



STATEMENT AND DIRECTIONS

Fair Work (Registered Organisations) Act 2009

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

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union
(D2022/10)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 16 SEPTEMBER 2022

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

Background

[1] Mr Grahame Kelly has applied under ss.94 and 94A of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) for a ballot to be held to decide whether, in relation to the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**):

- 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 Mining and Energy Division (the **Constituent Part**), should withdraw from the CFMMEU, or
- in the alternative, to decide 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 (the **Alternative Constituent Part**) should withdraw from the CFMMEU,
(the **Application**).

[2] The Application and accompanying documents were lodged on 15 September 2022 and comprised:

- a completed Form 2 Application for ballot under Part 3 of Chapter 3 of the RO Act;
- a copy of a resolution of the Central Council of the Mining and Energy Division of the CFMMEU (**M&E Division**) authorising Mr Kelly to make the Application;
- a written outline of the proposal for the Constituent Part to withdraw from the CFMMEU;

- a written outline of the proposal for the Alternative Constituent Part to withdraw from the CFMMEU;
- a copy of the name and rules proposed for the organisation to be registered by the M&E Division once the proposed withdrawal from amalgamation takes effect;
- a copy of the name and altered rules for the amalgamated organisation, the CFMMEU, once the proposed withdrawal from amalgamation takes effect;
- a Statement of Grahame Patrick Kelly dated 15 September 2022; and
- a Statement of Phillip John Pasfield dated 15 September 2022.

[3] Section 94 of the RO Act provides:

94 Applications to the FWC for ballots

- (1) An application may be made to the FWC for a secret ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:
 - (a) the constituent part became part of the organisation as a result of an amalgamation under Part 2 or a predecessor law; and
 - (b) the amalgamation occurred no less than 2 years prior to the date of the application; and
 - (c) the application is made before the period of 5 years after the amalgamation occurred has elapsed.
- (2) However, an application cannot be made if:
 - (a) during the last 12 months, the FWC has rejected an application for a ballot to be held in relation to the constituent part of the organisation; or
 - (b) a ballot was held that rejected the withdrawal of the constituent part.
- (3) The application may be made by:
 - (a) the prescribed number of constituent members; or
 - (aa) a person authorised to make the application by the prescribed number of constituent members; or
 - (b) a committee of management elected entirely or substantially by the constituent members, whether by a direct voting system or a collegiate electoral system; or
 - (c) if the application relates to a separately identifiable constituent part—the committee of management of that part; or
 - (d) a person who is:
 - (i) either a constituent member or a member of a committee of management referred to in paragraph (b) or (c); and
 - (ii) authorised to make the application by a committee of management referred to in paragraph (b) or (c).
- (4) The application must be in the prescribed form and must contain such information as is prescribed.

- (5) A constituent member of an amalgamated organisation who is not a financial member is taken not to be a constituent member for the purposes of subsection (3).
- (6) The regulations may prescribe the manner in which an authorisation for the purposes of paragraph (3)(aa) and subparagraph (3)(d)(ii) must be made.

[4] For the Commission to order that a vote of the constituent members be taken by secret ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, it must be satisfied of the matters in s.100(1) of the RO Act. This includes that the application for the ballot is validly made under s.94. In summary, s.94 requires the application to be made:

- in respect of a ‘constituent part’ of an ‘amalgamated organisation’;¹
- within the prescribed timeframe;²
- by a person or persons who is entitled to make an application;³
- in the form and containing the information prescribed by the *Fair Work (Registered Organisations) Regulations 2009*.⁴

[5] Relevant to the Application:

- section 94(1)(c) has the effect that an application cannot be made more than 5 years after the amalgamation occurred. However, the Commission has discretion to accept an application made after the end of the 5 year period under s.94A; and
- section 94(2)(a) does not allow an application to be made if, during the last 12 months, the Commission has rejected an application for a ballot to be held in relation to the constituent part of the organisation.

[6] Mr Kelly says that the Commission has not within the last 12 months before the Application, rejected an application for a ballot to be held in relation to the Constituent Part or the Alternative Constituent Part.

[7] This is the second application made by Mr Kelly under s.94 of the RO Act for a secret ballot to decide whether the M&E Division of the CFMMEU should withdraw from the CFMMEU. The first application was made on 26 March 2021 (the **March 2021 Application**). The March 2021 application was opposed by the CFMMEU.

