

IN FAIR WORK COMMISSION

Matter No: D2022/10

Application by Graham Patrick Kelly, withdrawal from amalgamated organisation

CFMMEU SUBMISSIONS ON THE NOTICE TO PRODUCE

INTRODUCTION

1. On 10 November 2022 the CFMMEU filed an Amended Application for an order for production of documents pursuant to s. 590 of the *Fair Work Act 2009* (Cth) (the **Act**) seeking eleven categories of documents relating to the membership records of either the United Mine Workers Federation of Australia (**UMFA**) or the Mining and Energy Division of the CFMMEU (the **M&E Division**). The applicant opposes the orders for production.

PROCEDURAL HISTORY

2. On 31 October 2022, the solicitors for the CFMMEU sent correspondence to the solicitors for the applicant, seeking the voluntary production of eleven categories of documents.¹
3. On 2 November 2022, the solicitors for the applicant advised that they would seek instructions and revert to the solicitors for the applicant.²
4. On 7 November 2022, having not had a response from the solicitors for the applicant, the CFMMEU filed an application for an order for the production of documents. The application filed inadvertently left off the final three categories of documents.³
5. On 8 November 2022, the solicitors for the applicant wrote to the solicitors for the CFMMEU advising that their client was agreeable to producing the documents in categories 7 and 8 and advising that the balance of the documents were either not able

¹ See paragraph 5; JDF-13 of the Statement of Ms Jessica Dawson-Field dated 16 November 2022 (Dawson-Field Statement)

² See paragraph 6 and JDF-14 of Dawson-Field Statement

³ See paragraph 7 and JDF-15 of Dawson-Field Statement

to be produced or to the extent they were, they were attached to the statement of Mr Kelly.⁴

6. On 9 November 2022, the solicitors for the CFMMEU sent correspondence to the solicitors for the applicant accepting the offer for production of categories 7 and 8 and advising that categories 9, 10 and 11 from the correspondence of 31 October 2022 had inadvertently been left off the application and sought voluntary production of documents in those categories.⁵
7. On 9 November 2022, the solicitors for the applicant sent correspondence to the solicitors for the CFMMEU seeking clarification as to the basis on which categories 9, 10 and 11 were sought. On 10 November 2022, that clarification was provided.⁶
8. On 10 November 2022, the solicitors for the applicant sent correspondence to the solicitors for the CFMMEU advising that (a) their client was willing to produce the documents in category 11; and (b) their client was not agreeable to producing the documents in categories 9 and 10, but had made enquiries with a former Commissioner and were prepared to disclose the documents to the former Commissioner on the basis that he would review the documents and issue some type of ruling about the issues in dispute between the parties which would be binding on the parties. This position was not accepted by the CFMMEU and production of the documents was sought.⁷
9. On 10 November 2022, the solicitors for the applicant advised that the applicant would not voluntarily produce the documents sought.⁸

LEGAL PRINCIPLES

10. In *Esso Australia Pty Ltd v. AWU and Ors* [2017] FWCFB 2200 at [6], the Full Bench described the approach that ought to be taken to an application for the order for production of documents under s. 590 of the *Fair Work Act 2009* (Cth) (the **Act**) as follows:

The principles to be applied in determining whether and if so what form of order should be made are not seriously in contention, and as the Unions point out, these principles were summarised in Australian

⁴ See paragraph 8 and JDF-16 of Dawson-Field Statement

⁵ See paragraph 9 and JDF-17 of Dawson-Field Statement

⁶ See paragraph 10 and JDF-18 of Dawson-Field Statement

⁷ See paragraph 12 and JDF-19 of Dawson-Field Statement

⁸ See paragraph 13 and JDF-20 of Dawson-Field Statement

Nursing Federation v Victorian Hospitals' Industrial Association, which we adopt without repeating them. It is sufficient to observe that the power under s.590(2)(c) to require a person to provide copies of documents or records, or to produce any other information to the Commission is a discretionary power, the exercise of which is to be guided by the principles adopted by courts in civil proceedings when compelling a person to produce documents, records or other things. Matters that will guide the exercise of the discretion to require production include relevance, the particularity with which the documents or category of documents that are to be the subject of the order sought are described, the extent to which the burden placed on a person required to comply with the order is reasonable, the extent to which particular documents sought amount to no more than fishing, and the proper administration of justice in the sense that material that is relevant to an issue or issues that fall for determination is available to parties to enable the parties to advance their respective cases.

11. In *Australian Nursing Federation v. Victorian Hospitals Industrial Association* [2011] FWA 8756, Commissioner Johns rounded up the various authorities concerning applications for orders to produce at [10] to [13].
12. As a general rule, before an application is made for the issuance of an order to produce, the Commission will exercise its discretion in favour of the applicant for production unless it appears it will be vexatious or frivolous or otherwise an abuse of process to issue the summons.⁹ Further, the principles in respect of the issue of subpoenas by superior Courts are applicable.¹⁰ To that end, it is well-accepted that the test of relevance for the issuance of a subpoena is apparent relevance.¹¹

ISSUES IN DISPUTE FOR THE PURPOSES OF THE APPLICATION FOR PRODUCTION

13. For the purposes of the Application for Production, the following matters are in issue between the parties whether:
 - (a) UMFA remains separately identifiable as the M&E Division of the CFMMEU;
 - (b) the alternative application in respect of the Alternative Constituent Part has been authorised by the requisite number of members.

