DECISION

Fair Work (Registered Organisations) Act 2009
s.94(1) RO Act—Withdrawal from amalgamation

Application by Grahame Patrick Kelly
(D2022/10)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MASSON

SYDNEY, 3 APRIL 2023

Application by Grahame Patrick Kelly – ballot regarding withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union.

Introduction

[1] As a member of the Central Council of the Mining and Energy Division (M&E Division) of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU)[1] and representative constituent member, Grahame Patrick Kelly has applied to the Commission under s 94 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) for a secret ballot to be held to decide in substance, whether the M&E Division should withdraw from the CFMMEU (Application). In our decision of 21 February 2023 in *Application by Grahame Patrick Kelly*[2] (21 February Decision) we dealt with several matters related to the Application. We will in this decision continue to use the abbreviations we used in the 21 February Decision.

[2] For the reasons stated at paragraphs [19] to [26] of the 21 February Decision we decided to accept the Application after the end of the period in s 94(1)(c) of the RO Act. We also expressed the view, for the reasons stated at paragraphs [28] to [49], that we were satisfied that the requirement in s 100(1)(ba) of the RO Act — that the material required by s 95A complies with the requirements of that section — has been met in respect of the Application as it pertains to the Constituent Part. The Application as lodged was for a secret ballot to be held to decide in relation to the CFMMEU, whether the Constituent Part or the Alternative Constituent Part should withdraw from the CFMMEU. During the further hearing of the Application on 1 March 2023, Mr Kelly applied by consent to adjourn the Application as it related to the Alternative Constituent Part to a date to be fixed after the hearing and determination of the Application related to the Constituent Part.[3] We allowed the adjournment[4] and proceeded to hear the parties in respect of the remainder of the Application. Mr Kelly also sought and was granted leave to file further amended proposed CFMEU rules which are substituted for those constituting annexure 6 to the Application.[5] Also since we expressed that view, there has been an alteration to the CFMMEU rules affecting the M&E Division approved by the General Manager of the

Commission.[6] Consequently Mr Kelly sought and was granted leave to amend the proposed rules of the MEU to reflect these amendments.[7] These were filed on 17 March 2023. Nothing in the amended proposed rules of the CFMEU nor in the amended proposed rules of the MEU causes us to depart from our earlier expressed view that the requirements in s 100(1)(ba) of the RO Act have been met.

[3] We also indicated at paragraph [18] of the 21 February Decision that our acceptance of an out-of-time application pursuant to s 95A did not then require a determination of whether the condition for a valid application contained in s 94(1)(a), namely that the Constituent Part must have become part of the relevant organisation as a result of an amalgamation under Part 2 of the RO Act or a predecessor law, had been met. We said we would deal with the issue raised by s 94(1)(a) as part of the third procedural step identified at paragraph [16] of the 21 February Decision.

[4] In this decision we determine that issue, and whether we are satisfied as to the remaining matters arising under s 100(1)(a), (b) and (c) of the RO Act such as to permit an order to be made that a secret ballot be conducted to decide whether the Constituent Part should withdraw from the CFMMEU.

[5] To recap, the Constituent Part identified in Mr Kelly's application is the M&E Division. There is no contest that the M&E Division is a 'constituent part' of the CFMMEU for the purpose of s 94(1)(a) of the RO Act consistent with the definition of that expression in s 93(1). It was held to be so on relevantly identical facts in a decision of a Full Court of the Federal Court in *Kelly v CFMMEU*,[8] which affirmed a decision of a Full Bench of this Commission[9] in connection with an earlier, unsuccessful application made by Mr Kelly pursuant to s 94 of the RO Act. We are satisfied, consistent with those decisions, that the M&E Division is a 'constituent part' within the definition in s 93(1) of the RO Act because it is a 'separately identifiable constituent part' within the separate definition of that expression in s 93(1).[10] The question to be determined in relation to s 94(1)(a) is therefore whether the M&E Division became part of the CFMMEU as a result of the amalgamation which occurred in 1992 as detailed below.

History of the M&E Division

[6] The history of the M&E Division may be traced back to 1913 when the Australasian Coal Miners Association was registered under the *Conciliation and Arbitration Act 1904* (Cth).[11] That organisation changed its name in 1916 to the Australasian Coal and Shale Employees' Federation and was thereafter commonly known as the Miners' Federation. The Miners' Federation continued to exist until 1990 when it amalgamated with the Federated Mine Mechanics' Association of Australia forming the amalgamated organisation known as the United Mineworkers Federation of Australia (UMFA).[12]

[7] Mr Kelly accepts that the history of amalgamations involving the organisation now known as the CFMMEU and the formation of the M&E Division as set out in *Application by Grahame Patrick Kelly*[13] is accurate.[14] He also sets out that history in his second witness statement filed in these proceedings.[15] Relevantly, that history includes the following.

[8] On 10 February 1992, 'The ATAIU and BWIU Amalgamated Organisation' and the UMFA amalgamated to form the Construction, Forestry and Mining Employees Union (CF&MEU). The UMFA was de-registered on the same day. Alterations to the Rules of the CF&MEU also commenced which included widened eligibility (Rule 2(D)), the creation of a restructured Mining Division (Rule 42(iii)(a)) and membership of the Mining Division (Rule 3).[16] This is the origin of the Constituent Part which, as at 10 February 1992, was constituted by the membership of the former UMFA as a separate division of the CF&MEU, then called the Mining Division.

[9] Since 10 February 1992, the following events have affected the Mining Division:

- On 23 September 1992 the Federated Engine Drivers' and Firemen's Association of Australasia (FEDFA) and the Operative Plasterers and Plaster Workers Federation of Australia amalgamated with the CF&MEU and formed the Construction, Forestry, Mining and Energy Union (CFMEU). The name of the Mining Division was changed to the UMW Division, but the Division was otherwise unaffected by the amalgamation;[17]

- The rules of the amalgamated organisation, the CFMEU, included 'Transitional Provisions' in Rule 42, which relevantly provided:

    - There will be five (5) Divisions of the CFMEU — the Building Unions Division, the ATAIU Division, the UMW Division, the FEDFA Division and the FFTS Union Division;

    - The UMW Division consists of those persons eligible for membership and continuing to be eligible for membership of the [CFMEU] under Rule 2(D), which encompassed: '…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.'

