



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MASSON**

D2022/10

s.94(1) RO Act - Application for ballots for withdrawal from amalgamated organisation

**Application/Notification by Kelly
(D2022/10)**

Melbourne

10.00 AM, WEDNESDAY, 1 MARCH 2023

Continued from 20/12/2022

PN119

PRESIDENT HATCHER: I will take the appearances. Mr Borenstein and Mr Bakri, you continue your appearance for the applicant?

PN120

MR BORENSTEIN: We do.

PN121

PRESIDENT HATCHER: Mr Dowling and Mr Massy, you continue your appearance for the CFMMEU?

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MR DOWLING: We do. Good morning.

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PRESIDENT HATCHER: All right. Mr Borenstein, I don't think we have marked to date any of the evidentiary material.

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MR BORENSTEIN: I plan to do that this morning.

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PRESIDENT HATCHER: All right. You will take us through that at your convenience, yes, all right.

PN126

MR BORENSTEIN: Can I start, your Honour, by dealing with some housekeeping.

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PRESIDENT HATCHER: Can you just hold on, Mr Borenstein. We have a technical problem with a chair, apparently.

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MR BORENSTEIN: We don't mind if his Honour wants to sit on the floor.

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PRESIDENT HATCHER: All right, let's go.

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MR BORENSTEIN: I was going to say the UFU were here yesterday.

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There are a couple of housekeeping matters, your Honour, that we wanted to deal with at the outset. In relation to the rules, which the Full Bench dealt with in its decision on 21 February, the parties have continued to review the rules to make sure that any errors are picked up before the final event and it's been discovered that there are a couple of errors in the rules that we handed up for the CFMEU and we have got a set of amended rules for the CFMEU which we would like to hand up to replace the rules which the Commission previously dealt with and I will

direct your attention to the changes which have been identified as necessary. You will see they are very minor.

PN132

On page 65, at rule 14, in (i), you will see that the reference to 'National Senior Vice President' has been deleted and the number 4 has been changed to 3, I think. Is that right?

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MR BAKRI: Yes.

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MR BORENSTEIN: That's to reflect a change that occurs earlier in the rules but which haven't been carried through. Then there's a similar carry over of that error in rule 22 on page 79. This is in rule 42C and it's rule - 22, I'm sorry - and it's rule 5A and rule 6, where again the reference to the 'National Senior Vice President' is amended to make it consistent with the earlier parts of the rule.

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They are the only two changes. We don't believe they bear on the matters that the Bench considered in its decision, but we thought that you should have a full and accurate set of the rules on the file.

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PRESIDENT HATCHER: This is an attachment to the application?

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MR BORENSTEIN: Yes, it's annexure 6.

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PRESIDENT HATCHER: So we should grant leave to amend the application to substitute this document for annexure 6; is that right?

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MR BORENSTEIN: Thank you.

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PRESIDENT HATCHER: Yes, that leave is granted.

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MR BORENSTEIN: While we are dealing with rules, can I flag a matter that has arisen in relation to the rules of the Mining & Energy Division and the rules of the Mining & Energy Union which are proposed. I am instructed that, over a period of time, the Mining & Energy Division has had pending an application to amend its rules for the establishment of the position of an affirmative action officer in the Queensland district. That rule application is with the general manager and it had been hoped that it would have been approved by now, but, unfortunately, it hasn't. It's in its latter stages, but it hasn't been finally approved and so what I'm instructed to ask is whether the Full Bench would allow us liberty to apply to amend the rules in annexure 5, which are the proposed rules of the MEU, if the

rule change that is before the general manager is approved before the ballot opens, if a ballot is ordered.

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We can do that by a simple written communication to the Commission, if we can have leave to do that, and then the rules that would go out to the ballot would include the amendment.

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PRESIDENT HATCHER: Yes, all right, we will grant that leave.

PN144

MR BORENSTEIN: Thank you. The next thing that we wanted to correct in terms of documents which have been filed with the Commission in the last few days is the draft order that we sent. Could we hand up a copy which has marked the changes which we would like to make.

PN145

The first change is a typographical error in paragraph number 1 at the bottom of the first page where the word 'part' was omitted from the previous version. The second matter is paragraph number 5, which records the order which you've made in terms of allowing for the amendment of the rules. The corresponding alteration occurs in paragraph (d) on the front page, which refers to these rules which I've just handed up and amends the date to 1 March.

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PRESIDENT HATCHER: Mr Borenstein, can you send my chambers an electronic copy of the amended CFMEU rules.

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MR BORENSTEIN: A non-electronic copy?

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PRESIDENT HATCHER: An electronic copy.