IS UMFA SEPARATELY IDENTIFIABLE AS THE M&E DIVISION?

14. There is no dispute that the M&E Division was created by way of an internal rule change in 1995 combining the United Mine Workers' Division and the FEDFA or Energy Division. Despite this, the applicant still contends that:

⁹ See *The Queen v. Marks ex parte Australian Building Construction Employees & Builders Labourers Federation* (1984) 159 CLR 163 at [12].

¹⁰ See *Re Clerks' (Alcoa of Australia - Mining and Refining) Consolidated Award 1985* Print H2892 at p 2 per Munro J

¹¹ See *Trade Practices Commission v Arnotts* (1989) 88 ALR 90 at 103 per Beaumont J.

- (a) UMFA is separately identifiable as the M&E Division; and
 - (b) the M&E Division became part of the CFMMEU as a result of an amalgamation.
15. In support of this contention, the applicant relies on the assertion that of the 21,146 members of the M&E Division, 18,027 would have been eligible to join UMFA.¹² The evidence relied upon in support of that assertion does not extend beyond the applicant asserting those conclusions.¹³
16. The documents set out at categories 9, 10 and 11 of the Application for Production are relevant to assessing the claim made at [55](a) of the applicant's outline. Namely, that "the overwhelming majority of members of the Mining and Energy Division are members who would have been eligible to join UMFA". Categories 9 and 10 are the membership rolls for the M&E Division and each of its divisional branches. Those roles are relevant for ascertaining the total number of members and the industry in which those members are employed. The CFMMEU does not have any other means of obtaining access to that information.¹⁴
17. The documents contained within category 11 are relevant for the same reasons. Those documents are the documents relied upon for the assertion at [8] of Mr Kelly's statement. Namely, that "the 18,027 constituent members is the result of an exercise undertaken by me with the District Secretary of each District Branch...each District Branch is responsible for the administration of the roll of members of its District Branch". From the applicant's correspondence dated 10 November (see [8] above) it appears that the applicant does not contest the relevance of category 11.
18. Putting aside that categories 9, 10 and 11 documents are relevant to the questions identified above, it is well-accepted that if a document is referred to in an affidavit or pleading, natural justice requires that it is produced to the other side.¹⁵ In paragraph [8] of Mr Kelly's statement those documents are referred to and should be provided.

HAS THE ALTERNATIVE APPLICATION BEEN PROPERLY AUTHORISED?

19. The alternative application is made on behalf of the Alternative Constituent Part, being that part of the membership of the CFMMEU eligible to have joined by virtue of

¹² See [55](a) applicant's outline of submissions.

¹³ See [8] of the statement of Mr Graham Kelly dated 24 October 2022.

¹⁴ See paragraph 15 of the Dawson Field Statement.

¹⁵ See *ACCC v. Vizzy Industries Holding Pty Ltd* [2006] FCA 136n at [33] per Heerey J

UMFA's eligibility rule. Regulation 81 of the *Fair Work (Registered Organisation) Regulation 2009* (Cth) provides that the prescribed number of constituent members is the number equal to five percent of the constituent members on the day on which the application is lodged or 2,000 whichever is the lesser.

20. To ascertain the correct number of constituent members who authorised the application, it is first necessary to ascertain the total number of constituent members. It is for that reason that categories 9, 10 and 11 are relevant. Again, from the applicant's correspondence dated 10 November (see [8] above) it appears that the applicant does not contest the relevance of category 11.
21. Further, categories 9 and 10 are also relevant to ascertain whether those persons relied upon by the applicant as having authorised the application are:
 - (a) members of the CFMMEU; and
 - (b) eligible to be a member of the CFMEU by virtue of rule 2D of the CFMMEU's rules.
22. For those reasons, the documents sought in categories 9, 10 and 11 are also relevant to the question of whether the alternative application is properly authorised.

UNDERTAKING AS TO USE AND DISSEMINATION OF DOCUMENTS PRODUCED

23. The CFMMEU submits that, in circumstances where it merely seeks the production of information about persons who are members of the CFMMEU to the CFMMEU, no issues arise as to confidentiality. However, to avoid any argument about these matters, over and above the implied undertaking, the CFMMEU is prepared to undertake that the documents produced subsequent to any order will only be shared with the external legal advisors of the CFMMEU and the internal lawyers employed by the CFMMEU.
24. Should the need arise for the documents to be disseminated any more widely than that, the CFMMEU will advise the applicant and seek his consent, and if necessary seek an order amending the undertaking.

CONCLUSION

25. For the reasons set out above, the Order for Production should be made. The documents sought are plainly relevant to the matters in issue and have been directly averted to in Mr Kelly's statement.

CW Dowling

CA Massy

16 November 2022