DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mining and Energy Union
v
Glencore Coal Assets Australia Pty Ltd Trading AS Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre
(C2025/1742)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT GRAYSON

SYDNEY, 23 MAY 2025

Appeal against decision [2025] FWC 471 and Order PR784443 of Deputy President Boyce at Sydney on 18 February 2025 in Matter Number B2024/911 – Application for a majority support determination – Whether the Mining and Energy Union is a bargaining representative for relevant employees – Whether union entitled to represent the industrial interests of employees in the Operational Awareness Monitoring Centre – In or in connection with the coal and shale industries – Effect of phrase "without limiting the generality of the foregoing" – Employees entitled to be members of the MEU under rule 2(A) – Rule 2(A) not limited by exclusions in rule 2(F) conferring additional eligibility in New South Wales – MEU entitled to apply for a majority support determination – Appeal allowed – Majority support determination made.

Introduction

[1] Glencore is one of Australia's largest producers of coal for export, with 16 operational mines across New South Wales and Queensland. The Operator Awareness Monitoring Centre (the **OAMC**) opened in 2018 and is a purpose-built facility operated by Glencore. It is located on the former West Wallsend Colliery site near Newcastle. The purpose of the OAMC is to provide real time event monitoring and analysis of the operation of machinery and vehicles used at Glencore mines, including monitoring for eye closure, distraction, system events and on-board system component failures.

[2] Fourteen OAMC officers perform work at the OAMC and are employed by Glencore Coal Assets Australia Pty Ltd (**Glencore**). Thirteen of the fourteen OAMC officers are members of the Mining and Energy Union (the **MEU**). Eleven of the OAMC officers have signed a petition requesting that Glencore commence bargaining for an enterprise agreement to apply at the OAMC. Glencore has refused to bargain. As a result, the MEU applied for a majority support determination under s 236(1) of the *Fair Work Act 2009* (Cth) (the **FW Act**) the effect of which, if made, would be to require Glencore to engage in bargaining.

[3] Section 236(1) permits a "bargaining representative" of an employee who will be covered by a proposed single-enterprise agreement to apply for a determination that a majority of the employees who will be covered by that agreement want to bargain. Section 176(1)(b) provides that an employee organisation, such as the MEU, will be the bargaining representative for each of its members unless the member appoints another representative or revokes the status of the organisation as their bargaining representative. However, s 176(3)(a) provides that an organisation cannot be a bargaining representative of an employee unless it is "entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement".

[4] The MEU's application for a majority support determination was heard by Deputy President Boyce. The Deputy President determined that the MEU cannot be a bargaining representative for any of the OAMC officers as it is not "entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement".[1] As a result, the Deputy President concluded that the MEU was not entitled to make an application for a majority support determination under s 236(1) of the FW Act and that the Commission had no jurisdiction to make the determination sought by the MEU.[2] The Deputy President dismissed the application.

[5] The MEU seeks permission to appeal and, if permission is granted, to appeal from the decision of the Deputy President. For the reasons that follow, the Deputy President was wrong to find that the MEU is not entitled to represent the industrial interests of the OAMC officers. The OAMC officers are eligible to be members of the MEU because they are engaged "in or in connection with the coal and shale industries" for the purpose of rule 2(A) of its rules. Rule 2(A) is not limited by the exclusionary words in rule 2(F)(b) relied upon by the Deputy President. Permission to appeal should be granted, the appeal allowed, the decision of the Deputy President quashed, and a majority support determination made.

Factual background

[6] There is little, if any, dispute between the parties as to the factual background to the proceeding before the Deputy President, the nature of the operations undertaken by the OAMC or the work performed by OAMC officers. In light of the conclusion we have reached in relation to the appeal, it is unnecessary to consider the evidence in detail. It is nonetheless convenient to provide a brief summary of the background to the dispute.

[7] The OAMC utilises a proprietary system known as the Operator Awareness System (the **OAS**). The OAS is an in-vehicle mine operator monitoring and fatigue detection system that runs 24 hours a day, 365 days per year. It operates primarily through a small camera mounted on the dashboard of a vehicle cabin which faces the operator. The camera has infrared lights embedded in it, so that it can see during the night and through any dark (sun) glasses worn by the operator. It is also made up of a forward-facing camera, a GPS antenna, and computer, speaker, and vibrator modules.

[8] The Deputy President made the following findings in relation to work performed by OAMC officers which are not in dispute:[3]

> a) The OAS monitors and detects relevant "events" that it has been programmed to monitor (e.g. an eye closure event). It does so via a computer program and platform that is able to

> continuously and simultaneously scan and review video footage derived from hundreds of in-vehicle cameras set-up to monitor (in real time) the faces of drivers or operators, so as to detect and capture (mostly fatigue related) "events" identified by the OAS in such video footage.
>
> b) When the OAS detects a relevant "event", it retrieves approximately 8-15 seconds of video footage which shows the event that the OAS has detected, and sends that video footage to an application (OpWeb) which alerts the OAMC officer that an event is awaiting review. The video footage is then accessed and viewed by an OAMC Officer (at the OAMC office) who thereafter confirms the classification of the event into a specific event category as per the relevant TARP [Trigger Action Response Plan].
>
> c) Following TARP classification, the OAMC Officer proceeds to observe and follow the relevant procedures and guidelines to deal with or respond to the event as set by the Respondent.
>
> d) In dealing with an event, the OAMC Officer follows the Respondent's relevant procedures and guidelines which include making contact with the relevant person (if applicable), and/or following up with a supervisor (if applicable), and completing relevant electronic records in respect of the event via an office computer.
>
> e) Additional or other duties performed by OAMC Officers (as part of their overall role) include tasks such as system and fault checks, shift handovers, email monitoring, historic event reviews (or the updating of same), reviewing script communications (for verbal contact directly with operators), footage retrieval, operator monitoring health checks, component failure, server performance checks, and internal system checks (e.g. for email connections/processes, site disconnections, and two-way communications systems). Any issues arising from system and fault checks are again dealt with pursuant to the Respondent's relevant procedures and guidelines.

