D2022/11

FAIR WORK COMMISSION

APPLICATION BY MICHAEL O'CONNOR

WITHDRAWAL FROM AMALGAMATED ORGANISATION – MANUFACTURING DIVISION – CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION

APPLICANT'S OUTLINE OF SUBMISSIONS

ON THE JURISDICTIONAL OBJECTION

A. Introduction

1. On 15 September 2022, Michael O'Connor (**the Applicant**) made an application to the Fair Work Commission (**Commission**) under s.94 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) (**the Application**) for a secret ballot to be held to decide whether the Manufacturing Division (**the Manufacturing Division**) of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) should withdraw from the CFMMEU.

2. On 30 September 2022, the CFMMEU filed a notice of its objections to the Application, including one jurisdictional objection (the **Jurisdictional Objection**).

3. On 3 October 2022 the Commission issued directions programming the hearing of the Jurisdictional Objection. The Commission issued directions for the filing of written submissions and statements of evidence in respect of the s.94(1) issue.

4. These submissions are filed on behalf of the Applicant pursuant to the Commission's directions. The Applicant relies on the documents filed with the Application and the statement of Geoffrey Borenstein dated 24 October 2022 (**Borenstein's statement**).

5. These submissions are structured as follows:

(a) Section B of these submissions addresses the relevant parts of the legislation and relevant legislative history.

(b) Section C of these submissions, outlines O'Connor's submissions in respect of why the Commission should conclude that the Manufacturing Division became a part of the CFMMEU on 27 March 2018 as a result of the amalgamation between the CFMEU, the Textile, Clothing and Footwear Union of Australia (**the TCFUA**) and The Maritime Union of Australia (**the MUA**) (**the 2018 Amalgamation**).

B. The legislation and relevant legislative history

B.1. The current withdrawal provisions

6. Chapter 3 of the RO Act provides in Part 2 for the amalgamation of organisations and in Part 3 for withdrawal from amalgamations. The present application is brought under Part 3.

7. Withdrawal from amalgamation under Part 3 is initiated by a process of application to the Commission under s.94 of the RO Act for an order that a secret ballot be held to decide whether a part of an amalgamated organisation which is called a "constituent part", and which became part of that organisation as a result of an amalgamation, should withdraw from the amalgamated organisation. It provides:

> *"(1) An application may be made to the FWC for a secret ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:*
>
> *(a) the constituent part became part of the organisation as a result of an amalgamation under Part 2 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."*

8. Thus, the necessary elements for an application under s.94 are:

(a) an amalgamated organisation;

(b) a constituent part of an amalgamated organisation;

(c) that the constituent part became part of the amalgamated organisation as a result of an amalgamation; and

(d) that the application is made no less than 2 years and no more than 5 years after the amalgamation.

9. The key terms in s.94 are defined.

10. The term "*amalgamated organisation*" is defined in s.93 as follows:

> *"**"amalgamated organisation"**, in relation to an amalgamation, means the organisation of which members of a de-registered organisation became members under paragraph 73(3)(d) of Part 2, or an equivalent provision of a predecessor law, but does not include any such organisation that was subsequently de-registered under Part 2 or a predecessor law."*

11. The term "*constituent part*" is defined in s.93 as follows:

> *"**"constituent part",** in relation to an amalgamated organisation, means:*
>
> *(a) a separately identifiable constituent part; or*
>
> *(b) a part of the membership of the amalgamated organisation that would have been eligible for membership of:*
>
> *(i) an organisation de-registered under Part 2 in connection with the formation of the amalgamated organisation; or*
>
> *(ii) a State or Territory branch of such a de-registered organisation;*
>
> *if the de-registration had not occurred."*

12. The term "*separately identifiable constituent part*" is defined in s.93 as follows:

> *"**"separately identifiable constituent part"**, in relation to an amalgamated organisation means:*
>
> *(a) if an organisation de-registered under Part 2 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*
>
> *(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; or

(c) any branch, division or part of the amalgamated organisation not covered by paragraph (a) or (b) that is separately identifiable under the rules of the organisation."

B.2. The legislative history of the withdrawal provisions

13. The statutory scheme has allowed for the amalgamation of organisations since the enactment of the *Conciliation and Arbitration Act 1972* (Cth) (**the C & A Act**).[1]

14. The amalgamation scheme has undergone reform over the years. In 1998 the C & A Act was repealed and the *Industrial Relations Act 1988* (Cth) (**IR Act**) was enacted.[2]

15. In 1991 upon the enactment of the *Industrial Relations Legislation Amendment Act* 1991 (Cth) the existing amalgamation scheme under the IR Act was repealed and substantially revised.[3]

16. The amalgamation scheme was next reformed in 1996 when the IR Act was repealed and the *Workplace Relations Act* 1996 (Cth) (**WR Act**) was enacted.[4] These reforms took effect from 31 December 1996.

17. The WR Act included the first provisions for withdrawal from amalgamations. Those provisions were contained in Division 7A of Part IX of the Act. They required that any application for a ballot had to occur between two and five years from the date of amalgamation.