    - The FEDFA Division consists of those persons eligible for membership and continuing to be eligible for membership of the CFMEU under Rule 2(E);

    - Rule 42(iii) provided that following amalgamation there will be a restructuring of the Divisions on the following basis:

        - Rule 42(iii)(a) provided that a restructured Mining Division shall be created consisting of 'all members of the [CFMEU] eligible to be members under Rule 2(D) and all members, including members eligible under Sub-Rules 2(A), (B), (C) and (E) employed in the Mining industry';

        - Rule 42(iii)(b) provided for the creation of a Forestry and Forest, Building Products Manufacturing Division consisting of all members of the CFMEU eligible to be members under Rule 2(C) and all

members, including members eligible under Sub-rules 2(A), (B) and (E) employed in the following sectors of the industry:

- Forest and forest products industry;

- Pulp and paper industry;

- Timber and building related manufacturing industry including joinery/shopfitting, wall frame/roof trusses, furniture, aluminium windows, glass window manufacturing and any other sectors of manufacturing activity as agreed to between the ATAIU and the Building Unions and FEDFA Divisions of the union;

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- Rule 42(iii)(c) provided for a Construction Division consisting of all members of the CFMEU employed in or in connection with the Construction industry; and

- Rule 42(iii)(d) provided for an Energy Division consisting of all other members of the CFMEU.[18]

[10] It is evident from the above that, since the amalgamation on 10 February 1992 involving the UMFA, the Mining Division was able to be constituted by persons who were within the FEDFA's coverage because Rule 2(D) (which was the UMFA eligibility rule until it was de-registered as part of the amalgamation) was an industry coverage rule entitling to enrolment as members all persons engaged in or in connection with the coal and shale industries. Rule 2(E), which was the FEDFA eligibility rule, is an occupational coverage rule. The alteration to the composition of the UMW Division contemplated by Rule 42(iii)(a) following the 23 September 1992 amalgamation involving the FEDFA, which added members eligible under Rule 2(E) employed in the mining industry, did not therefore disturb the existing coverage which was of all persons engaged in or in connection with the coal and shale industries.

[11] It seems apparent from the transitional arrangements described above that the rules contemplated a transition to industry-based divisions away from some occupational-based divisions the product of earlier amalgamations with occupational unions. Rule 42(xiii) provided for the restructuring to be completed within two years from 23 September 1991, except for the FEDFA Victorian Branch, which was to become the CFMEU, FEDFA Victorian Divisional Branch at a time later than 23 September 1995 but before 23 September 1999.[19]

[12] As of March 1993, Rule 42(iii) of the CFMEU rules expressed that there should be a stand-alone Energy Division of the CFMEU which would be comprised of the membership of the former FEDFA members engaged in the power generation, oil and gas industries. However, because of concerns about the economic viability of a stand-alone Energy Division and the financial state of the FEDFA Division, the notion of a separate Energy Division was abandoned and it did not come into existence.[20]

[13] On 23 September 1993, the Rules of the CFMEU were altered to insert Rule 42A, which provided for the incremental integration of the FEDFA into the CFMEU's other Divisions. Rule 42A(2)(c) provided for the FEDFA Division to be restructured in steps involving 'the continued operation of the Divisional Branches of the FEDFA Division with the intent, over time, of the restructuring of said Divisional Branches into the Building Unions Division, UMW Division and the ATAIU Division.'[21]

[14] On 2 December 1993 an alteration to Rule 42 of the CFMEU Rules was certified by the Deputy Industrial Registrar of the Australian Industrial Relations Commission.[22] The amendment inserted a new sub-rule (xvi). It relevantly provided in Rule 42(xvi)(d) as follows:

> (d) For the purposes of the above and in accordance with the scheme of amalgamation in relation to each past amalgamation, the following shall be the rights and obligations of the Divisions and shall be deemed always to have been the case:
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> * The United Mineworkers Federation of Australia shall be and be deemed always to have been a union that corresponds to the UMW Division and/or the Mining and Energy Division;
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> . . .
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> * The Federated Engine Drivers and Firemen's Association of Australasia shall be and be deemed always to have been a union that corresponds to the FEDFA Division;
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> . . .[23]

[15] In a written explanation to the CFMEU's National Executive Members dated 29 November 1993 circulated in conjunction with voting details for the amendment, the members are advised that:

> . . . our Barrister, Steven Rothman, has advised us [the amendment] would clarify any doubt about the rights and obligations of the Divisions in the amalgamated union. While the provisions in this Rule change are implicit in the Rules and certainly in line with the schemes of amalgamation that founded the amalgamated union, we are advised the safest course is to make these rights and obligations explicit in the Rules.[24]

[16] By October 1993, except for Victorian FEDFA Divisional Branch members, other members of the FEDFA Division were transferred to the UMW Division or the Building Unions Division according to the industries in which they worked.[25] As we have already noted, at all times the eligibility rules of UMFA, the Mining Division and the UMW Division covered employees who carried out the types of work referred to in the FEDFA eligibility rules at the time of the amalgamation on 23 September 1992, if that work was carried out in or in connection with the coal and shale industries. Members of the Victorian Branch of the FEDFA Division remained in that branch pursuant to a transitional arrangement until 2003.

[17] The UMW Division (then sometimes still referred to as the Mining Division in the rules) became the M&E Division on 5 May 1995 when the CFMEU's rules were altered. Relevantly Rule 42(iii)(a) was altered as marked up below:

> There shall be created a restructured Mining and Energy Division which shall consist of all members of the union eligible to be members under Rule 2(D) and all members, including members eligible under Sub-Rules 2(A), (B), (C) and (E) employed in the Mining, Exploration and Energy Industry~~y~~ies.[26]

[18] Thereafter Rule 3 of the Rules of the M&E Division provided:

> The Division shall consist of an unlimited number of employees, otherwise eligible for membership of the Union who:
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> (A) are engaged in or in connection with the Coal and Shale Industry;
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> (B) are engaged in or in connection with the Mining or Exploration Industries;
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> (C) are engaged as employees or as employees of contractors, in or in connection with the following industries:
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> (a) power generation, co-generation, transmission and distribution;
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> (b) oil;
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> (c) gas;
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> (d) nuclear; and
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> (e) chemical production;
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> (D) have been elected or appointed as paid officers of the Division or whilst financial members of the Division are elected as representatives of any working class organisation to which the Division is affiliated, or as a working class member of Parliament.[27]

[19] Paragraphs (B) and (C) of Rule 3 represent an expansion of the industries from which members constituting the division are sourced compared to the UMW Division, the name of which was altered to the M&E Division. Pursuant to Rule 42(iii)(d) as in force prior to 5 May 1995 persons eligible for membership under paragraphs (B) and (C) of Rule 3 above would have been allocated to the proposed Energy Division.