[9] The OAMC covers Glencore's coal mining operations in New South Wales and Queensland at Ravensworth Open Cut, Mangoola Open Cut, Bulga Open Cut, Mount Owen Open Cut, United Wambo Open Cut, Hunter Valley Operations Open Cut, Claremont Open Cut, Ralston Open Cut, Newlands Open Cut, Collinsville Open Cut and Hail Creek Open Cut as well as three coal mining operations in South Africa at iMpunzi, Tweefontein and Geodevonden and the nickel-cobalt mining operation in Murrin Murrin, Western Australia.

[10] There is no enterprise agreement that covers or applies to OAMC officers. On 13 June 2024, the MEU wrote to Glencore requesting that it commence bargaining for an enterprise agreement to cover employees at the OAMC. On 28 June 2024, Glencore responded requesting that the MEU set out the basis upon which it is entitled to represent the industrial interests of employees at the OAMC. On 1 July 2024, the MEU wrote to Glencore stating that it was entitled to represent the OAMC officers because it represents "persons working in or in connection with the coal industry".

[11] On 4 July 2024, Glencore responded indicating that it was not satisfied with what it described as the MEU's "cursory" response which "does not address the exception to eligibility in the MEU rules for persons performing the work that is undertaken by the OAMC Officers". The correspondence invited the MEU to address the basis upon which it says it is entitled to represent the OAMC officers or, failing that, to make an application for a majority support determination. On 18 July 2024, the MEU responded stating that:

> Glencore Coal Assets Australia Pty Ltd self-describes as one of the largest producers of coal in Australia. Rule 2(A) of the MEU rules provide that all employees engaged in or connection with the coal and shale industries are eligible for membership. The persons we seek to bargain for are all engaged by your company, which is one of the largest producers of coal in Australia. There is no exception in the Eligibility Rules of the MEU for persons performing the work that is undertaken by the Operator Awareness Monitoring Officers.

[12] The MEU applied to the Commission for a majority support determination under s 236 of the FW Act on 18 July 2024. Glencore provided a response to the application dated 22 July 2024 in which it indicated it opposed the application on the grounds that the MEU is not entitled to act as a bargaining representative for the proposed agreement and is incapable of bringing the application because it is not entitled to represent the industrial interests of the OAMC officers. Glencore asserted that the MEU's eligibility to represent employees engaged in connection with the coal industry is qualified and excludes persons employed in a supervisory, professional, administrative, clerical or technical capacity employed at mine offices. In that respect, it referred to rule 2(F)(b) of the MEU's rules.

[13] The Deputy President issued directions in relation to the application. Glencore filed an outline of submissions dated 18 August 2024 in which it submitted that the MEU is not entitled to act as a bargaining representative because is not entitled to represent the industrial interests of OAMC officers. No other basis for opposing the making of a majority support determination was identified. The MEU filed an outline of submissions dated 30 August 2024 in which it addressed its entitlement to represent the industrial interests of the OAMC officers by reference to rule 2(A) of its rules and the other requirements for the making of a majority support determination in ss 236 and 237 of the FW Act. Glencore filed an outline of submissions in reply dated 13 September 2024 again asserting that the MEU is not entitled to act as a bargaining representative and, for that reason, the application should be dismissed.

Statutory provisions

[14] Part 2-4 of the Act is entitled "Enterprise Agreements" and contains provisions dealing with bargaining for, making, approval, variation and termination of enterprise agreements. Integral to the bargaining process contemplated by the Act is the role of bargaining representatives. Section 176 sets out the persons who can be bargaining representatives for the purposes of a proposed enterprise agreement and relevantly provides as follows:

> **176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements**
>
> *Bargaining representatives*
> (1) The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed enterprise agreement that is not a greenfields agreement:
> (a) an employer that will be covered by the agreement is a bargaining representative for the agreement;
> (b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:
> (i) the employee is a member of the organisation; and
> (ii) in the case where the agreement is a multi-enterprise agreement in relation to which a supported bargaining authorisation is in operation—the organisation applied for the authorisation;

> unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or
>
> (c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;
>
> (d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.
>
> …
>
> (3) Despite subsections (1) and (2):
>
> (a) an employee organisation; or
>
> (b) an official of an employee organisation (whether acting in that capacity or otherwise);
>
> cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.
>
> …

[15] As we have earlier indicated, s 176(1)(b) provides that an employee organisation is the bargaining representative for any employee that is a member of the organisation unless the employee appoints another person or revokes the status of the organisation. However, the capacity of an employee organisation to be a bargaining representative is limited by its constitutional coverage. Section 176(3)(a) provides that an employee organisation cannot be a bargaining representative for an employee unless it is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

[16] Bargaining for a proposed enterprise agreement can commence if an employer agrees to bargain or initiates bargaining.[4] If an employer does not agree to bargain or initiate bargaining, another bargaining representative may apply for a majority support determination under s 236 which provides as follows:

> **236 Majority support determinations**
>
> (1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a ***majority support determination***) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.
>
> (1A) Despite subsection (1), a bargaining representative may not apply to the FWC for a determination if a supported bargaining authorisation that specifies the employee is in operation.
>
> **Note:** While a supported bargaining authorisation that specifies an employee is in operation, an employer cannot bargain with that employee for any kind of agreement other than a supported bargaining agreement (see subsection 172(7)).
>
> (1B) Despite subsection (1), a bargaining representative of an employee may not apply to the FWC for a determination if:
>
> (a) a single interest employer agreement or a supported bargaining agreement applies to the employee; and
>
> (b) the agreement has not passed its nominal expiry date.