PN149

MR BORENSTEIN: Of course, yes. While the Commission has the draft order, can I just indicate that draft order number 1 seeks an order that the application in respect of the alternative constituent part, which is referred to in paragraph 1(b) of the application, be adjourned to a date to be fixed after the hearing and determination of the application for the constituent part. That's an order that is agreed between the parties.

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A question has arisen as to whether this should be in the draft order because this would be the order which we put before the Commission to be made at the end of the hearing if the Commission is with us and, at that stage, it would have been effected that the constituent part application would have been approved because the order talks about ballots and so on. So, it may be that, strictly speaking, there is not a need for that to be in the final order, but we do seek an order now that the

Commission adjourn that part of the application in the way that it's expressed in order number 1.

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PRESIDENT HATCHER: Mr Borenstein, obviously in respect of the primary application, we will have to determine whether the constituent part became part of the organisation as a result of an amalgamation, et cetera. I assume it would be convenient, as regards to what conclusion we reach about that requirement, that we also state our conclusions about all the other relevant matters for more abundance of caution?

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MR BORENSTEIN: We had proposed to address your Honour on the lot. We did send an outline of submissions.

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PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: And that does address all of the matters that we believe need to be addressed under section 100, including section 94, so that was our intention.

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PRESIDENT HATCHER: Yes, all right.

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MR BORENSTEIN: Just coming back to the adjournment of the alternate application, would the Commission grant that adjournment?

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PRESIDENT HATCHER: Do you accede to that course, Mr Dowling?

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MR DOWLING: We consent to the adjournment of the application insofar as it affects the alternative constituent part, yes, your Honour.

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PRESIDENT HATCHER: Yes, all right, we allow that adjournment, Mr Borenstein.

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MR BORENSTEIN: Thank you, your Honour. Very well. As I say, we do intend to address the Full Bench this morning on all of the matters that we are required to establish under section 100.

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PRESIDENT HATCHER: Mr Borenstein, I take it then that we can delete paragraph 1 from the draft order?

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MR BORENSTEIN: Yes, having made that order now, that doesn't have to go in.

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Can I start by dealing with the evidence which your Honour raised. If the Bench has our outline of submissions and if you would turn to paragraph 13, you will see a list of witness statements that we will seek to rely on for the purposes of this morning's hearing and we would seek to tender each one of those.

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PRESIDENT HATCHER: All right. Is there any opposition to the admission of those statements?

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MR DOWLING: No, your Honour.

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PRESIDENT HATCHER: All right. The statement of Grahame Patrick Kelly dated 15 September 2022 will be marked exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF GRAHAME PATRICK KELLY DATED 15/09/2022

PN167

The further statement of Mr Kelly dated 25 October 2022 will be marked exhibit 2.

EXHIBIT #2 FURTHER WITNESS STATEMENT OF GRAHAME PATRICK KELLY DATED 25/10/2022

PN168

The third statement of Mr Kelly dated 27 February 2023 will be marked exhibit 3.

EXHIBIT #3 THIRD WITNESS STATEMENT OF GRAHAME PATRICK KELLY DATED 27/02/2023

PN169

And the witness statement of Shane Russell Thompson dated 27 February 2023 will be marked exhibit 4.

EXHIBIT #4 WITNESS STATEMENT OF SHANE RUSSELL THOMPSON DATED 27/02/2023

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MR BORENSTEIN: Mr Thompson is the proposed designated official to conduct the ballot.

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PRESIDENT HATCHER: Yes, all right.

PN172

MR BORENSTEIN: The only other matter that I would seek some direction from you about is in paragraph 12(b), reference is made to the written outline that was annexure 3 to the application. That outline has been amended and is annexed to

Mr Kelly's fourth statement, so I am taking it that that would be marked as part of that exhibit?

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PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: Thank you.

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PRESIDENT HATCHER: Just give me a second.

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DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Borenstein, just to be clear, Mr Kelly does not rely on his third statement of 6 December 2022?

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MR BORENSTEIN: There were a number of statements that were filed that were relevant to the 94A process and we're not relying on them for this morning's purposes.

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DEPUTY PRESIDENT GOSTENCNIK: Yes.

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PRESIDENT HATCHER: Yes, all right.

PN180

MR BORENSTEIN: The bag was a lot lighter this morning. As I said, we filed a written outline of submissions and we don't seek to deal with the preliminary matters, which are well known to the Bench.

PN181

In relation to the application for an order under section 100, obviously the first thing that we have to satisfy the Commission about under section 100(1) is that the application has been properly made under section 94.

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In terms of the application, it is accompanied, as is required, by a resolution of the Central Council which authorised Mr Kelly to bring the application, and that's annexure 1 to the application. The written outline, which is required by the statute, is also there and it's annexed to Mr Kelly's fourth statement at page 63. The Bench has copies of the rules, and so the documentation that was required to accompany the application has been filed.

