IN FAIR WORK COMMISSION

Matter No: D2022/10

Application by Grahame Patrick Kelly, withdrawal from amalgamated organisation

CFMMEU OUTLINE OF SUBMISSIONS ON JURISDICTIONAL OBJECTIONS

INTRODUCTION

1. The Construction, Forestry, Maritime, Mining and Energy Union (the **CFMMEU**) opposes the application for a ballot pursuant to s. 94 of the *Fair Work (Registered Organisation) Act 2009* (Cth) (the **Act**) on the basis that:

   (a) the United Mineworkers' Federation of Australia (**UMFA**) does not remain separately identifiable as the Mining & Energy Division of the CFMMEU (the **M&E Division**) within the definition in sub-paragraph (a) of the definition of Separately Identifiable Constituent Part in s. 93 of the Act;

   (b) UMFA does not fall within the definition in sub-paragraph (c) of the definition of Separately Identifiable Constituent Part in s. 93 of the Act; and

   (c) the evidence does not establish that the application on behalf of the Alternative Constituent Part has been authorised.

2. For the reasons set out in the written submissions filed on 8 October 2022 and the oral submissions made on 24 October 2022, the CFMMEU also submits that the application should not be accepted out of time in accordance with s. 94A of the Act.

FACTS

3. On 10 February 1992, UMFA amalgamated with the organisation that became the CFMEU.[1] At that time, the Mine Workers' Federation Division was created.[2] The members allocated to the Mining Division were the members of the CFMMEU who were employed in or in connection with the coal and shale industry. At this time, the Mining Division was responsible for organising the same group of members that UMFA had.

[1] See *Kelly v CFMMEU* [2022] FCAFC 130 at [20].
[2] See [40] of Mr Grahame Kelly's statement of 24 October 2022.

4. On 10 September 1992, the FEDFA amalgamated with the CFMEU.[3] After this amalgamation, rule 42 of the CFMEU rules provided that all members of the CFMEU who were employed in the "Mining Industry" should transfer to the Mining Division.[4] At the same time, the Energy division (also known as the FEDFA division) was established.[5]

5. On 10 May 1995 by way of administrative rule change, the FEDFA division was merged with the Mine Workers' Division to create the M&E Division.[6] The members who were allocated to the M&E Division expanded from members in the coal and shale industry to include all members in the Mining or Exploration industries, power generation, co-generation, transmission and distribution, oil, gas, nuclear or chemical production industries.[7]

6. By 10 September 1995, approximately 7,858 members had been allocated to the M&E Division who were not previously members of UMFA.[8]

7. Annexure A to these submissions is a table setting out the relevant differences between UMFA's rules, the rules of the Mining Division immediately post amalgamation, the M&E Division when it was first created in 1995 and the M&E Division at the time this application was made. The table compares the effect of each rule identified against the equivalent rule in the UMFA rules immediately prior to amalgamation. The table enables each set of rules to be directly compared to the UMFA rules. Copies of those rules can be found in Ms Dawson-Field's statement of 21 November 2022.

LEGISLATIVE SCHEME

8. The legislative history of Part 3 of the Act was set in *Application by Kelly* (2021) 310 IR 270 at [29] to [56] and *Kelly v CFMEU* [2022] FCAFC 130 at [67] to [76].

9. The legislative scheme and proper construction of Part 3 of the Act was also considered in *Application by Kelly* (2021) 310 IR 270 at [88] - [94] and [115] – [116] and *Kelly v CFMEU* [2021] FCAFC 130 at [88] – [100], [104] – [116] and [121] - [137].

[3] See [45] of Mr Grahame Kelly's statement of 24 October 2022.
[4] See r. 42 (iii)(a) at page 481 of Mr Grahame Kelly's statement of 24 October 2022.
[5] See r. 42 (iii)(d) at page 481 of Mr Grahame Kelly's statement of 24 October 2022.
[6] See [57] of Mr Grahame Kelly's statement of 24 October 2022.
[7] See rule 2 to Mining and Energy Division rules of 2 March 2006.
[8] See [60] of Mr Grahame Kelly's statement of 24 October 2022.

10. The CFMMEU also relies upon its oral and written submissions made in respect of the s. 94A application in respect of the proper construction of Part 3 of the Act.

11. The defined terms Constituent Part and Separately Identifiable Constituent Part are extracted at [13] and [14] of the applicant's outline of submissions.