(2) The application must specify:

(a) the employer, or employers, that will be covered by the agreement; and

(b) the employees who will be covered by the agreement.

[17] As will be apparent, only a "bargaining representative of an employee" can apply to the Commission for a majority support determination.

[18] The circumstances in which the Commission is required to make a majority support determination are set out in s 237 in the following terms:

237 When the FWC must make a majority support determination

Majority support determination

(1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:

(a) an application for the determination has been made; and

(b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

(2) The FWC must be satisfied that:

(a) a majority of the employees:

(i) who are employed by the employer or employers at a time determined by the FWC; and

(ii) who will be covered by the agreement;

want to bargain; and

(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

(c) the group of employees who will be covered by the agreement was fairly chosen; and

(d) it is reasonable in all the circumstances to make the determination.

(3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

(4) The determination comes into operation on the day on which it is made.

[19] The substance of Glencore's objection to the MEU's application is that an application had not been made for the purposes of s 237(1)(a) because the MEU was not a bargaining representative able to make the application. As such, Glencore submitted, the Commission was not required to make a determination by s 237(1) and, indeed, could not do so. Glencore did not otherwise suggest the Commission should not be satisfied that the requirements for the making of a majority support determination are met.

Eligibility rules of the MEU

[20] The Deputy President determined that the MEU was not entitled to represent the industrial interests of the OAMC officers and, for that reason, could not be a bargaining representative of those employees by operation of s 176(3) of the FW Act. Whether an employee organisation is entitled to represent the industrial interests of an employee, including for the purposes of being a bargaining representative under s 176(3), turns on whether the employee is eligible for membership in accordance with the organisation's eligibility rules.[5]

[21] The MEU was created as a separate union in 2023 following the withdrawal of the Mining and Energy Division from the amalgamated union that was then known as the Construction, Forestry, Maritime, Mining and Energy Union (the **CFMMEU**). The membership of the MEU following the de-amalgamation reflects the membership previously assigned to the Mining and Energy Division of the CFMMEU. The origins of the eligibility rules now found in the rules of the MEU lie in the rules of predecessor organisations, particularly the United Mineworkers Federation of Australia (the **UMFA**) and previously the Australasian Coal and Shale Employees' Federation as well as aspects of the rules of the Federated Engine Drivers and Fireman's Association (the **FEDFA**).

[22] The eligibility of persons to be members of the MEU is governed by rule 2 of its rules which is entitled "Eligibility to Join the Union". Rule 2 consists of nine subrules numbered (A) to (I). The coverage of the coal and shale industry generally is dealt with in rule 2(A) which provides as follows:

> **Section 1.01 2 – ELIGIBILITY TO JOIN THE UNION**
>
> The following persons are eligible to be members of the Union:
>
> (A) An unlimited number of employees engaged in or in connection with the coal and shale industries together with such other persons whether employees in the industries or not as have been appointed officers and admitted as members are eligible to be members of the Union.
>
> (i) Provided that the following persons engaged in or in connection with the coal and shale industries will not be eligible under Rule 2(A) to be members of the Union:
>
> (a) persons in the State of South Australia or the Northern Territory.
>
> (b) persons, other than those employed by the operator or principal mining contractor of a coal mine or coal preparation plant or a person that is a related body corporate to the operator or principal mining contractor within the meaning of s.50 of the *Corporations Act*, performing:
>
> (A) any work in or in connection with or incidental to the construction of a coal mine where mining operations have not commenced; or
>
> (B) construction work or work that is incidental to such construction work on or adjacent to a coal mine, including expansion work and demolition work.
>
> (c) persons engaged to perform work at the Port of Newcastle.

> (ii) Provided further that the following persons will not be eligible under Rule 2(A) to be members of the Union:
>
> (a) persons who are engaged to provide services in the mobile crane hire industry including the hiring, operating or driving of mobile cranes, mobile elevated work platforms and like equipment.

[23] The principal aspect of rule 2(A) is that the MEU is entitled to have as members any employees engaged in or in connection with the coal and shale industries. Rule 2(A)(i) and (ii) contain a number of exclusions. None of the exclusions within rule 2(A) are suggested to be relevant to the MEU's entitlement to represent the industrial interests of the OAMC officers.

[24] Rule 2(B) provides that the MEU is entitled to represent certain "engine drivers" and other enumerated occupations reflecting the previous coverage of the FEDFA. Rule 2(B) is not relevant to the present matter. Rule 2(C) to (G) then provide for "Additional Eligibility" in different geographical locations. Each subrule from rule 2(C) to (G) commences with the words "without limiting the generality of the foregoing, or being limited thereby". Rule 2(F) provides for "Additional Eligibility in the State of New South Wales". The aspect of Rule 2(F) which is relied upon by Glencore is rule 2(F)(b) which provides:

> (F) Additional Eligibility in the State of New South Wales:
>
> Without limiting the generality of the foregoing, or being limited thereby, the following persons are eligible for admission to membership of the Union in the State of New South Wales:
>
> …
>
> (b) Without limiting the generality of the foregoing and without being limited thereby, an unlimited number of persons engaged in any capacity in connection with coal and shale mining or in connection with the coke industry, but excepting persons employed in the iron, steel and metal industries; and excepting also persons who are now members, or in the future may be eligible for membership of the United Collieries Staff Association of New South Wales; but as regards the last mentioned union, so as not to exclude lampmen and grooms.
>
> …

[25] Glencore contended before the Deputy President that the MEU is not entitled to represent the OAMC officers because they fall within the exception in rule 2(F)(b) referring to "persons who are now members, or in the future may be eligible for membership of the United Collieries Staff Association of New South Wales".