[20] The Victorian Branch of the FEDFA Division continued a separate existence and was incrementally integrated into the M&E Division and the Construction and General Division.[28] This process was completed in 2003. Rule 42A which, as earlier noted, provided for the incremental integration of the FEDFA into the CFMEU's other Divisions, was amended on several occasions before finally being deleted from the rules in 2018.[29]

[21] The history recited above shows that on 10 February 1992, as part of the amalgamation involving the UMFA to form the CF&MEU, the UMFA was de-registered, and the Mining Division was created constituted by the membership of the former UMFA. On 23 September 1992, as part of the amalgamation involving the FEDFA, the name of the Mining Division was altered to the UMW Division, but the division was otherwise unaffected. Following the FEDFA amalgamation, the CFMEU's rules contemplated the creation of an Energy Division in Rule 42(iii) involving a restructuring of the organisation. As part of the restructuring, the UMW

Division would have assigned as members persons eligible to be members under, *inter alia*, Rule 2(E) (the FEDFA eligibility rule) who were employed in the mining industry. However, as we have earlier explained, this was not an expansion of the eligibility rule of the UMW Division. On 5 May 1995, the name of the UMW Division was, in effect, changed to the Mining and Energy Division, that part of the earlier planned restructure which contemplated the creation of a separate Energy Division was abandoned, and those members who would have been eligible to be members of the Energy Division were allocated to the M&E Division. Rule 3 of the Divisional rules was altered accordingly. It may therefore be concluded from this chronology of events that the M&E Division was not created by the rule alteration on 5 May 1995. Rather, the UMW Division (previously the Mining Division) simply continued its existence with another name and an expanded membership.

[22] In addition to the structural history of the M&E Division, Mr Kelly gave evidence that:

- The preponderance of the membership of the M&E Division consists of persons who would have been eligible to join the UMFA — of the 21,146 members of the M&E Division, 18,027 would have been eligible to join the UMFA;[30]

- As to eligibility, governance structures and offices, the rules of the M&E Division (both currently and historically) closely align to the rules of the UMFA prior to its de-registration.[31] The structure of the M&E Division is substantially the same as existed in the UMFA prior to its de-registration in 1992 and the Mining Division of the CFMEU upon the amalgamation with UMFA;[32]

- The strong financial position of the M&E Division is almost entirely attributable to the assets brought into the Division by the UMFA;[33]

- The overwhelming majority of:

    - the current and historical members of the committee of management of the M&E Division (the Central Council);[34] and

    - the current members of the governance bodies of the M&E Division[35]

    would have been eligible to join the UMFA.

Whether the M&E Division became part of the CFMMEU as a result of an amalgamation under a predecessor law

[23] Part 3 of Chapter 3 of the RO Act deals with the process for withdrawing from an amalgamation. The process is commenced with an application to the Commission under s 94. Section 94(1) of the RO Act provides that an application may be made to the Commission:

> for a secret ballot to be held, to decide whether *a constituent part* of an amalgamated organisation should withdraw from the organisation, if:
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> (a) *the constituent part became part* of the organisation *as a result of* an amalgamation under Part 2 of the RO Act or a predecessor law; and

(b) the amalgamation occurred no less than 2 years prior to the date of the application; and

(c) the application is made before the period of 5 years after the amalgamation occurred has elapsed.[36]

[24] Mr Kelly relies on the amalgamation of 'The ATAIU and BWIU Amalgamated Organisation' and the UMFA to form the CF&MEU which occurred on 10 February 1992 as the relevant amalgamation and so plainly s 94(1)(b) of the RO Act is satisfied. Although it has been more than 5 years since that amalgamation for the purposes of s 94(1)(c), as we noted earlier, in the 21 February Decision we decided to accept the Application after the end of that period pursuant to s 94A. Thus, the remaining element of s 94(1) is whether the *constituent part became part* of the organisation *as a result of* an amalgamation under Part 2 of the RO Act or a predecessor law. The 10 February 1992 amalgamation was one that occurred under Part IX, Division 7 of the *Industrial Relations Act 1988* (Cth) (IR Act) (as in force after 1 February 1991). The IR Act is a predecessor law as defined in s 93(1).

[25] Our earlier historical analysis demonstrates, we consider, that the M&E Division in its current form is the same part of the CFMMEU, in substance and identity, as the UMW Division (or Mining Division) established as a result of the 1992 amalgamation which saw the de-registration of the UMFA and the absorption of its members into the organisation. That analysis discloses that the M&E Division has retained the character of the UMFA and that it remains overwhelmingly representative of employees engaged in or in connection with the coal and shale mining industry. That is made apparent by the preponderance of the numbers of members in that industry and the makeup of the various governing bodies of the M&E Division.

[26] That the M&E Division has retained a continuous identity as that part of the CFMMEU which incorporated the entirety of the former UMFA membership and inherited the UMFA's rights and obligations consequent upon the 1992 amalgamation is evident in current CFMMEU Rule 42(xv)(d) which provides, *inter alia*:

(d) For the purposes of the above and in accordance with the scheme of amalgamation in relation to each past amalgamation, the following shall be the rights and obligations of the Divisions and shall be deemed always to have been the case:

* The United Mineworkers Federation of Australia shall be and be deemed always to have been a union that corresponds to the UMW Division and/or the Mining and Energy Division…

[27] It is to be recalled that this rule has its origin in the 2 December 1993 alteration to Rule 42 of the Rules of the CFMMEU (then known as the CFMEU) certified by the Deputy Industrial Registrar of the Australian Industrial Relations Commission. The effect of Rule 42(xv)(d) appears, for the purposes of both the past and the present, to earmark the M&E Division (including its previously named iterations) to be the Division of the CFMMEU which corresponds with the former UMFA. It appears to us that Rule 42(xv)(d) clearly expresses that the M&E Division has the same identity as the UMW Division established as a result of the 1992 amalgamation.