UMFA IS NOT SEPARATELY IDENTIFIABLE AS THE M&E DIVISION

12. The applicant's primary argument is put in two different ways. The applicant asserts that UMFA is separately identifiable within the meaning of (a) of the definition of Separately Identifiable Constituent Part as the M&E Division.[9] Alternatively, the applicant alleges that UMFA is a branch, division or part of the CFMMEU within the meaning of (c) of the definition of Separately Identifiable Constituent Part.[10]

13. On the first part of the applicant's primary argument, the question for resolution is whether UMFA remains "separately identifiable" under the rules of the CFMMEU.

14. The ordinary meaning of the word 'separately' is detached, set apart, not incorporated or joined[11] or existing or regarded as a unit by itself.[12] It is important that the legislature has chosen the phrase "separately identifiable" and not *substantially identifiable*. Given the legislative purpose of withdrawing from an amalgamation, that choice is understandable. The administrative unit entitled to apply for a ballot to *withdraw* from an amalgamation must be the unit that joined the amalgamated organisation as a result of the amalgamation.

15. Properly construed, the question posed by the definition of paragraph (a) of the definition of separately identifiable is: is the former deregistered organisation (or Branch) identifiable by itself within the rules of the amalgamated organisation? In these circumstances, the answer to that question must be no. Under the rules of the CFMMEU, UMFA is no longer separately identifiable. The administrative unit which was separately identifiable as UMFA has been joined by portions of the administrative unit that contained portions of the previously deregistered FEDFA to create a new administrative unit, the M&E Division. The fact that the M&E Division has some

[9] See [38] and [56] of the applicant's outline.
[10] See [38] and [56] of the applicant's outline.
[11] See shorter Oxford English Dictionary sense 2 (b), Oxford Press 2007.
[12] Shorter Oxford English Dictionary sense 3(a), Oxford Press 2007.

similarities to UMFA is not to the point. UMFA is no longer separately identifiable within the rules of the CFMMEU.

16. The applicant's reliance on *Gilchrist v. ASU* [2001] FCA 644 does not assist. In that case, Lee J was answering the factual question of whether a *state branch* of a deregistered organisation was still separately identifiable as the *state branch* within the amalgamated organisation.[13] His Honour was not purporting to lay down general principles for when a deregistered organisation such as UMFA would remain separately identifiable.

17. It should also be noted that in that case, the argument of the unsuccessful amalgamated organisation was to the effect that because the applicant Branch had a narrower "eligibility" than the previous State Branch of the de-registered organisation, it was not separately identifiable.[14] That argument was not accepted because the rules of the amalgamated organisation provided that the members attached the to the State Branch, immediately prior to amalgamation, were attached to the Branch and any new members would join the relevant branch that would have represented them if there had been no amalgamation.[15] Those circumstances are easily distinguishable from what has occurred in this matter. Here, the M&E Division is not geographically distinct, the members allocated to the M&E Division has expanded beyond the sole industry which was originally the purview of the UMFA, the purpose of the M&E Division has expanded to serving the members in those distinct industries and the structures of the M&E Division have been expanded from those in the UMFA to account for the new members and areas of responsibility.

18. In any event, even if the decision in *Gilchrist v. ASU* can be taken as establishing matters of general principle, they do not assist the applicant. The functions of the M&E Division and the members allocated to it are not the functions and members which were allocated to UMFA. UMFA was a union concerned with representing and advancing interests of members in one industry, being the coal and shale industry. The M&E Division on the other hand, is responsible for advancing the interests of members allocated to it who are employed in at least seven separate industries, being

[13] See *Gilchrist v. ASU* at [17].
[14] See [60] of the statement of Grahame Kelly dated 24 October 2022
[15] See [19] and [20] of the Decision.

coal and shale, Mining or Exploration, power generation, co-generation, transmission and distribution, oil, gas, nuclear or chemical production industries.

19. The facts also reveal that the effect of the internal reorganisation within the CFMMEU was that the membership of the M&E Division grew by approximately 33 per cent, it went from 14,559 members to 22,417 members.[16] On the applicant's case the additional FEDFA members represent approximately 15 per cent of the M&E Division's membership. In any event, what matters for the purpose of the definition is whether UMFA remains identifiable under *the rules*. Whether the M&E Division has taken up the eligibility allocated to it is not to the point. What matters is the difference manifested by the rules.

