

IN THE FAIR WORK COMMISSION

MATTER NO: D2022/10

APPLICATION BY GRAHAME KELLY – WITHDRAWAL FROM AMALGAMATED ORGANISATION – MINING AND ENERGY DIVISION – CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION

JOINT WRITTEN SUBMISSION ON THE SECTION 100(1)(BA) REQUIREMENTS

A. Introduction

1. On 21 December 2022, the Commission issued directions including directions for the filing of an amended application by the Applicant and the filing of a joint written submission by the parties addressing the requirements of s 100(1)(ba) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) in relation to the proposed rules contained in the amended application.
2. Pursuant to those directions, on 23 December 2022, the Applicant filed amended annexures 5 and 6 to the Application. Amended annexure 5 being the proposed rules of the new organisation, *the Rules of the Mining and Energy Union and its district branches* (**the Proposed MEU Rules**). Amended annexure 6 being the proposed altered rules for the CFMMEU when the proposed withdrawal takes effect (**the Proposed CFMEU Rules**).
3. The Proposed MEU Rules and the Proposed CFMEU Rules are relied upon in respect of both the Primary Ballot Application¹ and the Alternative Ballot Application.²

¹ As explained in the Application dated 15 September 2022, the primary application in respect of the constituent part which formerly constituted the United Mineworkers Federation of Australia, which 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 Mining and Energy Division.

² As explained in the Application dated 15 September 2022, the alternative application in respect of 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.

4. This outline is filed by the parties pursuant to the Commission's directions and addresses the requirements of s 100(1)(ba) of the RO Act in relation to the proposed rules in annexures 5 and 6.

B. The relevant provisions

5. Section 100(1) of the RO Act provides that the Commission must order a secret ballot of the constituent members if it is satisfied of the matters set out in sections 100(1)(a), 100(1)(b), 100(1)(ba) and 100(1)(c).
6. Under s 100(1)(ba) the Commission must be satisfied that "*the material required by section 95A complies with the requirements of that section*".
7. These joint submissions address the requirements of s 95A in relation to the amended rules which have been filed on 23 December 2022.

C. The Primary Ballot Application and the Alternative Ballot Application satisfy the requirements in s 95A

8. The amended rules which have been filed are proposed to be applied in relation to both the Primary Ballot Application and the Alternative Ballot Application.

C.1. Section 95A(2) and (3) – the names

9. The names proposed for the new organisation and the amalgamated organisation comply with the requirements of subsections 95A(2) and (3).
10. The proposed name of 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.
11. There is no other registered organisation with the word "Mining" in its name. Whilst the word "energy" appears in the name of the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* the names of the respective organisations are clearly distinguishable and as such would not be so similar as to cause confusion. The same can be said of the status quo where the word "energy" appears in the name of *the Construction, Forestry, Maritime, Mining*

and Energy Union as well as in the name of the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*.

12. Under both the Primary Ballot Application and the Alternative Ballot Application the name proposed for the amalgamated organisation is the “Construction, Forestry, and Maritime, Employees Union”. This proposed name will reflect the withdrawal of the Constituent Part or alternatively, the Alternative Constituent Part. This is because the new name removes the references to “mining” and “energy”.

C.2. Section 95A(4) - whether the eligibility rules of the new organisation are compliant

13. Section 95A sets out two related requirements in respect of the eligibility rules proposed for the new organisation.
14. Section 95A(4)(a) provides that the eligibility rules of the new organisation must as far as practical reflect the *application* of the eligibility rules of the amalgamated organisation in relation to the constituent part. The word ‘application’ indicates that s. 95A(4)(a) is not simply concerned with the assignment of eligibility as reflected in the rules of the amalgamated organisation, but how the eligibility has been *applied* within the organisation. This construction is supported by s. 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.*” That involves both the proper construction of the amalgamated organisation’s rules and the practices adopted in respect of eligibility.
15. Section 95A(4)(b) provides that the eligibility rules of the new organisation 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.
16. Prior to addressing the requirements in sections 95A(4)(a) and 95A(4)(b) we provide the following summary of the MEU eligibility rules. The eligibility rules are set out in MEU Rules 2(A) to 2(I).