[28] Until the 5 May 1995 Rules alterations, there can be no doubt that the UMW Division retained the structure and membership composition of the UMFA. Although by reason of the 5 May 1995 alteration to the Rules there was a change to the name of the UMW Division to the Mining and Energy Division and an expansion of its allocated membership to include those originally intended for allocation to the proposed Energy Division, we consider that the substantial structure, composition and identity of the Division remained unchanged. The M&E Division did not become part of the CFMMEU as a result of the 5 May 1995 rules alterations; rather, those alterations merely represented an adjustment to the pre-existing UMW Division (or Mining Division) which became part of the organisation as a result of the 10 February 1992 amalgamation.

[29] We derive support for our conclusion in this respect from the Federal Court decision in *Gilchrist v Australian Municipal, Administrative, Clerical & Services Union*.[37] In that matter, the Court considered an application under s 253ZJ of Division 7A of the *Workplace Relations Act 1996* (Cth) (WR Act) for an order that a ballot be held to decide whether a 'constituent part' of the Australian Municipal, Administrative, Clerical & Services Union (ASU) should withdraw from the ASU. The ASU was an 'amalgamated organisation' formed under Division 7 of the WR Act. Section 253ZJ of the WR Act then provided that an application might be made to the Court by, *inter alia*, the committee of management of a 'separately identifiable constituent part' of an amalgamated organisation. Section 253ZI(1) of the WR Act then defined 'separately identifiable constituent part' of an amalgamated organisation to mean:

> (a) if an organisation de-registered under Division 7 in connection with the formation of the amalgamated organisation remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation - that branch, division or part; or
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> (b) if a State or Territory branch of such a de-registered organisation under its rules as in force immediately before its de-registration remains separately identifiable under the rules of the amalgamated organisation as a branch, division or part of that organisation - that branch, division or part.

[30] In *Gilchrist*, the applicants (members of the relevant committee of management) contended that the Western Australian Division of the Federated Municipal and Shire Council Employees Union of Australia (FMU), was a division of an organisation de-registered in connection with the formation of the Union and remained separately identifiable under the rules of the ASU as the Branch. The argument engaged with paragraph (b) of the then definition of separately identifiable constituent part. The ASU contended, *inter alia*, that the branch was not a separately identifiable constituent part because it did not remain separately identifiable under the ASU Rules as a branch of the ASU. It said this in turn was because the ASU Rules relating to 'eligibility' for attachment of a member of the ASU to a branch were more restrictive than had been the corresponding rules of the 'State branch' of the FMU. The ASU contended that under the rules of the FMU both 'blue collar' and 'white collar' workers could be allocated to the 'State branch', whereas under the ASU Rules, only 'blue collar' workers could be allocated to the Branch.

[31] The Court rejected the ASU's contention and said:

> [19] . . . The State branch of the FMU as it existed on the day before amalgamation, was reformed after amalgamation as the Branch, by provisions of the Union Rules that stipulated that members of the FMU allocated or attached to the 'State branch' became attached to the Branch on amalgamation and by providing further that thereafter members of the Union would be attached to a branch of the Union that would traditionally have represented those employees if there had been no amalgamation. That is, the Branch was to carry on the former role of the 'State branch'. The Rules invested in the Branch the character of the 'State branch' of the FMU as taken into the Union upon amalgamation. The scope of eligibility for membership of the FMU before amalgamation is not the determinant of the identity of a separately identifiable constituent part as defined in s 253ZI(1). Of course, a branch has no separate rules in respect of eligibility and has no existence independent of the organisation. Eligibility for membership relates to membership of the organisation. Section 253ZI of the Act, however, recognises that a 'branch' of an organisation, established and conducted pursuant to the rules of the organisation, may remain 'identifiable' as part of the structure of the amalgamated organisation, notwithstanding that it has no separate identity at law. Such identification of a branch will derive from the class or classes of members of the organisation actually assigned or attached to the branch and the rules of the organisation relating to the branch. The issue whether a branch created under the rules of a de-registered organisation 'remains separately identifiable' under the rules of an amalgamated organisation as, *inter alia*, a branch of that organisation is a matter of the continuity of status as a branch and of continuity of the character of a branch according to its purpose. It is by those elements that a branch may be said to be separately identifiable. The members allocated or attached to a branch, in fact and by tradition, and the functions of the branch define the branch.
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> [20] The Branch Rules have continued the status and functions of the 'State branch' of the FMU as it existed under the Rules of the FMU prior to amalgamation, including representation of members who were 'traditionally' represented by the 'State branch'. It follows that the 'State branch' has remained 'separately identifiable' under the rules of the Union.[38]

[32] The facts in *Gilchrist*, and the legal issue determined, differ to those arising in respect of this Application. Nevertheless, we consider the reasoning extracted above is apposite to the circumstances of this case. There is no need for an exact identity in the membership composition of the Mining/UMW Division established consequent upon the 1992 amalgamation and that of the current M&E Division in order to conclude that the M&E Division became part of the CFMMEU (as it is now known) as a result of the 1992 amalgamation. For the reasons we have earlier given, there is a clear continuity of status and character notwithstanding that the M&E Division has a different name and a somewhat different composition than the Mining/UMW Division.

[33] Therefore, we conclude for the purpose of s 94(1)(a) that the Constituent Part (the M&E Division) became part of the CFMMEU as a result of the amalgamation which occurred under the IR Act in 1992. Accordingly, that requirement for the making of a valid application under s 94 is satisfied.