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The Commission, as presently constituted, has been through the relevant provisions of the statute and so I don't take up time by going through them again.

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The application in respect of the constituent part is made on the basis that it is the part which formerly constituted the United Mineworkers Federation of Australia,

which was deregistered on 10 February 1992 in connection with the formation of what is now the CFMMEU and which part, we say, remains separately identifiable under the rules of the union as the M&E Division.

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We submit that the inquiry for the Commission under section 94 in relation to whether there is a separately identifiable constituent part is whether the United Mineworkers Federation of Australia, which was deregistered in connection with the formation of the union, does remain separately identifiable under the rules - and we emphasise under the rules of the union - as a divisional part of that organisation.

PN186

PRESIDENT HATCHER: Mr Borenstein, I don't wish to interrupt you, but while we are dealing with the history, there was a relevant history of amalgamations in our 2021 decision in relation to the earlier application. I understand you may wish to supplement it, but is there any issue with the recount of the history in that decision?

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MR BORENSTEIN: No. In fact, Mr Kelly, in one of his affidavits, has also set out the history.

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PRESIDENT HATCHER: Yes, thank you.

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MR BORENSTEIN: I mean that's an objective fact and we don't take issue with the history.

PN190

Our submission is that although the Mining & Energy Division has coverage which extends beyond that which, if I can call it, the old union UMFA had, there is question about whether, in order to be a separately identifiable constituent part under the rules, it requires that the constituent part must be completely identical in all respects with the deregistered organisation, namely UMFA, and in this regard, the applicant submits that complete identity is not necessary and we rely on the reasoning in the judgment of Lee J in the Gilchrist case, which we will hand up to the Commission.

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Lee J was dealing with the corresponding provision under the Workplace Relations Act, which was section 253ZI, which is effectively in the same terms as section 94, and he was dealing with an objection to a withdrawal application by a particular branch on the basis that the branch that was seeking to leave the organisation was not identical with the branch that had been there before the amalgamation in that the rules had been changed. Now, unlike the rules here, the rules in that case, the rules of the constituent part in that case, had been changed to narrow its 'eligibility', but, nonetheless, objection was taken.

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At paragraph 19 of the decision, there is a passage that we seek to rely on in terms of the reasoning that his Honour adopted in relation to the need for identity between the constituent part and the part as it existed prior to amalgamation. At paragraph 17, his Honour sets out the submission that was raised against the application for withdrawal and, at paragraph 19, his Honour states that the submission of the union must be rejected, and he goes on to say:

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The State branch of the FMU as it existed on the day before amalgamation, was reformed after amalgamation as the Branch (with a capital B), by provisions of the Union Rules that stipulated that members of the FMU allocated or attached to the 'State branch' (which is the previous entity) became attached to the Branch on amalgamation and by providing further that thereafter members of the Union would be attached to a branch of the Union that would traditionally have represented those employees if there had been no amalgamation. That is, the Branch was to carry on the former role of the 'State branch'. The Rules invested in the Branch the character of the 'State branch' of the FMU as taken into the Union upon amalgamation. The scope of eligibility for membership of the FMU before amalgamation is not the determinant of the identity of a separately identifiable constituent part as

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defined in s 253ZI(1). Of course, a branch has no separate rules in respect of eligibility, and has no existence independent of the organisation. Eligibility for membership relates to membership of the organisation. Section 253ZI of the Act, however, recognises that a 'branch' of an organisation, established and conducted pursuant to the rules of the organisation, may remain 'identifiable' as part of the structure of the amalgamated organisation, notwithstanding that it has no separate identity at law.

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Then we emphasise the next two sentences:

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Such identification of a branch will derive from the class or classes of members of the organisation actually assigned or attached to the branch and the rules of the organisation relating to the branch.

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The issue whether a branch created under the rules of a de-registered organisation 'remains separately identifiable' under the rules of an amalgamated organisation as, inter alia, a branch of that organisation is a matter of the continuity of status as a branch and of continuity of the character of a branch according to its purpose. It is by those elements that a branch may be said to be separately identifiable. The members allocated or attached to a branch, in fact and by tradition, and the functions of the branch define the branch.

PN198

PRESIDENT HATCHER: Mr Borenstein, just so we can raise this early, and speaking for myself, the question which arises to my mind is not so much a strict

identity of membership but the existence of the necessary causal connection having regard to the fact that it appears on the history as recounted in the 2021 decision that the Mining & Energy Division came into being in 1995 as a result of a merger of two existing divisions, and therefore, on one view, the establishment of that division as an entity is not causally connected to the earlier amalgamation but arose from a distinct decision to, in effect, abolish two existing divisions and create a new division, or, alternatively, to merge them into a different division with a different character.