Decision of the Deputy President

[26] It is necessary to refer to the decision of the Deputy President only in overview. On appeal, both parties accepted that, if permission to appeal is granted, the question is simply whether the Deputy President was correct to conclude that the MEU was not entitled to represent the industrial interests of the OAMC officers or not.

[27] It is sufficient to observe that the Deputy President recorded that rule 2(A) of the MEU's rules provides that relevant persons are eligible for membership of the MEU if "engaged in or

in connection with the coal and shale industries". However, the Deputy President regarded rule 2(A) as being confined by rule 2(F)(b). In particular, the Deputy President said:

> **[35]** MEU Rule 2(E)(b) [sic] provides for an exclusionary rule, by reference to a person who "may" be "eligible for membership" of the United Collieries Staff Association of New South Wales (UCSA). In other words, the focus of the test (for exclusion) is upon eligibility for membership of the UCSA, not the eligibility for membership of the MEU itself. It creates an express exception to the MEU's broad coverage in the CMI [coal mining industry].

[28] As such, notwithstanding the broad terms of rule 2(A), the Deputy President considered that an employee is excluded from membership of the MEU if the person "may be eligible for membership of the United Collieries Staff Association of New South Wales" for the purposes of rule 2(F)(b).

[29] The Deputy President observed that the application of rule 2(F)(b) was, in one respect at least, problematic because the United Collieries Staff Association of New South Wales no longer exists.[6] However, the Deputy President did not accept that this meant that aspect of rule 2(F)(b) had no ongoing operation. The Deputy President characterised the submissions of the MEU as seeking to have the Commission read parts of rule 2(F)(b) as surplusage such that the exclusion referring to members or person eligible to be members of the United Collieries Staff Association would have no application or effect.[7]

[30] Having set out some of the history of rule 2(F)(b) and the origins of the United Collieries Staff Association, the Deputy President concluded that the reference to the United Collieries Staff Association should be read as if it referred to the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**). The Deputy President said:

> **[44]** The history identified by the Respondent (set out at paragraphs [39]-[40] of this decision) is not simply directed to the replacement of one legal entity for another as a matter of convenience for the purposes of avoiding the making of the MSD (as submitted by the MEU). I find that that the history of MEU Rule 2(E)(b) [sic] points to the exclusion contained therein as continuing to have work to do, such that it ought to be read as excluding from MEU membership persons (engaged in or in connection with the coal industry in New South Wales) who are now, or in the future may be, eligible for membership of the Collieries Staff Association of APESMA (under its federal rules). In short, the reference to UCSA under MEU Rule 2(E)(b) is to be read as a reference to APESMA.

[31] The Deputy President recorded that the eligibility rules of APESMA refer to persons employed in the coal or shale mining industry "in a supervisory, professional, administrative, clerical or technical capacity".[8] In light of the evidence as to the work of the OAMC officers, the Deputy President considered that the role of OAMC Officer falls within the "technical" category of rule 3.12.2 of APESMA's rules and, as a result, the MEU could not be a bargaining representative as it is not entitled to represent the industrial interests of OAMC officers in relation to work that will be performed under the proposed agreement for the purposes of s 176(3) of the FW Act.

Grounds of appeal

[32] The notice of appeal filed by the MEU identified three grounds of appeal that can be summarised as follows:

1. The Deputy President denied the Mining and Energy Union procedural fairness and/or failed to consider a substantial and clearly articulated argument by the MEU, by failing to consider and determine the MEU's case that it was entitled to represent the industrial interests of the employees who would be covered by the proposed agreement under rule 2(A) of its rules.

2. The Deputy President erred in failing to hold that the MEU was entitled to represent the industrial interests of the employees who would be covered by the proposed agreement in relation to work to be performed under that agreement under rule 2(A) of the MEU's rules.

3. Further or in the alternate to (2), the Deputy President erred in determining that the affected employees were not eligible for membership of the MEU under its rule 2(F) because they were members or may in the future be eligible for membership of the United Collieries Staff Association of New South Wales for the purposes of rule 2(F)(b).

[33] To dispose of the appeal, it is necessary only to address ground 2. Ground 1 is a procedural fairness complaint that the Deputy President failed to consider the MEU's submission that it is entitled to represent the industrial interests of the OAMC officers under rule 2(A). Even if there is force in the ground, unless the OAMC officers are, in fact, eligible to be members of the MEU under rule 2(A), there is no utility in permission to appeal being granted with respect to that ground. Ground 3, which concerns the application of the exclusionary words in rule 2(F)(b) referring to the United Collieries Staff Association of New South Wales, arises only if ground 2 is unsuccessful.

[34] Ground 2 is that the Deputy President erred by failing to hold that the MEU was entitled to represent the industrial interests of the employees who would be covered by the proposed agreement in relation to work to be performed under that agreement by rule 2(A) of its rules. The MEU submits that it is entitled to represent the industrial interests of the OAMC officers because they are employed "in or in connection with the coal and shale industries" and that the coverage set out in rule 2(A) is not confined by, or to be read down by reference to, rule 2(F)(b). That submission is correct. The Deputy President erred in finding that the OAMC officers are not eligible to be members of the MEU.