Remaining matters arising under s 100 of the RO Act

[34] Section 100(1) of the RO Act provides that the Commission must order a vote of the constituent members be taken by secret ballot, to decide whether the constituent part of the amalgamated organisation should withdraw from the organisation, if the Commission is satisfied that:

(a) the application for the ballot is validly made under section 94; and

(b) the outline under section 95 relating to the application:

(i) is a fair and accurate representation of the proposal for withdrawal from the organisation; and

(ii) addresses any matters mentioned in paragraph 95(1)(b) or prescribed for the purposes of paragraph 95(1)(c) in a fair and accurate manner; and

(ba) the material required by section 95A complies with the requirements of that section; and

(c) the proposal for withdrawal from the organisation complies with any requirements specified in the regulations.

[35] In relation to s 100(1)(a), we have already found in the 21 February Decision and in this decision that the requirements for a valid application in s 94(1) have been met. We have also found in the 21 February Decision that s 100(1)(ba) is satisfied. Accordingly, it remains for us to deal with the other requirements contained in s 94 for a valid application and the matters identified in paragraphs (b) and (c) of s 100(1).

Whether the Application is validly made under s 94

[36] In support of the validity of the Application under s 94, Mr Kelly relies on the Application and the following documents:

(a) Resolution of Central Council dated 14 September 2022 (Annexure 1 to the Application);

(b) Amended written outline of the proposal for the Constituent Part to withdraw from the Union (Annexure 3 to the Application amended as set out in the statement of Mr Kelly dated 27 February 2023[39] at Annexure GK-94);

(c) Copy of the Rules for the new organisation (Annexure 5 to the Application which has been amended as earlier noted); and

(d) Copy of the altered rules for the CFMEU (Annexure 6 to the Application, also amended as earlier noted).

[37] The prohibition upon the making of an application in s 94(2) does not arise here. We are satisfied that Mr Kelly is a person described in s 94(3)(d) and so is able to make the Application, and that the Application otherwise complies with s 94(4). The matters raised by ss 94(5) and (6) do not arise. The Application for the ballot is therefore validly made under s 94.

Whether the outline under s 95 meets the criteria set out in s 100(b)(i) and (ii).

[38] Section 100(1)(b) of the RO Act requires that the Commission be satisfied that the outline under s 95 meets the criteria set out in s 100(1)(b)(i) and (ii). Mr Kelly has applied for leave to amend his outline of the proposed withdrawal of the Constituent Part from the

CFMMEU.[40] A further amended outline was filed on 17 March 2023. The amendments are directed to the ballot question and to address the matters required by s 95(1)(c) of the RO Act and regs 83(b) and (d) of the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations).

[39] Pursuant to s 98(2) of the RO Act we allow the amendments to the outline. Having reviewed the amended outline, we are satisfied that it is a fair and accurate representation of the proposal for withdrawal of the Constituent Part from the CFMMEU. Section 100(1)(b)(i) is satisfied.

[40] As to the matters mentioned in s 95(1)(b) — that the outline address particulars of any proposal by the applicant for the apportionment of the assets and liabilities of the amalgamated organisation and the constituent part — these are set out in the amended outline as follows:

> 35. The CFMMEU is a reporting unit for the purposes of the Act. A reporting unit must comply with the reporting requirements set out in Chapter 8 of the Act. These requirements include detailing the financial and assets positions of the reporting unit, prepared in accordance with mandated accounting standards.
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> 36. Each of the Divisions of the CFMMEU is also a reporting unit for the purposes of the Act. As such, each of the Divisions is required to lodge annual financial reports with the Registered Organisations Commission ('ROC').
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> 37. Rule 27(iii) of the CFMMEU provides that: 'Each Division shall have autonomy in relation to its funds and property'. This has meant that each Division has had the control and exclusive use of the funds and property that are attached to the Division. In the case of the ME Division, there is likewise a Divisional rule that provides for District Branch autonomy in respect of property owned or acquired by the District Branch (ME Division rule 12(ii)).
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> 38. The CFMMEU has, in practice, operated on the basis of a highly decentralised financial structure with the funds and assets of the organisation residing overwhelmingly in the Divisions. That is shown by the fact that the CFMMEU National Office in its most recent financial year report (year ended 31 December 2020) recorded a total comprehensive income of $280,375 and a net liability position of ($347,030).
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> 39. In contrast, the financial reports for each of the respective Divisions lodged with the ROC reveals the following results for funds and assets:
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> a. Mining and Energy Division (Divisional National Office only, for the year ended 31 December 2021) – a total comprehensive income of $10,568,480 and a net asset value of $75,256,025.
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> b. Construction and General Division (Divisional National Office only, for year ended 31 March 2021) – a total comprehensive income of $208,821 and net asset value of $11,798,133.
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> c. MUA Division (for year ended 30 June 2021) – a total comprehensive income of $1,729,396 and a net asset value of $46,381,005.

d. Manufacturing Division (for year ended 31 December 2021) – a total comprehensive income of $142,665 and a net asset value of $4,900,650.

40. In addition, whilst the MUA Division and Manufacturing Division reports consolidate the financial reports for each of their Branches/Districts, the Mining and Energy Division and the Construction and General Division do not. These divisions prepare financial reports for each of their Branches/Districts. Accordingly, to ascertain the total financial and asset position of each of those Divisions, the financial returns of each of the respective Divisional Branches/Districts needs to be combined with the report of the respective Divisional National Offices.

41. Tallying up the financial returns of each of the respective Divisional Branches/Districts are combined, the total comprehensive income of the Mining and Energy Division is $14,375,726 and the net asset position is $132,833,900. Under this method, the total comprehensive income of the Construction and General Division is $10,782,204 and the net asset position is $112,153,927.

42. There is no property, assets or liabilities held in common by the ME Division and any other Division or part of the CFMMEU, with the possible exception of part ownership of any current deficit attaching to the Central Office.

43. It is proposed that the newly registered organisation will assume ownership of all of the funds, assets, property and liabilities of the ME Division as outlined in the most recent financial reports to the ROC by the ME Division National Office and each of its District Branches, with any necessary adjustments being made to reflect the date of withdrawal.

44. Further, it is proposed that the inventory of funds, assets, property and liabilities belonging to the ME Division will be subject of transfer to the newly registered organisation and will be the subject of orders sought from the Federal Court of Australia under s.109 of the Act.