20. The applicant's submission at [55](a) should not be accepted. For reasons set out above, the members allocated to the M&E Division are substantially different than those who were eligible to join UMFA.[17]

21. Contrary to [55](b) of the applicant's submissions, as is demonstrated by annexure A, the M&E Division today differs from UMFA as at 9 February 1990 in the following structural respects:

    (a) Its coverage extends beyond coal and shale and includes 'Mining or Exploration', and 'power generation, co-generation, transmission and distribution, oil, gas, nuclear and chemical production';

    (b) Its Central Council has an additional 4 officers, being 3 Vice-Presidents and 1 Affirmative Action Councillor. All of the Executive Officers are elected by and from representatives who are directly elected by members who are drawn from <u>both</u> the mining and the energy sections of the Division's coverage;

    (c) There are 6 District Branches instead of 5, and the identity and coverage of those District Branches differs considerably;

    (d) In 1990, UMFA had 5 District Branches. 3 were in NSW (Northern, Southern and Western District), 1 was in Queensland and 1 was in Tasmania. It had no District Branches in Victoria or Western Australia. The coverage of all District Branches was limited to employees in coal and shale;

[16] See [60] of the statement of Grahame Kelly dated 24 October 2022
[17] See rule 3 of the M&E Divisional Rules and rule 42 of the CFMMEU Rules.

(e) Today, the M&E Division has 6 District Branches. It has 2 branches in NSW, being the Northern Mining and NSW Energy District Branch and the South Western District Branch. It also has District Branches in Western Australia and Victoria. All of its branches have coverage in both mining and energy, and include express coverage in respect of power generation, co-generation, transmission and distribution, oil, gas, nuclear and chemical production. Two branches (the Northern Mining and NSW Energy District Branch and the Victorian District Branch) make express provision for District offices elected exclusively by Energy members. The Victorian District also has Energy-only lodges.

22. The submission at [55](c) pays no attention to the text of the definition of *separately identifiable*. The actual financial position is not relevant to whether UMFA remains identifiable under *the rules*.

23. The applicant's reliance at [55] (d) and (e) on a majority of members of the various governance bodies being able to join UMFA is misplaced. *Firstly*, the FEDFA was a union which operated in the coal and shale industry. Therefore, persons who had historically been members of the FEDFA answered the description of being eligible to have joined UMFA. Their position on a governance body says nothing about whether UMFA is separately identifiable as the M&E Division.

24. *Secondly*, the mere fact that members from the FEDFA were not commensurately represented on the governance bodies of the M&E Division does not mean that UMFA is separately identifiable under *the rules* of the CFMMEU.

25. *Thirdly*, the various committees relied upon at [55](d) and (e) of the applicant's submissions reveal that approximately 21 percent of the members of those identified at [100] of Mr Kelly's statement were from the FEDFA eligibility. At [101] 18% of the members were from the FEDFA eligibility. At [102] 11% of the members were from the FEDFA eligibility. At [103] 24% of the members were from the FEDFA eligibility. At [104] 23% of the members were from the FEDFA eligibility. At [105], 22% of the members were from the FEDFA eligibility. At [107], 25% were from the FEDFA eligibility. At [110], 29% of the members were from the FEDFA eligibility. At [113], 25% of the members were from the FEDFA eligibility. At [116], 25% of the members

were from the FEDFA eligibility. At [120], 31% of the members were from the FEDFA eligibility. At [123], 25% of the members were from the FEDFA eligibility.

26. *Finally*, the applicant's reliance on rule 42(xv)(d) of the CFMMEU's rules at [55](f) is misplaced. Rule 42(xv)(d) is plainly directed at identifying which parts of the CFMMEU are responsible for the rights and obligations attaching to the amalgamated organisation by virtue of the conduct of one of the now de-registered organisations. The rule does not have the effect that each of the de-registered unions identified in that rule are separately identifiable as the divisions to which they belong. If that was the case, the Operative Plasterers and Plaster Workers Federation of Australia would be separately identifiable as the Construction and General Division. Such a proposition is obviously untenable.

27. The alternative component of the primary argument is not developed by the applicant. Despite asserting at [38] and [56] that UMFA falls within (c) of the definition, no attempt is made explain how UMFA answers the description of a *branch, division or part* of the CFMMEU. In any event, the text of the CFMMEU and the M&E Division rules conclusively disposes of any such contention.

28. For those reasons, UMFA does not remain separately identifiable as the M&E Division within the meaning of the definition in s. 93 of the Act.