PN199

MR BORENSTEIN: Two things, your Honour. Firstly, the dissolution of the FEDFA Division and the absorption of its membership into not only the Mining & Energy Division but also the Construction Division and the Manufacturing Division was a dissolution of the FEDFA Division, and we would say that in terms of the ongoing existence of the Mining Division, those people were added to the Mining Division, but the Mining Division continued as it had before with those additional people and the name change reflected that those people came in, but the Mining Division continued on.

PN200

Our submission is that when you track the history, you start with the Mining Division following the amalgamation with UMFA at the outset and then there are other groups of employees that are absorbed into the Mining Division, but it still remained, in essence, the Mining Division, and Mr Kelly has given detailed evidence of the way in which numbers of persons have been absorbed into the Mining Division, but that, at all times, the Mining Division has predominantly been a division covering employees in the coal mining industry in the same way as UMFA did.

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PRESIDENT HATCHER: You characterise the 1995 change as the continuation of the Mining Division, albeit that the FEDFA Division was abolished?

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MR BORENSTEIN: Yes.

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PRESIDENT HATCHER: And then its members were reallocated to existing branches?

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MR BORENSTEIN: Existing divisions.

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PRESIDENT HATCHER: Existing divisions. Can that be substantiated in terms of the actual rule change at that time and any documents which explain it?

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MR BORENSTEIN: Reference is made to that in Mr Kelly's statement. Mr Bakri will turn up the page. In terms of the history, Mr Kelly goes through and indicates the point in time when rules were changed to give effect to the dissolution of the

FEDFA Division and its allocation to the other divisions. We will turn that up for you in a moment, your Honour.

PN207

Just parking that for a moment, if that is right, and if what transpired was the dissolution of the FEDFA Division and the distribution of its members across the others, then we say that that doesn't point against the argument that we are making that you had the Mining Division, as it was after the original amalgamation, continuing to overwhelmingly represent employees in the coal mining industry and, indeed, even when it absorbed the FEDFA membership, a large proportion of those would have been, in any event, eligible to be under the Mining Division eligibility rules because the distribution of them was on the basis that those FEDFA members were employed in the coal mining industry and under the coal mining industry rule, the original rule, they always had coverage to cover any employees who were engaged in or in connection with the coal mining industry.

PN208

Even though the FEDFA rule was an occupational rule, whereas the UMFA rule was an industry rule, there was an overlap and some members of FEDFA decided to go with FEDFA because it was an occupational rule, but they could just have easily has been in UMFA as well, so that although, on the face of it, there seems to be a significant change by reason of the distribution of the FEDFA membership, and we don't say there wasn't some change, a large number of the FEDFA members would, in any event, have been eligible to be in UMFA without that.

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The second affidavit of Mr Kelly, which is 25 October 2022, at paragraph 57, Mr Kelly explains that the rules, -rule 42(iii)(a) formalised the absorption of the FEDFA members into the Mining & Energy Division, and he sets out that rule. That encapsulated what had been happening over a period of time leading up to that, and that was the rule change that was made.

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In addition to that rule, we also point to rule 42(xv)(d), which is at page 155 of Mr Kelly's statement, and in - - -

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PRESIDENT HATCHER: 42 what?

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MR BORENSTEIN: (xv)(d), which states:

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For the purposes of the above and in accordance with the scheme of amalgamation in relation to each past amalgamation -

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so this includes the amalgamation of UMFA -

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the following shall be the rights and obligations of the divisions and shall be deemed always to have been the case.

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PRESIDENT HATCHER: When did that enter the rules?

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MR BORENSTEIN: I believe that that occurred in 95, after the other amalgamations that followed. We will check the exact date, but my recollection is that it was in 1995.

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PRESIDENT HATCHER: So might it have been part of the same rule change?

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MR BORENSTEIN: Yes, it may be, yes. We will check that out, but I'm confident it was in that time because it refers to the other organisations that came into the union after UMFA, but the critical thing is that this is a recognition in the rules that:

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The United Mineworkers Federation of Australia shall be and be deemed always to have been a union that corresponds to the UMW Division and/or the Mining and

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Energy Division.

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So the wording of that suggests that it was after the FEDFA had been disbanded and been absorbed into the other divisions because it's at that point that the Mining Division became the Mining & Energy Division.

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The point we want to make arising from that is that the definition of 'separately identifiable constituent part' talks about being separately identifiable under the rules of the organisation, and we say that this is a rule which offers acknowledgement that, so far as the rules are concerned, UMFA is to be deemed and to be deemed always to have been corresponding to the UMW Division or the Mining & Energy Division.

