Revocation of exemption that allowed a branch of the CFMEU to conduct its own elections without the participation of the Australian Electoral Commission

(R2014/186)

1. On 30 October 2015 the Delegate of the General Manager of the Fair Work Commission (the Commission) formally revoked an exemption which had been issued in 1996 to the Queensland District Branch (the Branch) of the Mining and Energy Division (the Division) of the Construction, Forestry, Mining and Energy Union (CFMEU) which enabled the Branch to conduct its own elections internally without the participation of the Australian Electoral Commission (AEC). The revocation was based on the conduct of senior officers of the Branch, including serious contraventions of union rules, in a previous election in circumstances which led to the Delegate not being satisfied that future elections by the Branch would be conducted in accordance with the rules and relevant legislation.

2. The Fair Work (Registered Organisations) Act 2009 (the RO Act) requires that all federally registered organisations have elections for offices conducted by the AEC unless an exemption has been granted. It also requires all elections for office (by a direct voting system) to be conducted by a secret postal ballot unless an exemption has been granted. These provisions reflect similar provisions that commenced in the federal industrial legislation in March 1989 with the commencement of the Industrial Relations Act 1988. Since 1996, the Division has held a secret postal ballot exemption and most of its branches, including the Queensland District Branch, have held AEC exemptions. In 1996, and aligned with the granting of the secret postal ballot exemption, the Division amended its rules to provide only for attendance ballots.

3. However since 1996 the Branch and the Division have increasingly used postal ballots contrary to the rules of the Branch and the Division.

4. In addition, in 2003 the legislation was amended to require the use of prescribed declaration envelopes as an essential integrity and security measure for postal ballots (although the amendment only imposed obligations on organisations whose rules provided for postal ballots). The Division did not use such envelopes after 2003 and therefore after that time, it was using postal ballots contrary to its rules, not using the relevant envelopes and not taking action to seek to further amend its rules to take into account the use of postal ballots and the relevant envelopes.
5. A 2011 election conducted in the Branch was recently described by the General Secretary of the Division as a ‘debacle’. In that election, a number of potential irregularities occurred including that ballots went ‘missing.’ During the election process, the President of the Branch, who had a preferred candidate, sought to direct the election process. After a candidate (who was not the President’s preferred candidate) had been advised by the Returning Officer that he had won the election, the President decided that irregularities had occurred and a Branch Board of Management (Board) meeting was called. At the meeting, a proposed resolution to declare the ballot ‘invalid’ was locked at five for and five against until the Branch President used his casting vote to purportedly enable the Board to declare the ballot invalid. That resolution was beyond power under the union rules because only the Federal Court has power under the RO Act to determine whether irregularities have occurred in an election and to declare a ballot void.

6. The candidate who had been advised by the Returning Officer that he had won the election complained to the Branch President (based on a rule which requires Board resolutions to be endorsed by rank and file members before they become effective) without success. The Board’s resolution was not so endorsed although the resolution was beyond power and it should not have become operative.

7. A complaint was received by the Commission in 2013 which included allegations about the way elections had been conducted by the Division and the Branch. Extensive inquiries were conducted and a notice was issued to the Branch to show cause why its AEC exemption should not be revoked under s.186(2)(b) of the RO Act. In September 2015 a hearing was conducted by the Delegate during which the Branch and Division conceded contraventions of the rules and the RO Act had occurred but submitted that the exemption should not be revoked because of, among other things, a series of actions which had been taken, were being taken and were proposed to be taken, to ensure such contraventions did not occur again in the future.

8. Based on the serious contraventions of union rules by senior officers of the Branch in the abovementioned election and other matters, the Delegate was not satisfied that future elections by the Branch would be conducted in accordance with the rules and the RO Act. Accordingly, on that basis the Delegate revoked the AEC exemption.

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This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.

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