45. The asset and funds position of the ME Division is very strong and will enable the newly registered organisation to properly represent members as a newly registered organisation.[41]

[41] As to the requirement in s 95(1)(c) of the RO Act that the outline address such matters as are prescribed, reg 83 of the RO Regulations prescribes matters for the purposes of s 95(1)(c). We set out below the requirement prescribed (in italics) and details of how the amended outline complies:

(a) *details of the circumstances in which the constituent part became part of the amalgamated organisation, including the name, immediately before de-registration, of any organisation de-registered in connection with the formation of the amalgamated organisation that the constituent part was or was part of;*

'The Constituent Part previously constituted the registered organisation known as UMFA. UMFA was de[-]registered in connection with the amalgamation between it and the ATAIU and BWIU Amalgamated Organisation which took effect on 10 February 1992. The amalgamated organisation formed on 10 February 1992 is presently named the Construction, Forestry, Maritime, Mining and Energy Union.'[42]

(b) the eligibility rules of the amalgamated organisation immediately before the application for a ballot is made;

'The eligibility rules of the CFMMEU immediately before the application for a ballot was made (as required by s.95(1)(c) of the Act and paragraph b of regulation 83).'[43]

(c) if an organisation that the constituent part was, or was part of, was de-registered in connection with the formation of the amalgamated organisation--the eligibility rules of the de-registered organisation immediately before de-registration;

'Accordingly, the proposed eligibility rules of the MEU are comprised of the following components:

a. Rule 2(A) of the proposed MEU rules deals with the coverage of the MEU in the coal industry. This rule originally derived from the now de-registered UMFA. With the exception of the State of South Australia, it is uncontroversial that the ME Division has at all relevant times exercised exclusive coverage of workers in the coal industry as part of the CFMMEU.

…'[44]

'the eligibility rules of UMFA immediately before its de-registration (as required by s.95(1)(c) of the Act and paragraph c of regulation 83.'[45]

(d) the eligibility rules of the amalgamated organisation immediately before the constituent part became part of the amalgamated organisation;

'The eligibility rules of the amalgamated organisation immediately before its amalgamation with UMFA (as required by s.95(1)(c) of the Act and paragraph d of regulation 83).'[46]

(e) particulars of the assets and liabilities of the amalgamated organisation;

See paragraphs 35-42 of the amended outline earlier set out at paragraph [40] of this Decision.

(f) if an organisation that the constituent part was, or was part of, was de-registered in connection with the formation of the amalgamated organisation:

(i) particulars of the assets and liabilities of the de-registered organisation immediately before de-registration; and

(ii) any change in the net value of those assets or liabilities that has occurred since the amalgamation;

'Immediately prior to its de[-]registration on 10 February 1992, UMFA's National Office had a net asset value of $3,675,630.'[47]

See paragraph 39a of the amended outline earlier set out at paragraph [40] of this Decision.

(g) particulars of any rules, arrangements, practices or understandings referred to in paragraph 109(2)(ba) of the Act;

See paragraphs 37-38 of the amended outline earlier set out at paragraph [40] of this Decision.

(*h) any other matters the applicant considers may be relevant to the making of orders under paragraph 109(1)(b) of the Act (orders necessary to apportion the assets and liabilities of the amalgamated organisation between the amalgamated organisation and the constituent part)*.

Mr Kelly says there are no such other matters[48] and we accept his contention.

[42] Having regard to the matters set out above, we are satisfied the amended outline meets the requirements in s 100(1)(b)(ii) of the RO Act.

Whether the proposal for withdrawal from the organisation complies with any requirements specified in the regulations – s 100(1)(c)

[43] There is no regulation made for the purposes of s 100(1)(c) of the RO Act. The requirements of reg 83 have been addressed above. For the purposes of reg 82 we are satisfied that the Application:

- is in accordance with Form 2;
- contains the information prescribed in that form; and
- nominates a person to be the representative constituent member for the ballot to receive documents on behalf of the applicant and for any other purpose specified.

The requirements of reg 82 are met.

[44] Therefore, as each of the matters in s 100(1) has been satisfied, we will order that a vote of the constituent members be taken by secret ballot to decide whether the Constituent Part, the M&E Division of the CFMMEU should withdraw from the CFMMEU.

Conduct of the ballot — s 102

[45] As to the conduct of the ballot, s 102 of the RO Act relevantly provides:

(1) All ballots are to be conducted by the AEC in accordance with the regulations. The expenses of conducting such a ballot are to be borne by the Commonwealth.

(1A) Despite subsection (1), if:

> (a) an exemption is in force under section 186 (General Manager may permit organisation or branch to conduct its elections for office) in relation to elections for the constituent part, or any identifiable part of the constituent part, of the amalgamated organisation; and
>
> (b) the applicant or applicants under section 94 apply to the FWC for the purposes of this subsection;
>
> the FWC may, in making an order under section 100 that a ballot be held, allow the ballot to be conducted by an officer of the constituent part (the ***designated official***), with the expenses of conducting the ballot to be borne by the constituent part.
>
> (1B) If the FWC makes an order under subsection (1A), it may make any other orders it considers are needed for the conduct of the ballot by the designated official.

[46] As foreshadowed in the Application at paragraph [13], Mr Kelly applies under s 102(1A) of the RO Act for an order that the ballot be conducted by an officer of the M&E Division. He also applies for an order that the designated official have power to conduct an attendance ballot.

Is there an exemption in force under s 186?

[47] Mr Kelly contends that the M&E Division has had an exemption under s 186 of the RO Act allowing it to conduct its own elections. He has produced a certificate issued to the M&E Division on 2 May 1996 by the Industrial Registrar of the Australian Industrial Relations Commission under s 211 of the IR Act as evidence of this.[49]

[48] The IR Act was renamed as the WR Act by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) and no relevant amendment was made to ss 211 to 213, which dealt with the in-house conduct of elections by registered organisations. Schedule 1B of the WR Act was inserted by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth) and commenced operation on 12 May 2003. That schedule replicated most matters relating to registered organisations which were previously within the body of the WR Act and repealed those provisions in the WR Act. Section 211 of the WR Act became s 183 of Schedule 1B and s 213 of the WR Act became s 186 of Schedule 1B. There was no material change to the wording of the provisions. These provisions were corresponding provisions for the purposes of item 1(2) of Schedule 1 to the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002* (Cth). Item 2 of that schedule provides that a certificate made, given or granted under a repealed provision continues in force on and after the commencement as if it had been granted under Schedule 1B of the WR Act.