[35] Rule 2(A) of the MEU's rules is an example of what is referred to as an "industry rule". It is well-established that an industry rule, including historical equivalents of rule 2(A) itself, provides for eligibility for membership based on the industry of the employer. As long ago as *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290, the High Court considered the rules of a predecessor of the MEU, the Australasian Coal and Shale Employees' Federation, which provided that the union consisted "of an unlimited number of employees engaged in or in connection with the coal and shale industry, together with such other persons … as have been appointed offers of the federation and admitted as members thereof". The Court observed:[9]

> These workmen, it is said, have been admitted as members of the Coal and Shale Employees' Federation *as persons engaged in or in connection with the coal and shale industry*. The words are no doubt wide, but they do not cover every person who uses coal or works in connection with it. The Arbitration Act allows the organization of employees according to their association with the trades or businesses of employers or according to the occupations or avocations of

> employees. The discrimen adopted by the Coal and Shale Employees' Federation, on a proper interpretation of their rules, is, we think, the trade or business of the employer. Thus, some employers extract coal from the earth, convert some of it into coke, and distribute both coal and coke to consumers. Such a business would in point of fact be part of the coal or shale industry, and all persons employed in that business are properly said to be employed in or in connection with that industry.

[36] A long line of decisions have made clear that the application of historical equivalents of rule 2(A) of the MEU's rules turns on whether the employer of relevant employees operates in or in connection with the coal and shale industries.[10] Whether an employer operates in a particular industry turns upon the nature or character of the enterprise in which it is engaged.[11] There have been many hard fought and difficult cases which have considered whether the operations of particular employers can properly be characterised as being in or in connection with the coal and shale industries. This is not one of them. Glencore is a large coal mining company. There is, and could be, no dispute that it operates "in" the coal and shale industries for the purposes of rule 2(A). The OAMC officers are employed by Glencore and are eligible for membership under rule 2(A).

[37] The conclusion of the Deputy President that OAMC officers are not entitled to be members of the MEU depends on the proposition that the exceptions to the additional eligibility conferred by Rule 2(F) qualify the generality of Rule 2(A). Glencore submits that the decision of the Deputy President in this respect is correct. It says that the better view is that the additional eligibility set out in rule 2(F) with respect to New South Wales should be read as defining and confining the scope of the general coverage of the MEU in rule 2(A) and excludes persons eligible for membership of the United Collieries Staff Association of New South Wales. The submission cannot be accepted.

[38] *First*, the text of rules 2(A) and 2(F) is inconsistent with the submission. Rule 2(F) commences with the words "without limiting the generality of the foregoing, or being limited thereby". Those words make clear that rule 2(F), in providing additional eligibility in New South Wales, does not limit the eligibility conferred by rule 2(A) (or any other part of rule 2). The same words appear at the commencement of each of rules 2(C) to (G). The language indicates that each subrule is intended to provide an independent source of coverage which is not limited by the other subrules and itself does not limit the coverage conferred by any other subrule. The introductory words of rule 2(F) cannot be reconciled with the submission that rule 2(F) confines the coverage conferred by rule 2(A).

[39] In *Leon Fink Holdings Proprietary Ltd v Australian Film Commission* (1979) 141 CLR 672, the High Court considered the meaning to be attached to the words "without limiting the generality of the foregoing" in the context of the *Australian Film Development Corporation Act 1970* (Cth). Mason J (as his Honour then was) said:[12]

> … In this case the words "without limiting the generality of the foregoing" evince an intention that the general power should be given a construction that accords with the width of the language in which it is expressed and that this construction is not to be restricted by reference to the more specific character of that which follows. The clause therefore operates to negative the restrictive implication which might otherwise have been derived from the presence of the specific power to lend contained in par. (a).

[40] His Honour acknowledged that the formulation of words will not always be effective to prevent the making of a restrictive implication derived from the presence of a specific power which is expressed to be subject to limitations and that, in every case, it will depend on the character of the relevant provisions and on the context in which they are found. Glencore relies on similar observations of Aickin J which were as follows:[13]

> The formula "without limiting the generality of the foregoing" has been extensively used in Commonwealth legislation and regulations, but so far as appears it has not previously been the subject of judicial consideration in Australia. At first sight it would appear to indicate a parliamentary intention that the general words which precede the expression should be construed as if the more particular words which follow were not there. That however is too wide a proposition for in every case it must depend on the whole of the context. In some cases the particular words which follow may be such as necessarily to indicate an intention to restrict the operation of the preceding general words. In each case it will be a matter requiring examination of the actual words used, both general and particular, as well as the context as a whole.

[41] Although the effect of the phrase "without limiting the generality of the foregoing" may depend on context, in our opinion, there is no reason in the MEU's rules to give it a meaning other than, to paraphrase Mason J, that the general coverage in rule 2(A) is not to be restricted by reference to the more specific character of that which follows in rule 2(F).[14] We believe that, in this instance, the introductory words of rule 2(F) mean what they say.