MEU Rule 2(A)

17. MEU Rule 2(A) deals with the coverage of the MEU in the coal industry. It is based on existing CFMMEU Rule 2(D) which has its genesis as the UMFA's eligibility rule and was included in the rules of the amalgamated organisation when the amalgamation with the UMFA took effect.
18. The only difference between MEU Rule 2(A) and CFMMEU Rule 2(D) are the inclusion of the limitations/exceptions in MEU Rules 2(A)(i) and 2(A)(ii). MEU Rule 2(A) read with the limitations/exceptions in MEU Rules 2(A)(i) and 2(A)(ii) serve to confirm existing coverage arrangements as between the Mining and Energy Division (**ME Division**) and the rest of the CFMMEU. There is no dispute between the parties that the draft rules reflect the existing organisational and administrative arrangements within the amalgamated organisation for the allocation of members within the amalgamated organisation. Accordingly, it is submitted that the Commission can proceed on that basis. However, despite the respective concessions from the relevant parties, if the Commission considers that evidence is required to establish those matters, the applicant and the amalgamated organisation request the opportunity to file such evidence.

MEU Rule 2(B)

19. MEU Rule 2(B) derives from CFMMEU Rule 2(E) which was included in the rules of the amalgamated organisation when the amalgamation with the FEDFA took effect.
20. The difference between MEU Rule 2(B) and CFMMEU Rule 2(E) is the inclusion of the limitations/exceptions in MEU Rules 2(a)(i)-(iii) and MEU Rules 2(b)-(e). Presently, members who are enrolled under CFMMEU National Rule 2(E) are attached to either the ME Division or the Construction and General Division depending on the work they perform. The inclusion of the limitations/exceptions in MEU Rules 2(a)(i)-(iii) and MEU Rules 2(b)-(e) explains which members are entitled to join the MEU under MEU Rule 2(B) as opposed to the CFMEU. These limitations/exceptions reflect and confirm the existing coverage arrangements as between ME Division and the rest of the CFMMEU.

MEU Rule 2(C)

21. MEU Rule 2(C) is based on the existing CFMMEU Rule 2(G). It is substantively the same as CFMMEU Rule 2(G) with the only difference being the changes to the cross-references in the rule. This rule was included in the rules of the amalgamated organisation as a result of the decision of the Australian Industrial Relations Commission³. MEU Rule 2(C) serves to reflect and confirm existing coverage arrangements as between ME Division and the rest of the CFMMEU.

MEU Rule 2(D)

22. MEU Rule 2(D) derives from existing CFMMEU Rule 42(iii)(a). CFMMEU Rule 42(iii)(a) was included in the rules of the amalgamated organisation as a result of the amalgamation between UMFA and the amalgamated organisation.
23. The first paragraph of MEU Rule 2(D) is identical to CFMMEU Rule 42(iii)(a). The second paragraph of the rule which inserts a limitation/exception serves to reflect and confirm existing coverage arrangements as between ME Division and the rest of the CFMMEU.

MEU Rule 2(E)

24. MEU Rule 2(E) which is limited to Queensland is derived from existing CFMMEU Rule 2(O) which is a state-based eligibility rule that was 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.⁴
25. The difference between MEU Rule 2(E) and CFMMEU Rule 2(O) is that only those aspects of CFMMEU Rule 2(O) which pertained to the ME Division have been included.
26. MEU Rule 2(E)(a) is derived from CFMMEU Rule 2(O) - Section B which was the FEDFA eligibility rule. CFMMEU Rule 2(O) - Section B replicates CFMMEU Rule 2(E) in respect of Queensland. As has been done in respect of MEU Rule 2(B), MEU Rule 2(E)(a) expressly explains which members are entitled to join the MEU under

³ [2001] AIRC 932.

⁴ See [2014] FWCG 5423.

MEU Rule 2(E)(a) as opposed to the CFMEU by including limitations/exceptions have been included to reflect and confirm existing coverage arrangements as between the ME Division and the rest of the CFMMEU.