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PRESIDENT HATCHER: Mr Borenstein, it seems to me that if the 1995 change is to be characterised in the way you say, then you would be entitled to rely upon the logic of our decision in the O'Connor matter, that is, the addition of new members to an existing division doesn't interrupt the continuity or identity of the original division.

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MR BORENSTEIN: Well, it's certainly consistent with that.

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PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: That arose in a slightly different context.

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PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: But, yes, your Honour is correct, if I may say so, that it's certainly consistent with that finding.

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PRESIDENT HATCHER: I don't know if it's in the materials, Mr Borenstein, but it seems to me that if this issue of the causal connection turns upon the proper characterisation of the 1995 rule change, it might be advisable that we have access to all the materials pertaining to that rule change.

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MR BORENSTEIN: We can - - -

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PRESIDENT HATCHER: That may exist in our archives or one of the parties might have it.

PN233

MR BORENSTEIN: Yes, we can take steps to - yes.

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The final piece of the puzzle in relation to that is something that's recorded in the Full Bench's decision in the earlier decision in 2021 at paragraph 19 - this is what was in the back of my mind - where it's noted that:

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On 23 September 1993, the rules of the CFMEU were altered to include rule 42A -

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which was in an exhibit that the Commission had -

PN237

which provided for the incremental integration of the FEDFA Division into the CFMEU's other divisions.

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PRESIDENT HATCHER: So you say that indicates, as it were, an advance plan to move the relevant group of Energy members into the existing Mining Division and the 1995 rule change was a consummation of that plan?

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MR BORENSTEIN: Yes, and that's how Mr Kelly describes it, that that gave effect to what happened after this.

PN240

So that's essentially the basis on which we say that the UMFA remains separately identifiable under the rules of the amalgamated organisation as the Mining & Energy Division and it's on that basis that we advance the argument that that's a constituent part under paragraph (a) of the definition of 'separately identifiable constituent part'.

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As I have said in passing, the evidence that we have filed from Mr Kelly demonstrates that the overwhelming character of the Mining & Energy Division remains as a representative of employees employed in the coal mining industry. There are other cohorts of employees that are also covered, but they are very much in the minority, and Mr Kelly has set out a series of charts in his October statement which demonstrate the make-up of the governing bodies of the organisation over that period of time, and you will see that overwhelmingly they are people drawn from the coal mining industry that were the officials and the members of the governing bodies of the organisation, and he also gives evidence about the numbers of membership and, again, you have got membership where persons engaged in the coal mining industry are - I think it's over 85 per cent of the membership of the UMFA Division and have been at that level over the years.

PN242

We say that having regard to all of those factors, we submit that the Commission should find that the Mining & Energy Division is a relevant separately identifiable constituent part, successor to the UMFA.

PN243

If the Commission makes that finding, then it must next turn to the question of whether the separately identifiable constituent part became part of the amalgamated organisation as a result of an earlier amalgamation, and the earlier amalgamation that we rely on is the 1992 amalgamation when the UMFA became part of the amalgamated union, which was then called ATAIU and BWIU Amalgamated Organisation, now the CFMMEU, and was deregistered as part of that process, but it became part of the organisation in that amalgamation, and if the Commission accepts that the Mining & Energy Division is the constituent part that reflects the UMFA, then the Commission necessarily should find that it has satisfied the requirements under section 94(1)(a) and became part of the amalgamated organisation in that way.

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I am just told that the evidence that I have referred the Commission to in Mr Kelly's second statement starts at paragraph 40 and follows through to approximately paragraph 60, just as a matter of reference.

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Those submissions address the requirement under section 100(1)(a) that the application is validly made under section 94.

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The next requirement under section 100(1) is in paragraph (b), that the outline under section 95 relating to the application is a fair and accurate representation of

the proposal for withdrawal from the organisation and addresses any of the matters mentioned in 95(1)(b) or the regulations under 95(1)(c).

PN247

If the Commission would turn to paragraph 56 of the outline which we have filed, the first thing that we seek to address is the outline of proposed withdrawal which is required under (i) of paragraph (b) and we seek to amend the outline that was filed with the application in the form that appears as annexure GK94 to Mr Kelly's fourth statement, exhibit 4.

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PRESIDENT HATCHER: GK what?

PN249

MR BORENSTEIN: GK94. It's on page 63 of the affidavit. There are two changes that we wish to make to the document that was filed with the application. The first one is at paragraph 11, which is the proposed ballot question, and that's just been reordered in its terminology to be consistent with the ballot paper that's proposed to be distributed.