[42] It is not just the presence of the words "without limiting the generality of the foregoing" in rule 2(F) which supports that conclusion. Rule 2(F) is entitled "Additional eligibility for New South Wales". That suggests rule 2(F) provides eligibility which is intended to add to, and to enlarge, the eligibility otherwise conferred by rule 2 and not limit the coverage provided for in its other subrules. The chapeau to rule 2(F) also contains the words "or being limited thereby" such that the other subrules do not limit the operation of rule 2(F). As we have said, that underscores that rule 2(F) is intended to provide a separate and independent basis of eligibility without reference to the other subrules within rule 2. Furthermore, rule 2(F)(b), which is relied upon by Glencore, itself commences with the words "without limiting the generality of the foregoing, or being limited thereby". The exception within that subrule can only sensibly be understood as providing an exception to the entitlement to eligibility conferred by rule 2(F)(b) itself and not more generally.

[43] *Second*, the history and development of the MEU's rules supports the conclusion that rule 2(F) does not limit rule 2(A). Rule 2(F) was incorporated into the rules of what was then the Construction, Forestry, Mining and Energy Union (the **CFMEU**), as rule 2(P)(E), in 2017.[15] Prior to 2017, the rules of the CFMEU relevantly provided in rule 2(D) as follows:

> (D) Without limiting the generality of the foregoing and without being limited thereby an unlimited number of employees engaged in or in connection with the coal and shale industries together with such other persons whether employees in the industries or not as have been appointed officers and admitted as members are eligible to be members of the Union.

[44] That, of course, reflects the coverage now found in rule 2(A) of the MEU's rules. The equivalent of what is now rule 2(F) reflects the eligibility rules of the New South Wales registered union known as the Construction, Forestry, Mining and Energy Union (New South Wales Branch) (the **CFMEU (NSW Branch)**). In 2017, the CFMEU applied to alter its rules under s 158A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (the **RO Act**). That

section requires the General Manager to consent to the alteration to the eligibility rules of an organisation to extend them to apply to persons within the eligibility rules of an association that is registered under a State or Territory industrial law if, among other things, the organisation is the "federal counterpart" of the association. Such an application could be made after 1 January 2012.[16] The CFMEU was the federal counterpart of the CFMEU (NSW Branch) and was able to make such an application.[17]

[45] Following the changes to the structure of the federal industrial system resulting from the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and later the FW Act, State registered unions were able to become registered as a "transitionally registered organisations" and thereby participate in the federal industrial system. Unless extended, transitional recognition was to end on 1 January 2017, being the fifth anniversary of the date on which an application could be made in accordance with s 158(2) of the RO Act.[18] On 14 July 2016, the CFMEU applied to alter its eligibility rules under s 158A. The explanation provided for the application being made included:[19]

> The application is for the consent for the transition of the CFMEU-NSW Rule 2 into the eligibility Rules of the CFMEU, with the intent that thereafter the CFMEU will be entitled to enrol and represent all employees in the federal system who were previously entitled to be enrolled in, and represented by, both the CFMEU and the CFMEU-NSW, and that the CFMEU has that right to the ultimate exclusion of the CFMEU-NSW. This application is made in contemplation of the ending of the transitional recognition of the CFMEU-NSW pursuant to s.6(1)(c)(i) of Schedule 1 of the *Fair Work (Registered Organisations) Act 2009*, or earlier Order of the FWC.

[46] As is apparent, the intention of the application was to ensure that all persons eligible for membership of the CFMEU (NSW Branch) were able to be represented in the federal system by the CFMEU given that the transitional recognition of the CFMEU (NSW Branch) was to end. For that purpose, the application sought to replicate the relevant part of the eligibility rules of the CFMEU (NSW Branch) in the rules of the CFMEU. It is impossible to infer that there was any intention to restrict the existing coverage of the federally registered CFMEU. If Glencore's submissions were correct, that would have been the surprising and unforeseen consequence of incorporating what is now rule 2(F) into the rules of the CFMEU. The only inference that can be drawn is to the contrary. There was never an intention that the alteration of the rules of the CFMEU would reduce its existing coverage.

[47] A further requirement for consent to be granted for an alteration to the eligibility rules of an organisation under s 158A of the RO Act, found in s 158A(1)(c), is that "that the alteration will not extend the eligibility rules of the organisation beyond those of the association". Glencore submits that this context supports rule 2(F) being an exception to all parts of the MEU's rules because otherwise the eligibility rules of the MEU would extend beyond the CFMEU (NSW Branch). The submission is misconceived. Section 158A(1)(c) of the RO Act requires only that the Commission be satisfied "the alteration" does not extend the eligibility of the organisation beyond that of the State registered association. "The alteration" is the change being made to the rules of the organisation. Section 158A(1)(c) says nothing about the existing coverage of the federally registered organisation.

[48] *Third*, contrary to the submissions of Glencore, the construction of rule 2(A) and 2(F) advanced by the MEU does not result in the exception in rule 2(F)(b) having no work to do.

Rule 2(F) confers coverage which, potentially at least, extends beyond the existing coverage of the federally registered CFMEU. Rule 2(F)(b) extends to "persons engaged in any capacity in connection with coal and shale mining or in connection with the coke industry". The exceptions that follow operate to confine that extension to the coverage of the MEU in New South Wales. The exceptions in rule 2(F)(b), including the reference to membership of the United Collieries Staff Association of New South Wales, have work to do to that extent.

[49] Even if the exceptions in rule 2(F)(b) are redundant, that would not justify construing those exceptions as confining the extent of the coverage of the MEU provided for in rule 2(A). As we have explained, the language of rule 2(F), understood in the context of the rule as a whole, cannot be reconciled with that outcome. Furthermore, as we have also explained, the intention of rule 2(F) was to replicate the rules of the CFMEU (NSW Branch) and ensure that "the alteration" to the rules of the CFMEU did not extend beyond the coverage of the CFMEU (NSW Branch). It was necessary to include the exceptions to comply with s 158A(1)(c) of the RO Act even if the existing coverage of the CFMEU means that the exceptions have no practical operation.