[49] Schedule 1B was renumbered as Schedule 1 by item 2(2) of Schedule 5 to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), relevantly with effect on 27 March 2006, but there were no changes to ss 183 and 186. In 2009, the WR Act was repealed, and the provisions of Schedule 1 were retained in the RO Act. Pursuant to Schedule 22, Part 9, item 621(1), item 3 of the table of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) the exemption granted continues in force as though granted by

the General Manager of the Commission. Therefore, we accept that the M&E Division holds an exemption under s 186, and the requirement in s 102(1A) of the RO Act is therefore satisfied.

Should the conduct of an in-house attendance ballot be permitted?

[50] As to the attendance ballot, Mr Kelly says that the election model used by the M&E Division has been very successful in encouraging member participation in elections, with attendance ballots conducted by the M&E Division routinely achieving double or triple the participation rates of union postal ballots conducted by the Australian Electoral Commission (AEC). In support of this contention Mr Kelly points to research M&E Division staff conducted into comparative participation rates between attendance ballots conducted by the M&E Division and postal ballots conducted by the AEC in respect to several other federally-registered organisations. That research shows that the M&E Division elections conducted between 1996 and 2012 as attendance ballots attracted an average membership participation rate of 69.4%. In contrast, the union postal ballots surveyed show an average participation rate of just 23.2%.[50]

[51] Mr Kelly says that in view of the importance of the withdrawal ballot application to the future of members of the M&E Division, an attendance ballot should be ordered because it will maximise the democratic participation of members and thereby impart significant legitimacy to the result of the withdrawal ballot. We agree and accept that an attendance ballot will more likely result in a higher level of constituent member participation in the ballot than would a postal ballot.

[52] However, we also wish to ensure that constituent members who are not in attendance during a period when the attendance ballot is conducted are not disenfranchised. Mr Kelly says that the proposal sought is that the withdrawal ballot be conducted primarily as an attendance ballot and that the designated official will have the capacity to issue postal votes where the conduct of an attendance ballot is not practical or appropriate. These postal ballots will also be conducted in accordance with the requirements of the RO Act and RO Regulations.[51] Therefore the ballot process will permit the designated officer to conduct a hybrid ballot which will consist principally of an attendance ballot with an allowance for a postal ballot for any constituent member unable to participate in the attendance ballot or where the conduct of an attendance ballot is not practicable.

[53] Mr Kelly contends that Shane Russell Thompson should be the designated official permitted to conduct the ballot. On 23 February 2023, the Central Council of the M&E Division passed a resolution nominating Mr Thompson as the designated Official to conduct a ballot of M&E Division members to decide whether the M&E Division should withdraw from the CFMMEU and Mr Thompson has accepted the nomination.[52]

[54] Mr Kelly described the proposed ballot process as follows:

> Once appointed to the role of Designated Official, Shane Thompson will appoint a number of union members as assisting officials to assist in the conduct of the ballot. This will be done in writing pursuant to regulation 94A(1) of the RO Regulations. I anticipate that most assisting officials will be drawn from the ranks of local returning officers that conduct ballots for elected office under the s.186 exemption applying to the ME Division.

> Normally, attendance ballots are conducted on the employer's property in a convenient area on the surface of the mine, or other facility, such as a training room, bath house area, or administration area. The ballot will be conducted outside of normal working hours and ballot hours will accommodate shift start times and shift changeover periods. Based on past experience, I believe that the attendance ballot process will result in minimal or no disruption to the normal productive operation of the enterprise.
>
> The ballot is then conducted in the much same manner as a vote in local, State or Federal elections, with an employee receiving a ballot paper from the assisting officials after having his or her identity and membership status confirmed and marked off a roll of voters for that site. The member will then be given a watermarked ballot paper containing a facsimile of the signature of the Designated Official and the assisting official will initial the box provided.
>
> The member would then attend a private area to fill in the ballot paper and place the ballot paper in a secure box retained by the assisting official. It is the assisting official's responsibility to provide a secure and lockable ballot box. The assisting official also has a responsibility to ensure that members are free from intimidation and attempts to influence their votes.
>
> The assisting official will then have the responsibility of returning all ballot papers (including unused papers) and a summary sheet to the Designated Official. The Designated Official will then conduct a count of the ballot papers in the ME Divisional Office at Clarence Street, Sydney. Scrutineers appointed by the amalgamated organisation will be permitted to view the count. Progressive tallies will be issued by the Designated Official, at his or her discretion.
>
> Once the count is completed (including all postal votes) the Designated Official will declare the results of the ballot. The Designated Official will then provide a certificate to the General Manager of the FWC, the amalgamated union and the Central Council of the ME Division containing the information required under s.106 of the RO Act. The Designated Official will also file a report on the conduct of the ballot under s.107 of the RO Act and will provide copies to the General Manager, the amalgamated organisation and the ME Division.[53]

[55] Additionally, Mr Kelly proposes that there be two ballot papers used in the ballot: a ballot paper for use in the attendance ballot and a ballot paper for use in the postal ballot. The papers will be identical except that the attendance ballot paper will contain a box in which an assisting official will endorse their initials while the postal ballot paper will contain the letter 'P' in the equivalent box, signifying that it is a postal ballot.

[56] We consider the process is entirely appropriate in the circumstances.

[57] Based on the evidence given by Mr Kelly[54] and Mr Thomson[55] we appoint Mr Thompson as the designated official to conduct the withdrawal ballot as we are satisfied, taking into account the considerable preparatory work that has been undertaken, that Mr Thompson will be able to properly conduct the ballot in accordance with the RO Act, the RO Regulations and the orders we propose to make. The orders we make will accommodate the ballot process described above.

The 'yes' case — s 96

[58] Mr Kelly has filed a written statement[56] which we allow under s 96(2)(b) of the RO Act in support of the proposal for the constituent part to withdraw from the amalgamated organisation. It complies with the word limit in s 96(1) (it is under 2,000 words).

