BACKGROUND DOCUMENT

Fair Work (Registered Organisation) Act 2009
s.94—Application for withdrawal from amalgamated organisation

Application by Grahame Patrick Kelly
(D2021/2)

MELBOURNE, 8 JUNE 2021

Note: This document has been prepared to facilitate the hearing and determination of the matter before a Full Bench. It does not represent the concluded view of the Bench on any matter or issue. The questions set out in the document are to be addressed by the parties during the course of the oral hearing.

[1] Mr Grahame Kelly (**Applicant**) has applied to the Commission under s.94 of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) for a secret ballot to be held to decide whether the Mining and Energy Division (**M&E Division**) of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) should withdraw from the CFMMEU (**Application**).

[2] The Application and accompanying documents were lodged on 26 March 2021. They comprise:

- a completed Form 2 *Application for ballot under Part 3 of Chapter 3*
- a copy of a resolution of the Central Council of the M&E Division authorising Mr Kelly to make the Application
- a written outline of the proposal for the M&E Division 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, and
- a copy of the name and altered rules proposed for the amalgamated organisation, the CFMMEU, once the proposed withdrawal from amalgamation takes effect.

[3] The Application is made on the basis that:

- the CFMMEU is an 'amalgamated organisation' for the purposes of Part 3 of Chapter 3 of the RO Act
- the M&E Division is a 'constituent part' of the CFMMEU, being a 'separately identifiable constituent part' under paragraph (c) of the definition in s.93(1) of the RO Act, and
- the M&E Division became a constituent part of the CFMMEU as result of the amalgamation of the CFMEU with the Maritime Union of Australia (**MUA**) and the Textile, Clothing and Footwear Union of Australia (**TCFUA**) on 27 March 2018 (**2018 amalgamation**).[1]

[4] The CFMMEU opposes the Application.

[5] Submissions were received as follows:

- CFMMEU submissions, along with Statement of Declan Murphy (19 May 2021)
- Applicant submissions (2 June 2021)
- CFMMEU submissions in reply (7 June 2021).

[6] In overview, the Applicant submits:

- As a matter of construction, paragraph (c) of the definition of 'separately identifiable constituent part' covers branches, divisions and parts of the amalgamated organisation that do not correspond to any branch, division or part of an organisation de-registered in forming the amalgamated organisation.
- The M&E Division falls under paragraph (c) of the definition and consequently is a 'constituent part' of the CFMMEU.
- While the M&E Division existed in its present form before and after the 2018 amalgamation, its position was affected by the changes to the organisation's structure and governing bodies in the 2018 amalgamation.
- The reference to 'amalgamated organisation' in s.94(1) is to the organisation in the particular form that it has following an amalgamation and this a 'separately recognised artifact' under the RO Act distinct from the registered entity and the legal entity.
- The M&E Division became part of the CFMMEU in its present form as a result of the 2018 amalgamation.
- It follows that the Application is properly made under s.94(1).

[1] Outline [7]–[9] and Form 2 [3].

[7] In overview, the CFMMEU submits:

- As a matter of historical fact, the M&E Division was created by an internal reorganisation unconnected with any amalgamation and it does not correspond to all or part of any single organisation de-registered in forming the CFMMEU.
- As a matter of construction, paragraph (c) of the definition of 'separately identifiable constituent part' must be read down so that any separately identifiable constituent part of an amalgamated organisation, and consequently any 'constituent part' of an amalgamated organisation for the purposes of s.94(1), must correspond to all or part of an organisation de-registered in forming the amalgamated organisation.
- As the M&E Division does not correspond to all or part of any single organisation de-registered in forming the CFMMEU, it is not a 'constituent part' for the purposes of s.94(1) of the RO Act. Consequently, the M&E Division cannot be the subject of an application under s.94(1).
- Further, the M&E Division did not 'become part of' the CFMMEU 'as a result of an amalgamation' within the meaning of s.94(1). Rather, it became part of the CFMMEU as a result of a rule change unconnected with an amalgamation.
- The Applicant's reading, under which, for the purposes of s.94(1), every constituent part of an organisation 'becomes part of' the organisation all over again after each amalgamation, should be rejected as a matter of construction.
- Alternatively, if the M&E Division did become part of the CFMMEU 'as a result of' an amalgamation within the meaning of s.94(1), that amalgamation was in 1992 and the application is out of time.

Q1: Do the parties agree with the overview of submissions as set out above?

[8] The CFMMEU and Applicant appear to broadly agree that there are 2 questions to be determined:

- 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 2018 amalgamation.[2]

Q2: Do the parties agree these are the questions to be determined?

[9] The Applicant submits that:

---

[2] CFMMEU Submission [21], Applicant Submission [7] (noting that the CFMMEU submits that the second question is whether the M&E Division became part of the CFMMEU as a result of (any) amalgamation and that the second question need only be answered if the answer to the first is yes).

> it is uncontroversial that the [M&E] Division first came into existence by an administrative rule change that preceded and was unconnected with an amalgamation.[3]

[10] The CFMMEU draws upon the Murphy Statement in respect of the history of the CFMMEU and the M&E Division[4] and asserts that: 'In 1995, as a result of an internal reorganisation and not as a result of any amalgamation, the Mining Division combined with the Energy Division … As a consequence, the M&E Division had members which extended [sic] beyond the respective eligibilities of the [UMW] or FEDFA.'[5] Further the CFMMEU submits that when the MUA and TCFUA amalgamated with the organisation in 2018, there was no change to the M&E Division and 'the CFMMEU's pre-existing corporate status was unaffected.'[6]

Q3: Is it common ground that the M&E Division first came into existence by an administrative rule change that preceded and was unconnected with an amalgamation?

Questions for the Applicant:

Q4: On the Applicant's reading of s.94(1) do you accept that:

- *following any amalgamation any constituent part can make an application for a secret ballot; and*
- *they are locked out from making such an application for 2 years after the most recent amalgamation?*

Q5: If the expression 'amalgamated organisation' in s.94(1) means the entity with the new structure created by each amalgamation, then what happens if the entity undergoes an internal restructure after an amalgamation? In such circumstances does it cease to be an 'amalgamated organisation' such that s.94(1) can no longer apply to it?

---

[3] Applicant Submission [67].

[4] CFMMEU Submission [1]–[20].

[5] Ibid. See further at [58]: 'There should be no dispute that the M&E Division did not become part of the CFMMEU as a result of an amalgamation – the M&E Division was created out of an administrative rule change, unconnected with amalgamation.'

[6] CFMMEU Submission [20].