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The second alteration is in paragraph 47. The alterations that are made there are to include matters that are required under regulation 83 to be made available to constituent members who receive the outline. The way in which the regulation is framed seems to suggest that when the outline is sent that it includes these various rules and, because they are quite voluminous, as the Bench has seen, what has been proposed is that this outline would have a QR code placed on it in paragraph 47 and that by accessing the QR code, it would connect to all of these documents that are listed, so you have the eligibility rules of the CFMEU, the eligibility of UMFA immediately before its deregistration back in 1992 and the eligibility rules of the amalgamated organisation in 92 after UMFA joined it.

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PRESIDENT HATCHER: Mr Borenstein, apart from some vague recollection of COVID, what's a QR code?

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MR BORENSTEIN: It's one of those - it's not a barcode - it's one of those codes where if you scanned it with a camera on a phone, it connects you to a site which contains, in this case, documents.

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PRESIDENT HATCHER: Well, you're not going to read it on a phone, so if you had a computer, how would you do it?

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MR BORENSTEIN: I am told by people who know these things that you get a link that you then connect to and you see these - - -

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PRESIDENT HATCHER: Mr Borenstein, imagine if you were a member of the Mining & Energy Division given one of these codes, would you be able to access it?

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MR BORENSTEIN: I'm sorry?

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PRESIDENT HATCHER: Imagine yourself as a member of the Mining & Energy Division - you.

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MR BORENSTEIN: Yes.

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PRESIDENT HATCHER: Would you be able to access those documents using a QR code?

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MR BORENSTEIN: I did.

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PRESIDENT HATCHER: You did?

PN262

MR BORENSTEIN: I tested it. But I reject the premise. I don't think I'm qualified to be a member of the Mining & Energy Division. I should say it's the members of the Mining & Energy Division that proposed this arrangement, so I'm assuming they are more - - -

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PRESIDENT HATCHER: I'm sure they are all very technologically savvy.

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MR BORENSTEIN: - - - knowledgeable about the abilities of their members than I am.

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PRESIDENT HATCHER: Why can't they just be sent electronically and have it as hyperlinks or something similar?

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MR BORENSTEIN: I'm sorry, I didn't hear the last bit.

PN267

PRESIDENT HATCHER: Why can't they just get this electronically and have them as hyperlinks, or something a bit simpler?

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MR BORENSTEIN: I think - again my technological ignorance is going to come to the fore here - but I think that if a hyperlink is provided, it's got to be sent in some form to people, some electronic form that they can click on, so that would

mean that it would have to be sent, I assume, by some form of email or something of that sort. This outline is sent in hard copy.

PN269

PRESIDENT HATCHER: By post?

PN270

MR BORENSTEIN: It's sent by post to the constituent members who are voting. I am told that it's potentially possible to do two things, to do the QR code and also on the document provide an address to a site or a link or a website that would have the documents on them and that that might solve the problem of people having to look at things on their phone.

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PRESIDENT HATCHER: So the division doesn't keep email addresses of members?

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MR BORENSTEIN: The answer is that they have for some, but not all, members.

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PRESIDENT HATCHER: All right.

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MR BORENSTEIN: An additional facility of dialling into a particular site might overcome the sort of concern your Honour has about - - -

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PRESIDENT HATCHER: Mr Borenstein, it's also correct in your submissions that you also have proposed that hard copies be made available if requested.

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MR BORENSTEIN: If requested, yes.

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PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: They would be for people like me.

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PRESIDENT HATCHER: Could the documents also simply be accessible on the division's website? I assume it's got one.

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MR BORENSTEIN: I am told that when I said to your Honour a moment ago that we could give an address to a site, that's what was intended, that it would be given an address to the union's website where the documents would be available.

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PRESIDENT HATCHER: I see.

PN282

MR BORENSTEIN: In terms of the amendment, we would seek to amend it in the terms of the document which I have just been speaking to your Honours about and with the addition of a website that members can access to see the documents as well.

PN283

PRESIDENT HATCHER: All right, we will allow those amendments.

PN284

MR BORENSTEIN: The Commission then, under the Act, needs to be satisfied that the outline is a fair and accurate representation of the proposal for withdrawal from the organisation. That's a matter that we can assert from the Bar table, but, ultimately, the Bench will have to satisfy itself, but you will see that it sets out the features of the proposed withdrawal in an accurate and in a fair way.

PN285

In terms of the requirements under 95(1)(c), which pick up regulation 83, we have set out at paragraph 60 of the written submission the manner in which each of the requirements in regulation 83 are addressed. You will see in 83 that there's a requirement for eight matters to be dealt with in the outline and we have given a reference to the paragraphs where each of those matters has been dealt with and, unless you wish me to go through each one of them in detail, we rely on those references.

PN286

PRESIDENT HATCHER: On the basis that if we identify any difficulty, we will notify the parties and give you an opportunity to deal with that.