[8] A Full Bench of the Commission identified two threshold questions that required determination before it could deal further with the March 2021 Application:

¹ RO Act, s.94(1). See s.93 for the definitions of ‘amalgamated organisation’ and ‘constituent part’.

² RO Act, s.94(1), 94(2) and 94A.

³ RO Act, s.94(3).

⁴ RO Act, s.94(4).

- whether the M&E Division is a ‘constituent part’ of the CFMMEU for the purposes of s.94(1) of the RO Act, and
- whether the M&E Division ‘became part of’ the CFMMEU ‘as a result of’ the Construction, Forestry, Mining and Engineering Union’s amalgamation with the Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia on 27 March 2018.

[9] On 14 September 2021, a Full Bench of the Commission dismissed the March 2021 Application because it was not satisfied that the application was validly made under s.94 of the RO Act (**the September 2021 Decision**).⁵ It determined that the answer to the first threshold question was ‘yes’ and the second was ‘no’.

[10] Mr Kelly made an application for judicial review of the September 2021 Decision. On 8 August 2022, a Full Court of the Federal Court dismissed that application.⁶

[11] The Application was made on 15 September 2022. The March 2021 Application was dismissed on 14 September 2021.

[12] Section 94A of the RO Act provides:

94A Accepting applications for ballots more than 5 years after amalgamation

- (1) Despite paragraph 94(1)(c), the FWC may accept an application made under section 94 after the end of the period referred to in that paragraph if the FWC is satisfied that, having regard to the matters set out in subsection (2), it is appropriate to accept the application.
- (2) The matters are the following:
 - (a) 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;
Note: *Workplace or safety law* is defined for this Part in subsection 93(1).
 - (b) 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.
- (3) If the FWC considers that an amalgamated organisation has a record of not complying with workplace or safety laws but that the constituent part has not contributed to that record, the FWC must decide that it is appropriate to accept the application.
- (4) Submissions in relation to the matters mentioned in subsection (2) may only be made by the following persons:
 - (a) the applicant or applicants, or any person who could have made an application under subsection 94(3) in relation to the proposed withdrawal;
 - (b) the amalgamated organisation;
 - (c) the Commissioner.

⁵ *Re Kelly* [2021] FWC 6002

⁶ *Grahame Patrick Kelly v Construction, Forestry, Maritime, Mining and Energy Union and Anor* [2022] FCAFC 130

[13] The Applicant says that as the Application is made more than 5 years after the date of the 1992 amalgamation, he relies on s.94A of the RO Act. He seeks that the Commission exercise its discretion under that section to accept an application made after the end of the period mentioned in s.94(1)(c) of the RO Act.

[14] It is my *provisional view* that the Commission will need to determine as threshold issues whether, pursuant to s.94A of the RO Act, it is appropriate to accept the Application. As a consequence, directions should be issued that require Mr Kelly and the CFMMEU, and any other interested party eligible pursuant to s.94A(4), to make submissions that address:

- whether the CFMMEU has a record of not complying with workplace or safety laws, and
- if so, whether the Constituent Part or the Alternative Constituent Part has had any contribution to that record, and
- the likely capacity, of the organisation that Constituent Part or 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.

Next steps

[15] This matter is listed for mention at **9:30 AM on Wednesday, 21 September 2022** via Teams. A Notice of Listing with details for attendance will be sent to parties shortly.

[16] Interested parties are directed to submit draft directions by no later than **2.00 pm on Tuesday, 20 September 2022**.

[17] The Applicant and the CFMMEU are directed to confer and, if possible, reach agreement in relation to the proposed directions, including on any preliminary/jurisdictional issues to be decided.

Other matters – keep informed

[18] The Commission has established a dedicated Major Cases webpage for this matter.

[19] The Commission’s subscription service will be used to notify interested parties of updates during this matter such as deadlines for the filing of submissions and evidence, notices of listing and when any decisions or statements are issued. A dedicated subscription service called ‘Ballot for withdrawal of ME Division from CFMMEU’ has been established. Interested parties are encouraged to subscribe to receive notifications on the [subscription services page](#) on our website. Any questions about the subscription service can be sent to ros@fwc.gov.au.

PRESIDENT

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