THE CONSTITUENT PART DID NOT BECOME A PART OF THE CFMMEU AS A RESULT OF AN AMALGAMATION

29. The relevant Constituent Part is the M&E Division. The M&E Division did not become a part of the CFMEU as a result of an amalgamation. It was created by an internal rule change merging two separate divisions of the CFMEU.[18] The applicant does not grapple with this in his submissions at [57] to [60].

30. In circumstances where the M&E Division became a part of the CFMEU as a result of a rule change and not an amalgamation, the primary application must fail.

SUMMARY – PRIMARY APPLICATION

31. For the reasons set out above, the Primary Application should not be accepted. UMFA is not separately identifiable as the M&E Division. In any event, the M&E Division did not become part of the CFMMEU as a result of amalgamation.

[18] See *Kelly v CFMMEU* [2022] FCAFC 130 at [2] and [26].

THE ALTERNATIVE APPLICATION WAS NOT PROPERLY AUTHORISED

32. The alternative application is made in respect of the Alternative Constituent Part being that part of the membership of the CFMMEU that would have been eligible to join UMFA. The Alternative Application is beset by confusion. Despite the Alternative Constituent Part being framed separately to the M&E Division, the outline for the scheme of the withdrawal and the proposed rules filed in support of the alternative application simply mirror the scheme in respect of the Constituent Part. That is, despite only relying upon the Alternative Constituent Part constituted by the UMFA eligibility rule, the applicant proposes a scheme for withdrawal which is premised on the Alternative Constituent Part being the M&E Division.

33. The confusion in respect of the alternative application extends to the question of whether the alternative application was authorised. The applicant initially relies upon a resolution of the Central Council of the M&E Division as authorising the application. The Central Council is established by rule 8 of the M&E Division rules and has the power set out in rule 8(vi). Those rules do not grant the Central Council authority in respect of the Alternative Constituent Part. The Central Council's authority is confined to the M&E Division. It has no power to authorise any application in respect of the Alternative Constituent Part. Accordingly, the resolution is beyond power.

34. It is not to the point that the Central Council might answer the description in s. 94(3)(b) of the Act. Section 94(3)(b) permits the application to be made by a committee of management. However, s. 94(3)(b) says nothing about the powers of a particular committee to pass such a resolution. Whether any such application is within power for the relevant committee turns on the proper construction of the rules of the relevant committee.

35. The second way the applicant says the alternative application is authorised is to rely upon the purported individual members who have authorised the application. Section 94(3)(a) permits an application to be made by a person authorised by the prescribed number of constituent members. The phrase *Constituent Members* is relevantly defined in s. 93 as those members of the CFMMEU who would be eligible for membership of the organisation which was de-registered, being UMFA.

36. At [8] Mr Kelly in his statement asserts that there are 18,027 members of the M&E Division who would have been eligible to join UMFA. He also asserts that the application was authorised by 2,496 constituent members.

37. In circumstances where the UMFA eligibility rule (rule 2D) relied upon is an industry rule, it is well settled that it is the industry of the employer that is relevant.[19] It is also well-settled that an employer/employee may be simultaneously engaged in more than one industry.[20]

38. The evidence relied upon by the applicant is deficient in at least three ways.

39. *Firstly,* the evidence of Mr Kelly as to the conclusions about eligibility is plainly inadmissible.

40. *Secondly*, in respect of 2,496 constituent members relied upon for the purposes of authorising the application, no admissible evidence has been given as to their membership of the CFMEU, the identity of their employer, or the industry of that employer. In any event, the written authorisations are unreliable. The authorisations assert that the signatories are financial members of the CFMMEU and employed for relevant employers in the relevant roles. In many cases it is apparent from the strikethroughs and the columns completed by the applicant, that those persons were wrong about being members or financial. If persons who signed were wrong on such fundamental matters, how could the Commission rely on the other assertions? For both of those reasons, the Commission cannot be satisfied that the persons relied upon are constituent members.

41. *Thirdly*, in respect of the 18,027 members relied upon, Mr Kelly does not identify, in an admissible way:

    (a) who the employers are; and

    (b) what industry they are in.

42. Without that information, the Commission could not be satisfied that they are eligible to join the CFMMEU or that they were eligible by virtue of rule 2D.

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[19] See *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290 at 296-8.
[20] see *R v Issacs; Ex Parte TWU* (1985) 159 CLR 323 at 333 per Gibbs CJ (with Dawson and Deane JJ agreeing).

CONCLUSION

43. For the reasons set out above, both the Application and the Alternative Application should be dismissed.

CW Dowling

CA Massy

DV Murphy

21 November 2022