PN287

MR BORENSTEIN: Certainly. The next part of section 100 that needs to be satisfied is subsection (1)(ba), which calls for the Commission to be satisfied that the material required by section 95A complies with the requirements of the section. Section 95A deals with the rules of the organisation and the Commission, in its decision on 21 February, has addressed those and expressed its satisfaction with the rules and we rely on that for the purpose of compliance with that part of section 100.

PN288

Going then to section 100(1)(c), the Commission is to be satisfied that the proposal for withdrawal from the organisation complies with any requirement specified in the regulations. The regulations, relevantly, are regulations 82 and 83 and then submission that we make is that those regulations have been complied with in the way in which we have addressed the various documents. I will just remind the Commission what they require.

PN289

Regulation 82 is that the application for a ballot under section 94 has to be in accordance with form 2, contain the information prescribed in the form and nominate a person to be the representative constituent member. All of that has

been done. Regulation 83 we have just been through and we therefore say that those requirements under section 100(1)(c) are met.

PN290

We therefore submit that the requirements of subsection (1)(b) being satisfied, the Commission should order a vote of the constituent members in a ballot to decide whether the constituent part should withdraw.

PN291

In relation to the ballot, we draw attention to some matters that we have set out at paragraph 64 and following of the written outline.

PN292

Firstly, we draw attention to the fact that at paragraph 13 of the application, Mr Kelly has sought an order pursuant to section 102(1A) allowing the ballot to be conducted by a designated official, and an application is also made under section 102(4) that the designated official have power to conduct an attendance ballot.

PN293

The evidence in support of those applications is in Mr Kelly's fourth statement at paragraphs 12 to 25 and a statement of Mr Thompson, who is the designated official. For convenience, I will take the Commission to Mr Kelly's statement and those paragraphs just to indicate in general terms how Mr Kelly puts his application.

PN294

Firstly, he points to the fact, at paragraph 3, that the M&E Division, the Mining & Energy Division, has an existing exemption under section 186 of the Registered Organisations Act allowing it to conduct its own elections and that it has held that since shortly after becoming part of the CFMEU and he notes that the first general election of that division as part of the CFMEU in 1996 was conducted in accordance with that exemption. The exemption is attached to his statement at GK85.

PN295

PRESIDENT HATCHER: If you have a coal mine which is - I assume there's such a thing - a fly in/fly out mine or a drive in/drive out mine where you have people there for a block of time and then away, how does an attendance ballot work in that context?

PN296

MR BORENSTEIN: The intention is that the ballot wouldn't be entirely by way of an attendance ballot, that the designated official would make a judgment about which cohorts of workers couldn't practically be balloted by an attendance ballot and those people would be provided with a postal ballot, and there is provision for that in the material.

PN297

In relation to the actual attendance ballot, it is intended that the ballot would be conducted over a period of time, so it wouldn't just be on one or two days, it

would be over a period of time and would therefore catch people who are rotating in and out on these rosters.

PN298

PRESIDENT HATCHER: So, at a given site, there might be more than one attendance ballot occurring, that is you might try to capture - - -

PN299

MR BORENSTEIN: Well, the ballot would continue.

PN300

PRESIDENT HATCHER: Yes.

PN301

MR BORENSTEIN: Yes, that's right. They have had experience doing this over many years and so they have a history of knowledge to draw on in terms of accommodating those things and, of course, their interest is to maximise the return and, as Mr Kelly has indicated in his statement, in a document which the division prepared for Mr Heydon's Royal Commission, they did some research about the success rate of their attendance ballots compared to postal ballots and you will see, at paragraph 5, over a period from 1996 to 2012 they estimated that the average membership participation rate on the attendance ballots was 69.4 per cent whereas the average for union postal ballots is something like 23 per cent, so they seem to have the knack of people being able to do it reasonably effectively, and certainly the intention is that they would have people receiving ballots at the attendance places over a period of time in order to capture the sort of employees that your Honour mentioned and, as I say, they obviously have a purpose to try and maximise that because they have an interest in the success - - of the ballot.

PN302

Mr Kelly also addresses the actual form of the ballot papers and some specimens of the ballot paper are attached to his statement. As a matter of interest, the Commission may wish to know that the ballot paper, the paper it's printed on will be watermarked for security reasons, and Mr Thompson, the designated official, has expressed his commitment to conduct the ballot in accordance with the rules and the statute and regulations, and so it's on that basis that the application to conduct the ballot themselves and to have it conducted as an attendance ballot is made and we would ask that the Commission grant that order.