Conclusion

[59] For the reasons stated herein and those set out in the 21 February Decision we conclude that:

(a) the Constituent Part (the M&E Division) is a constituent part within the meaning of the definition in s 93 of the RO Act;

(b) the Constituent Part became a part of the amalgamated organisation as a result of the amalgamation which took effect on 10 February 1992 between the ATAIU and BWIU Amalgamated Organisation and UMFA;

(c) the Application for a ballot to decide whether the Constituent Part should withdraw from the amalgamated organisation is validly made under s 94 of the RO Act;

(d) the amended outline of the proposed withdrawal meets the requirements in s 100(1)(b);

(e) the rules of the proposed MEU as amended, if and when the proposed withdrawal of the Constituent Part takes effect, meet the requirements in s 100(1)(ba);

(f) the altered rules for the CFMMEU (which will become the CFMEU if and when the proposed withdrawal of the Constituent Part takes effect) as amended meet the requirements in s 100(1)(ba);

(g) the proposal for withdrawal complies with the requirements in the RO Regulations;

(h) as we are satisfied of the matters in s 100(1), we will order that a vote of the constituent members of the M&E Division be taken by secret ballot, to decide whether the M&E Division of the CFMMEU should withdraw from the CFMMEU;

(i) Shane Russell Thompson will be appointed as the designated official of the M&E Division of the CFMMEU to conduct the ballot for the purposes of s 102(1A) of the RO Act;

(j) the ballot will be conducted primarily as an attendance ballot with some votes to be cast by postal ballot as the circumstances require; and

(k) under s 96(2)(b) of the RO Act we allow Mr Kelly to file the statement, filed on 17 March 2023, as the written statement in support of the proposal for the constituent part to withdraw from the amalgamated organisation, i.e. the ‘yes’ case.

[60] An order[57] giving effect to this decision will be published in conjunction with this decision.

PRESIDENT

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[1] The CFMMEU has continually existed as a registered organisation since 1962, albeit it did not acquire its current name until 2018. References to the 'CFMMEU' in this decision may refer to the organisation as it was prior to 2018 when it operated under a different name.

[2] [2023] FWCFB 33.

[3] Transcript, 1 March 2023, PNs 149, 156-158.

[4] Ibid PN 159.

[5] Ibid PNs 131-140.

[6] *Construction, Forestry, Maritime, Mining and Energy Union* [2023] FWCG 11.

[7] Transcript, 1 March 2023,) PNs 141-143.

[8] [2022] FCAFC 130, [99]-[100].

[9] [2021] FWCFB 6002, [94], [124].

[10] That is the case whether the M&E Division falls within paragraph (c) of the definition of 'separately identifiable constituent part' in s 93(1) of the RO Act, as found in the Full Court and Full Bench decisions concerning Mr Kelly's earlier application, or falls within paragraph (a) of the definition, as Mr Kelly contended before us in the present matter. We note that, in the earlier matters before the Full Court and the Full Bench, Mr Kelly conceded that paragraph (a) (and (b)) of the definition did not apply, but it may be that this concession was incorrectly made having regard to our analysis later in this decision concerning s 94(1)(a) of the RO Act.

[11] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [25], annexure GK-8.

[12] Ibid [26].

[13] [2021] FWCFB 6002, [10] to [28].

[14] Transcript, 1 March 2023, PNs 186-189.

[15] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022.

[16] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002, [14]-[15]; Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [40].

[17] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002 at [18]; Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [45].

[18] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002, [18]; Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [47], annexure GK-12.

[19] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [47], annexure GK-12.

[20] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [49]-[51].

[21] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002, [19].

[22] Correspondence from C Brendon, Deputy Industrial Registrar AIRC to S Sharkey, National Secretary, CFMEU dated 2 December 1993 and the documents attached thereto, filed in these proceedings on behalf of Mr Kelly on 15 March 2023.

[23] Certified Rules of the Construction, Forestry, Mining and Energy Union as at 2 December 1993.

[24] Correspondence to the CFMEU's National Executive Members dated 29 November 1993 from Stan Sharkey, National Secretary attached to correspondence from C Brendon, Deputy Industrial Registrar AIRC to Mr S Sharkey, National Secretary, CFMEU dated 2 December 1993, filed in these proceedings on behalf of Mr Kelly on 15 March 2023.

[25] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [56].

[26] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [57]; correspondence from M Buchanan, Deputy Industrial Registrar AIRC to Mr S Sharkey, National Secretary, CFMEU dated 5 May 1995 and the documents attached thereto, filed in these proceedings on behalf of Mr Kelly on 15 March 2023.

[27] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002, [22].

[28] Ibid [23]; Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [61].

[29] *Application by Grahame Patrick Kelly* [2021] FWCFB 6002, [25].

[30] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [8], [63].

[31] Exhibit 2, Second Statement of Grahame Patrick Kelly, 25 October 2022, [87].

[32] Ibid.

[33] Ibid [88].

[34] Ibid [91]-[125].

[35] Ibid [126]-[129].

[36] *Fair Work Act 2009* (Cth) s 94(1) (emphasis added).

[37] [2001] FCA 644.

[38] Ibid [19]-[20] (citations omitted, emphasis added).

[39] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, 27 February 2023.)

[40] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, annexure GK-94 (noting that the amended outline was filed on 17 March 2023); Mr Kelly's outline of submissions, 28 February 2023, [57].

[41] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, annexure GK-94, [35]-[45] (as amended by the outline filed on 17 March 2023).

[42] Ibid [7].

[43] Ibid [47(b)].

[44] Ibid [33a].

[45] Ibid [47(c)].

[46] Ibid [47(d)].

[47] Ibid [46].

[48] Mr Kelly's outline of submissions dated 28 February 2023, [60].

[49] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, [3], annexure GK-85.

[50] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, [4]-[5], annexure GK-86.

[51] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, [8].

[52] Exhibit 4, Statement of Shane Russell Thompson, 27 February 2023, [5].

[53] Exhibit 3, Fourth Statement of Grahame Patrick Kelly, [9]-[14].

[54] Ibid.

[55] Exhibit 4, Statement of Shane Russell Thompson, 27 February 2023.

[56] Initially filed as Exhibit 3, Fourth Statement of Grahame Patrick Kelly, annexure GK-94. An amended version was filed on 17 March 2023.

[57] PR760701.