MEU Rule 2(F)

27. MEU Rule 2(F) which is limited to New South Wales is derived from existing CFMMEU Rule 2(P) which is a state-based eligibility rule that was 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.⁵
28. The difference between MEU Rule 2(F) and CFMMEU Rule 2(P) is that only those aspects of CFMMEU Rule 2(P) which pertained to the ME Division have been included
29. MEU Rule 2(F)(e) is derived from CFMMEU Rule 2(P)(F). CFMMEU Rule 2(P)(F) replicates CFMMEU Rule 2(E) in respect of New South Wales. As has been done in respect of MEU Rule 2(B), MEU Rule 2(F)(e) expressly explains which members are entitled to join the MEU under MEU Rule 2(F)(e) as opposed to the CFMEU by including limitations/exceptions have been included to reflect and confirm existing coverage arrangements as between the ME Division and the rest of the CFMMEU.

MEU Rule 2(G)

30. MEU Rule 2(G) which is limited to Western Australia is derived from existing CFMMEU Rule 2(Q) which is a state-based eligibility rule that was 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.⁶
31. The difference between MEU Rule 2(G) and CFMMEU Rule 2(Q) is that only those aspects of CFMMEU Rule 2(Q) which pertained to the ME Division have been included.

⁵ See [2017] FWCG 116.

⁶ See [2017] FWCG 117.

32. MEU Rule 2(G)(a) is derived from CFMMEU Rule 2(Q)(5). CFMMEU Rule 2(Q)(5) substantively replicates CFMMEU Rule 2(E) in respect of Western Australia. As has been done in respect of MEU Rule 2(B), MEU Rule 2(G)(a) expressly explains which members are entitled to join the MEU under MEU Rule 2(G)(a) as opposed to the CFMEU by including limitations/exceptions have been included to reflect and confirm existing coverage arrangements as between the ME Division and the rest of the CFMMEU.

MEU Rule 2(H)

33. MEU Rule 2(H) is substantively identical to existing CFMMEU Rule 2(J). This rule serves to put beyond any doubt that independent contractors, if they were employees performing work of the kind which they usually perform as independent contractors, would be eligible for membership of the MEU. This rule serves to confirm existing coverage arrangements as between ME Division and the rest of the CFMMEU.

MEU Rule 2(I)

34. MEU Rule 2(I) is substantively identical to existing CFMMEU Rules 2(H) and 2(I) which contain limitations on the eligibility of the MEU in respect of particular named employers in Queensland and Tasmania.

C.2.1. The requirements in sections 95A(4)(a) and 95A(4)(b) in respect of the Primary Application

35. As explained above at paragraphs 17-35, MEU Rules 2(A) to 2(I) reflect the existing coverage arrangements as between ME Division (which, as explained above in footnote 1, is the Constituent Part that remains separately identifiable), and the rest of the CFMMEU. Accordingly, the Commission should conclude that:
- (a) in accordance with s 95A(4)(a), 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
 - (b) in accordance with s 95A(4)(b), MEU Rules 2(A) to 2(I) will not 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.

C.2.2. The requirements in sections 95A(4)(a) and 95A(4)(b) in respect of the Alternative Application

36. As explained above in footnote 2, the constituent part relied upon in the Alternative Application is 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.
37. The proposed eligibility rules in respect of the Alternative Application are the same as those proposed in respect of the Primary Application, namely those set out in MEU Rules 2(A) to 2(I).
38. MEU Rules 2(A), 2(D), 2(E)(c), 2(F)(a)-(b), are each derived from the eligibility rules of the UMFA. Accordingly, these proposed eligibility rules satisfy the requirements in sections 95A(4)(a) and 95A(4)(b).
39. As explained above, MEU Rule 2(I) contains limitations on the eligibility of the MEU in respect of particular named employers in Queensland and Tasmania. As such it does not offend the requirements in sections 95A(4)(a) and 95A(4)(b).
40. In respect of the balance of the proposed MEU eligibility rules which are rules which extend beyond what used to be the eligibility rules of the UMFA, namely MEU rules 2(B), 2(C), 2(E), with the exception of 2(E)(c), 2(F), with the exception of 2(F)(a)-(b), and 2(H), the Commission should conclude that the proposed rules satisfy the requirements in sections 95A(4)(a) and 95A(4)(b) once regard is had to s 95A(6). This submission is developed in the section below.