PN303

In relation to the orders that we would ask the Commission to make if the Commission accepts the application for the constituent part, we ask the Commission to make an order in the form that we handed up this morning. The order notes the Commission's satisfaction about the relevant matters that are required under the legislation. It provides for the ballot to be taken and the question for the ballot, which is in paragraph 2(c) of the order.

PN304

It sets a commencing date for the ballot of 17 May and a closing date on 19 June. Mr Kelly has explained the dates which are in the ballot order are different than those which are set out in regulation 84; they are more

expansive. The Commission has power under section 100(3) to order a ballot period which is different from the default period and because of the sort of matters that your Honour raised in terms of the attendance ballot and also the fact that the period overlaps with Easter and school holidays in various places, it was thought that it would be better to have a longer period for the ballot and a later period to start the ballot than the regulations prescribe.

PN305

I have been asked to say that those dates that we have put in the order are nominated on an assumption, which, you know, is not meant to be presumptuous, that an order would issue from the Commission by 3 April, and Mr Kelly has explained the various logistical steps that have to be taken in order to have everything in place in time.

PN306

The order then goes on to identify Mr Thompson as the designated official to conduct the ballot. Paragraph 2(f) approves that the ballot be conducted in part as an attendance ballot and in part as a postal ballot. The order has the ballot papers for each of those, the attendance ballot and the postal ballot, annexed.

PN307

Paragraph 2(i) references the mechanism to allow the designated official not to provide hard copies of the voluminous documents but to provide electronic links to them so that they can be accessed and, having regard to the discussion we had earlier, as well as the QR code which is referred to, we will also provide a link to a site which will allow people to access the documents at a particular site, and we will include that in the rejig of the orders when we are finished.

PN308

The 'Yes' case has also been put to the Commission as an attachment to Mr Kelly's statement. It's at GK90, page 50 of the statement, and the Commission can be satisfied that it meets the requirements of the Act in terms of its word limit.

PN309

The other matters in the draft order are matters that we have already dealt with.

PN310

In terms of the orders for the timing of the ballot, can I just direct particular attention to paragraph 24 through to 26 in Mr Kelly's fourth affidavit, where he sets out why the dates are what they are, what the requirements are in terms of engaging printers and so on, to explain the period in question.

PN311

They are the matters that we seek to put to the Commission in support of the application. We note that you asked us to provide you with the documentation for the 95 rule change where the FEDFA was disbanded and we will take steps to do that in the next few days.

PN312

If there is nothing else that I can assist the Commission with, they are our submissions.

PN313

PRESIDENT HATCHER: All right. Thank you. Mr Dowling?

PN314

MR DOWLING: Thank you, your Honour, just three short matters. Firstly, we confirm - when I say 'we', the amalgamated organisation confirms - - -

PN315

PRESIDENT HATCHER: Sorry, what was that?

PN316

MR DOWLING: The amalgamated organisation confirms it withdraws its objections in respect of the primary application, the constituent part, and that means withdrawing the statements and submissions in respect of the constituent part.

PN317

PRESIDENT HATCHER: Yes.

PN318

MR DOWLING: It does not withdraw its jurisdictional objections in respect of the alternative constituent part, but they will only become relevant if our learned friends re-enliven the application in respect of the alternative constituent part that's been adjourned.

PN319

One small and very minor matter in respect of the substituted annexure 6 that was handed up this morning. The document that was provided, there's a mechanism within the document that populates a heading at the top of every page so that it records the rule that is set out on that page. The Bench will see from pages 71 through to 96 that that has malfunctioned, that process, and at the top of all of those pages, you will see a reference to rule 42C, Amalgamation with FBTPU. That's a mistake and I am sure between us we can sort that out so that that process can be corrected and so that the version of the rules that is made does not carry that error.

PN320

Save those matters, unless we can be of any assistance with respect to the material that is sought by the Full Bench, there's no further submissions.

PN321

PRESIDENT HATCHER: Thank you. Subject to two matters, we will reserve our decision. The two matters are the further supply of material in respect of the 1995 rule change and, secondly, any difficulty we identify with respect to some of the formal matters about which we will request further submissions if that arises.

PN322

We thank counsel for their submissions and we now adjourn.

ADJOURNED INDEFINITELY

[11.14 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #1 WITNESS STATEMENT OF GRAHAME PATRICK KELLY
DATED 15/09/2022.....PN166**

**EXHIBIT #2 FURTHER WITNESS STATEMENT OF GRAHAME
PATRICK KELLY DATED 25/10/2022.....PN167**

**EXHIBIT #3 THIRD WITNESS STATEMENT OF GRAHAME PATRICK
KELLY DATED 27/02/2023PN168**

**EXHIBIT #4 WITNESS STATEMENT OF SHANE RUSSELL
THOMPSON DATED 27/02/2023PN169**