those proposed in respect of the Application for the Ballot — Proposed MEU Rules 2(A) to 2(I).

[44] As earlier noted, Proposed MEU Rules 2(A), 2(D), 2(E)(c), 2(F)(a)-(b), are based on the corresponding rules in the CFMMEU Rules and have their genesis in the eligibility rules of the UMFA. These satisfy the requirements in ss 95A(4)(a) and 95A(4)(b) of the RO Act. Proposed MEU Rule 2(I) contains limitations on the eligibility of the MEU in respect of particular named employers in Queensland and Tasmania. It is not inconsistent with the requirements in ss 95A(4)(a) and 95A(4)(b).

[45] As to the balance of the Proposed MEU Rules relating to eligibility for membership which extend eligibility beyond the eligibility rules of the UMFA — that is, Proposed MEU Rules 2(B), 2(C), 2(E) (other than rule 2(E)(c)), 2(F), (other than rule 2(F)(a)-(b)), and rule 2(H) — Mr Kelly says that, taking into account s 95A(6) of the RO Act, the Proposed MEU Rules meet the requirements in ss 95A(4)(a) and 95A(4)(b). The CFMMEU does not wish to be heard on this matter. In summary Mr Kelly contends that the purpose of ss 95A(4)-(6) is explained in paragraph [42] of the Explanatory Memorandum to the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020*, which states:

“The purpose of the above provisions is to ensure that as far as practical, the eligibility rules for the new registered organisation and the amalgamated organisation reflect the

status quo applying immediately before withdrawal, meaning that members that are associated with particular parts of the amalgamated organisation remain able to be represented by that part following the withdrawal if they choose. Consideration of internal organisational and administrative arrangements can be used to demarcate coverage, where the rules are not explicit in this regard.”

[46] Mr Kelly contends that the proposed eligibility rules for the MEU reflect the status quo in that those rules provide for members of the CFMMEU who have been allocated to that part of the CFMMEU which derived from UMFA — the M&E Division — to continue to be represented by that part following the withdrawal. Mr Kelly contends that the internal organisational and administrative arrangements in the CFMMEU support the allocation to the MEU of coverage of the members under the extended eligibility proposed for the MEU. That would preserve the status quo of coverage. He submits that the eligibility rules reflect the internal organisational and administrative arrangements within the CFMMEU as envisaged by s 95A(6) of the RO Act.

[47] Although we accept that regard may be had to the matters identified in s 95A(6) in assessing whether the eligibility rules of the proposed new organisation comply with s 95A(4), it is difficult to understand how they are of assistance in respect of the Alternative Constituent Part. The difficulty is in reconciling the strict requirement in s 95A(4)(b) with the proposal in the Proposed MEU Rules to expand the class of persons eligible for membership compared to the class of persons constituting the Alternative Constituent Part. The Application identifies the Alternative Constituent Part as constituting that part of the membership of the CFMMEU which would have been eligible for membership of the UMFA if it had not been de-registered on 10 February 1992 in connection with the formation of the CFMMEU. We accept that s 95A(6) might arguably assist in reconciling the eligibility rules of the Proposed MEU Rules with the requirement in s 95A(4)(a). However, given the membership of the Alternative Constituent Part, it is difficult to conceive that s 95A(4)(b), even when read with s 95A(6), would allow a broader class of individuals to be eligible for membership of the MEU when that broader class would not have been eligible for membership of the Alternative Constituent Part immediately before the Application was made. These matters may be addressed further at the final hearing, and we should indicate that we would be assisted by submissions by counsel for the CFMMEU, despite the earlier indication that the CFMMEU did not wish to be heard. Alternatively, a modified eligibility rule for the MEU in respect of the Application insofar as it relates to the Alternative Ballot might be proposed by Mr Kelly.

[48] It follows from the foregoing that we find that the requirements in s 95A(4) of the RO Act have been met in respect of the Application as it applies to the Constituent Part. As to the Alternative Constituent Part, we will hear the parties further or allow leave to further amend the Application.

[49] Section 95A(5) of the RO Act requires that the eligibility rules of the CFMMEU as proposed to be altered must, as far as practical, avoid an overlap with the eligibility rules of the MEU. It is evident that the drafters of the Proposed MEU Rules and the Proposed CFMEU Rules relating to eligibility as proposed have been prepared with the object of avoiding overlap when the withdrawal from amalgamation takes effect. The inclusion of limitations or exceptions earlier described in the Proposed MEU Rules where otherwise there might have been overlap

serves to underscore this point. We therefore consider that the requirement in s 95A(5) has been met in respect of both the Constituent Part and the Alternative Constituent Part.

[50] As requested by the parties, for the reasons stated above, we express the view that we are satisfied that the requirements in s 100(1)(ba) of the RO Act — that the material required by section 95A complies with the requirements of that section — has been met in respect of the Application as it pertains to the Constituent Part. We are not presently satisfied that this is so in respect of the Alternative Constituent Part for the reasons stated in [47] above.



PRESIDENT

Appearances:

H Borenstein KC with *Y Bakri* of counsel for Grahame Patrick Kelly.

C Dowling SC with *C Massy* of counsel for the Construction, Forestry, Maritime, Mining and Energy Union.

Hearing details:

2022.

Melbourne:
20 December.

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¹ Transcript (20 December 2022) at PN82

² *Ibid*

³ Annexures PJP-3 (pp 102-167) and PJP-5 (pp 173-175)

⁴ See for example *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126, (2018) 265 FCR 208, at [14]; *Pattinson v Australian Building and Construction Commissioner*, [2020] FCAFC 177, (2020) 282 FCR 580.

⁵ *Construction, Forestry, Maritime, Mining* [2018] FCAFC 126 and *Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126, (2018) 265 FCR 208 at [65].

⁶ See *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243 at [43]

⁷ See *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13, (2022) 399 ALR 599, (2022) 314 IR 301 at [43].

⁸ [PR908896](#); [2001] AIRC 932

⁹ See *Re Construction, Forestry, Mining and Energy Union* [\[2014\] FWCG 5423](#)

¹⁰ See *Re Construction, Forestry, Mining and Energy Union* [\[2017\] FWCG 116](#)

¹¹ See *Re Construction, Forestry, Mining and Energy Union* [\[2017\] FWCG 117](#)