[50] *Fourth*, Glencore submits that the MEU did not demonstrate that it had an established custom and practice of representing employees beyond production and engineering employees in the black coal industry. The Deputy President similarly concluded that "the history of coverage and eligibility of the MEU, in my view, does not weigh in favour of the MEU having coverage (under its rules or otherwise) of 'staff' employees working in the CMI [coal mining industry]".[20] At first instance, Glencore pointed to the following statement of the Full Bench in *Re Award Modernisation* [2008] AIRCFB 1000:[21]

> The Construction, Forestry, Mining and Energy Union (CFMEU) is the key union that represents production employees in the industry. The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is the key union representing staff employees in the industry.

[51] Glencore referred to other statements recording the historical role of APESMA and its predecessors in representing "staff" employees in coal mining and of the CFMEU in representing "production" employees.[22]

[52] It is permissible to have regard to any common understanding among people concerned with relevant industries and particularly with industrial matters of the ordinary application of the words used, and to the previous use of the words in the relevant organisation's rules and in statutory provisions, decisions, determinations, awards, reports and other papers concerned with the relevant industry or industries.[23] However, history and the common understanding of persons in a particular industry can be deployed only to construe the words of the rules of a union. Glencore seeks to use historical practice to disregard the plain words of rules 2(A) and 2(F) of the MEU's rules. Whatever the historical practice of actual membership and representation, the rules of the CFMEU and its predecessors extended its coverage to any employees engaged in or in connection with the coal and shale industries. For the reasons we have explained, the insertion of what is now rule 2(F) in 2017 did not qualify that general coverage. Furthermore, as the MEU submits, the work of the OAMC officers is novel and reflects technological developments and limited assistance can be derived from historical practice when considering their representation.

[53] Glencore separately submitted that the MEU had not established that it is entitled to represent the industrial interests of the OAMC officers "in relation to work that will be performed under the agreement" for the purposes of s 176(3) of the FW Act. It has been suggested that in case of an industry eligibility rule, although an employee might be entitled to membership of an organisation, the work to be performed under the agreement might be in a different industry such that the organisation is not entitled to represent its members' industrial interest in relation to that work.[24] We have some doubt about the correctness of that understanding of s 176(3) but it is unnecessary to express a final view about the matter. The work of the OAMC officers is undoubtedly "in or in connection with" the coal and shale industries and the MEU is entitled to represent their industrial interests in relation to work to be performed under the proposed agreement.

[54] For those reasons, the MEU is entitled to represent the industrial interests of the OAMC officers under rule 2(A) of its rules and that entitlement is unaffected by the exception in rule 2(F)(b) referring to the United Collieries Staff Association of New South Wales. In those circumstances, it is unnecessary to resolve ground 3 which raises the question of whether the Deputy President was correct to read the reference to the United Collieries Staff Association as if it referred to APESMA. Even if the OAMC officers are persons who "in the future may be eligible for membership of the United Collieries Staff Association of New South Wales" for the purposes of rule 2(F)(b), they are nonetheless eligible for membership under rule 2(A). The MEU is a bargaining representative for the OAMC officers who are its members.

[55] In relation to ground 3, it is sufficient to record that we doubt that the conclusion of the Deputy President is correct. It is true that the meaning of the terms used in an eligibility rule of a union do not remain static and expressions in a union's rules are not to be interpreted as having a static denotation incapable of adaption to changes in work and industry.[25] However, although the evidence suggested that there was some historical association between the New South Wales registered United Collieries Staff Association of New South Wales and predecessors of APESMA, it was not established that it became part of APESMA as a result of any amalgamation or reorganisation and its eligibility rules were not in the same terms as the present eligibility rules of APESMA. In those circumstances, without expressing a concluded view, it is difficult to accept that rule 2(F)(b) can be read as if it referred to APESMA.

[56] We also have some doubt that the OAMC officers fall within the description of being employed "in a supervisory, professional, administrative, clerical or technical capacity" for the purposes of rule 3.12.2 of APESMA's rules. Glencore submitted at first instance and on appeal that the OAMC officers are properly described as being employed in an "administrative" or "clerical" capacity. The Deputy President rejected that submission but found that they were employed in a "technical" capacity.[26] It is at least arguable that the OAMC officers are not employed in an "administrative", "clerical" or "technical" capacity. However, it is appropriate that we refrain from expressing any firm view in relation to the interpretation and application of APESMA's rules where it is unnecessary to do so. We are conscious that APESMA was not heard at first instance and has not made submissions on the appeal. The application of rule 3.12.2 of APESMA's rules can be left to another day.

Conclusion and disposition

[57] We are satisfied that it is in the public interest for permission to appeal to be granted for the purposes of s 604(2) of the FW Act and, as such, we are required to grant such permission. A group of employees wishes to engage in bargaining with their employer for the purposes of making an enterprise agreement to improve their terms and conditions of employment. The employees have been denied a majority support determination which would achieve that outcome as a result of an erroneous construction being adopted of the MEU's rules. The appeal also raises questions of wider importance and implications in relation to the rules of the MEU and the interpretation of a formulation of words which is not uncommon in union eligibility rules.

[58] Permission to appeal should be granted, the appeal allowed, and the decision and order made by the Deputy President quashed. The parties both submit that it is open to the Full Bench to redetermine the MEU's application for a majority support determination. Glencore confirmed that, aside from contending that the MEU is not a bargaining representative for the OAMC officers, it otherwise accepts that the Commission should be satisfied in relation to the other matters set out in s 237(1) and (2) of the FW Act.