C.2.3 The application of s 95A(6) to the Application and the Alternative Application

41. In respect of the Primary Application, it is submitted that the proposed eligibility rules satisfy the requirements in sections 95A(4)(a) and 95A(4)(b). However, to the extent necessary the Commission may have recourse to s 95A(6) as discussed below.

42. The applicant submits that in respect of the Alternative Application, when considering MEU rules 2(B), 2(C), 2(E) with the exception of 2(E)(c), 2(F) with the exception of 2(F)(a)-(b), and 2(H), the Commission is permitted by s 95A(6) to have regard to existing organisational and administrative arrangements in determining whether these eligibility rules satisfy the requirements of s 95A(4). In accordance with the settlement agreement, the amalgamated organisation does not wish to be heard about that matter.
43. The applicant submits that in the particular circumstances of this case, where the ME Division substantially replicates the UMFA, such an expanded eligibility rule does not offend against s 95A(4).
44. The purpose of sub-sections 95A(4)-(6) is explained in paragraph 42 of the Explanatory Memorandum where it is stated:

“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.”
45. In relation to the Alternative Constituent Part, the applicant submits that the proposed eligibility rules for the new organisation reflect the status quo in that they provide for members of the amalgamated organisation who have been allocated to that part of the amalgamated organisation which derived from UMFA, which is the ME Division, to continue to be represented by that part following the withdrawal.
46. Further, as explained in paragraph 42 of the Explanatory Memorandum, internal organisational and administrative arrangements can be used to demarcate coverage between the new organisation and the amalgamated organisation where the rules are not explicit. Here, the internal organisational and administrative arrangements in the amalgamated organisation support the allocation to the new organisation of coverage of the members under the extended eligibility proposed for the new organisation. That would preserve the status quo of coverage.
47. Those eligibility rules reflect the internal organisational and administrative arrangements within the amalgamated organisation as envisaged by subsection (6).

48. Once regard is had to these arrangements the Commission should conclude that the eligibility rules satisfy the requirements of s 95A(4) in respect of both the Primary Ballot Application. Further, the applicant submits that the requirements of s. 95A(4) are met in respect of the Alternative Ballot Application.

C.3. Section 95A(5) - whether the eligibility rules of the CFMMEU as proposed to be altered are compliant

49. Section 95A(5) requires that 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.
50. It is submitted that great care was taken by the parties in preparing the MEU Rules and the CFMEU Rules to avoid overlap between the coverage of the MEU and the CFMEU, so far as was practical. With the objective of avoiding such overlap the two sets of rules have been drafted to include limitations/exceptions in eligibility rules where otherwise there might have been overlap.
51. An example to illustrate the approach adopted is that MEU Rules 2(A)(i) and 2(A)(ii) include limitations/exceptions to the coverage of the MEU. These areas of limitation/exception are then expressly provided for as areas of CFMEU eligibility in CFMEU Rules 2(D) and 2(DA).
52. A further example is the eligibility rule of the amalgamated organisation which is derived from the eligibility rule of the FEDFA (CFMMEU Rule 2(E)) has been divided between the MEU and the CFMEU. MEU Rule 2(B) includes limitations/exceptions in MEU Rules 2(a)(i)-(iii) and MEU Rules 2(b)-(e). These areas of limitation/exception are then expressly provided for as areas of CFMEU eligibility in CFMEU Rule 2(E)(aa).
53. The Commission should conclude that the requirement in s 95A(5) has been met in respect of both the Primary Ballot Application and the Alternative Ballot Application.

D. Disposition

54. For the reasons set out above, the Commission should be satisfied that the requirements in s 100(1)(ba) in relation to the proposed rules, have been met in respect of both the Primary Ballot Application and the Alternative Ballot Application.
55. If, however, the Commission is not so satisfied in any particular respect, the parties respectfully request that they be notified of the Commission's concerns and allowed an opportunity to make changes necessary to address those concerns.

30 January 2023

H Borenstein

Y Bakri

Counsel for the Applicant

C Dowling

C Massy

Counsel for the CFMMEU