[59] Having found that the MEU is a bargaining representative, we are satisfied that an application for a majority support determination was made for the purposes of s 237(1)(a). We are also satisfied that the evidence before the Deputy President establishes that a majority of employees who are employed by Glencore and will be covered by the proposed agreement want to bargain for the purposes of s 237(2)(a), that Glencore has not agreed to bargain for the purposes of s 237(2)(b), that the group of employees that will be covered by the proposed agreement was fairly chosen for the purposes of s 237(2)(c) and that it is reasonable in all the circumstances to make the determination for the purposes of s 237(2)(d). The consequence is that s 237(1) requires that the Commission make a majority support determination.

[60] In relation to the question posed by s 237(2)(c), we have taken into account whether the group of employees is geographically, operationally or organisationally distinct. The OAMC officers form a distinct group within Glencore's organisation who perform work at a purpose-built facility and perform a distinctive task with distinctive operational and productive activity. The group of employees is geographically, operationally and organisationally distinct and that favours a finding it was fairly chosen. There is no other consideration which suggests we should not be satisfied it was fairly chosen. In relation to s 237(2)(d), an overwhelming majority of the employees want to bargain. It is reasonable to make a determination in order to facilitate bargaining. No matter has been raised that would suggest it is not reasonable in all the circumstances to make the determination. We are satisfied that it is.

[61] The Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is allowed; and
(c) The decision in [2025] FWC 471 and order PR784443 made by Deputy President Boyce at Sydney on 18 February 2025 in Matter Number B2024/911 are quashed.

[62] A majority support determination is made and is issued separately in PR787600. In accordance with s 237(4) of the FW Act, the determination will come into operation on the date of this decision.

VICE PRESIDENT

Appearances:

P Boncardo, of counsel, instructed by A Jacka for the Mining and Energy Union.
K Brotherson, of counsel, instructed by Corrs Chambers Westgarth for Glencore Coal Assets Australia Pty Ltd.

Hearing details:

15 May 2025.
Sydney (in person).

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[1] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [63].

[2] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [64].

[3] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [56].

[4] *Fair Work Act 2009* (Cth), s 173(2)(a).

[5] *Regional Express Holdings Limited v Australasian Federation of Air Pilots* [2017] HCA 55; (2017) 262 CLR 456 at [45]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Elecnor Australia Pty Ltd* [2025] FCA 156 at [169] (Wigney J).

[6] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [36](b).

[7] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [37]-[38].

[8] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [47]-[48] referring to rule 3.12.2 of APESMA's rules.

[9] *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290 at 297 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See also *R v Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* (1976) 51 ALJR 266 at 268 (Barwick CJ) and *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 70 at 483-484 (Aickin J).

[10] See, for example, *Construction, Forestry, Mining and Energy Union v Dyno Nobel Asia Pacific Limited* [2005] AIRC 622 at [51]; *Harnischfeger of Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 152 IR 243 at [85]; *Construction, Forestry, Mining and Energy Union v Orica Australia Pty Ltd* [2020] FWC 2781 at [87].

[11] *Central West Group Apprentices Ltd v Coal Mines Insurance Ltd* [2008] NSWCA 348 at [51] (Allsop P, with whom Giles and Bell JJA agreed).; *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 at [57] (Collier and Snaden JJ) and [79] (Hatcher J).

[12] *Leon Fink Holdings Proprietary Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 (Mason J).

[13]*Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* (1979) 141 CLR 672 at 680 (Aickin J).

[14] See also *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30; (2009) 238 CLR 489 at [42]-[48] (French CJ, Heydon, Crennan, Kiefel and Bell JJ).

[15] *Construction, Forestry, Mining and Energy Union* [2017] FWCG 116.

[16] Being the later date declared by the Minister for the purposes of s 158(2) as explained in *Construction, Forestry, Mining and Energy Union* [2017] FWCG 116 at [4].

[17] *Fair Work (Registered Organisations) Act 2009* (Cth), Item 107 of Schedule 1A.

[18] *Fair Work (Registered Organisations) Act 2009* (Cth), s 6(1)(c)(i) of Schedule 1.

[19] Form F68A – Application for Consent to the Alteration of Eligibility Rules of an Organisation by the General Manager, dated 14 July 2016 at paragraph [18].

[20] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [41].

[21] *Re Award Modernisation* [2008] AIRCFB 1000 at [155].

[22] *Australian Collieries' Staff Association re Coal Mining Industry (Supervision and Administration) Consent Award 1999* [2004] AIRC 449 at [93]; *Construction, Forestry, Maritime, Mining and Energy Union v Anglo American Australia Limited* [2019] FCAFC 109 at [55] (Kerr and O'Callaghan JJ).

[23] *R v Williams; Ex parte Australian Building, Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 407; *Co-operative Bulk Handling Ltd v Waterside Workers' Federation of Australia* (1980) 49 FLR 355 at 370; *Australian Manufacturing Workers' Union v Resmed Limited* [2014] FWCFB 3501 at [34](3).

[24] *Re Railtrain Pty Ltd* [2016] FWCA 1385 at [14]-[16].

[25] *Australian Manufacturing Workers' Union v Resmed Limited* [2014] FWCFB 3501 at [87] referring to *Co-operative Bulk Handling Ltd v Waterside Workers' Federation of Australia* (1980) 49 FLR 355 at 364.

[26] *Mining and Energy Union v Glencore Coal Assets Australia Pty Ltd – Operator Awareness Monitoring Centre* [2025] FWC 471 at [59]-[62].