18. Section 253ZJ(1) of the WR Act, the predecessor to s.94 of the RO Act, provided:

"An application may be made to the Court for a ballot to be held, to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, if:

(a) the constituent part became part of the organisation as a result of an amalgamation under Division 7 after 1 February 1991; and

---

1 See sections 158L-158R.
2 See Division 7 of Part IX.
3 See sections 7 of Part IX.
4 See Division 7 of Part IX.

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

(c) the application is made:

(i) if the amalgamation occurred before the commencement of this Division – no more than 3 years after that commencement; or

(ii) if the amalgamation occurred after the commencement of this Division – no more than 3 years after that commencement; or

(iii) if the amalgamation occurred after the commencement of this Division – no more than 5 years after the amalgamation occurred.

19. Section 253ZI(1) of the WR Act defined the term "constituent part". It provided:

*"**constituent part**, in relation to an amalgamated organisation, means a part of the membership of the amalgamated organisation that would have been eligible for membership of:*

(a) an organisation de-registered under Division 7 in connection with the formation of the amalgamated organisation; or

(b) a State or Territory branch of such an organisation;

if the de-registration had not occurred."

20. The next material development was the enactment of the *Workplace Relations & Other Legislation Amendment Act 1997* (Cth). These amendments broadened the availability of the withdrawal provisions by expanding the definition of "*constituent part*" in s.253ZI(1) to also include a "*separately identifiable constituent part*" which was defined in s.253ZI(1) as follows:

*"**separately identifiable constituent part,** in relation to an amalgamated organisation means:*

(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

(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."

21. The above definition is substantively identical to paragraphs (a) and (b) of the current definition in s.93 of the RO Act.

22. In 2002 upon the enactment of the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth) the relevant provisions were moved into Schedule 1B to the WR Act.

23. In 2005, the withdrawal scheme was again reformed with the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The definition of "*constituent part*" was not materially changed. Section 94 was amended to provide that applications were to be made to the Commission instead of the Federal Court.

24. In 2009, the RO Act was enacted and incorporated the provisions of Schedule 1 of the WR Act. No material changes were made to the withdrawal provisions at this time.

25. Critical to the construction of Part 3 as it now stands, are the amendments made to it by the *Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamation) Act 2020* (**the Amendment Act**)[5] which came into effect on 15 December 2020.

26. The Amendment Act significantly broadened the application of the scheme.

27. Significantly for the present application, there was an amendment of the definition of "*a separately identifiable constituent part*" by the addition of paragraph (c). That in turn expanded the definition of "*constituent part"* and in consequence, the scope of operation of s.94.

28. The terms of paragraph (c) stand in contrast to the terms of paragraphs (a) and (b). Paragraphs (a) and (b) identify parts of the amalgamated organisation that had previously been an organisation which was deregistered in connection with an amalgamation or a branch of such a deregistered organisation. Each expressly states the need for a connection to a deregistered organisation. Paragraph (c) does not and the reason for that is explained in paragraphs 15-16 of the *Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamation) Bill 2020* (***Explanatory Memorandum***) which states in relation to

---

5 Act No. 131/2020.

paragraph (c):

> *"This item adds to the definition of **separately identifiable constituent part**, new paragraph (c) which is, any branch, division or part of the amalgamated organisation not covered by existing paragraphs (a) and (b) that is separately identifiable under the rules of the organisation.*
>
> *The effect of this amendment is to provide that the withdrawal provisions set out in Part 3 of Chapter 3 apply to any branch, division or part of an amalgamated organisation that is separately identifiable under the rules of the organisation. This means that the ability to withdraw from an amalgamation is not limited by the pre-requisite of de-registration in connection with the formation of the amalgamated organisation."*[6] (Underlining added)

29. This meaning of paragraph (c) in the definition was upheld by the Commission in *Re Kelly*[7] and by the Full Court of the Federal Court in *Kelly v CFMMEU.*[8]

C. The Manufacturing Division became a constituent part of the CFMMEU as a result of the 2018 amalgamation

30. The Jurisdictional Objection is framed by the CFMMEU as follows:

> ***"**The CFMMEU objects to the application on the basis that the Manufacturing Division did not become a part of the CFMMEU within the meaning of s. 94 of the Fair Work (Registered Organisations) Act 2009 (Cth) on 27 March 2018 and accordingly there is no jurisdiction to make the order sought."*

C.1. The Manufacturing Division is a Constituent Part

31. The Manufacturing Division is a separately identifiable constituent part of the CFMMEU within the meaning in paragraph (c) of the definition in s.93 of the RO Act.

C.2. The 2018 Amalgamation

32. Immediately prior to the 2018 Amalgamation, the CFMMEU was known as the CFMEU and comprised three Divisions. They were the Construction and General

---

6 [15]-[16].
7 *Re Kelly* (2021) 310 IR 270 at [80]-[94].
8 *Kelly v CFMMEU* [2022] FCAFC 130 at [78]-[100].

Division, the Mining and Energy Division and the Forestry, Furnishing, Building Products and Manufacturing Division (**FFPD**).

33. The application made under s 44 of the RO Act for a ballot to approve the 2018 Amalgamation was accompanied by the required Scheme for the Amalgamation (**the Scheme**) and an Outline of the Scheme (**the Outline**).[9]

34. Relevantly for the present matter, the Scheme sets out the following:

(a) The parties to the proposed amalgamation[10] were the CFMEU, MUA and TCFUA (clause 1).

(b) The CFMEU was the proposed amalgamated organisation[11] (clause 2).

(c) The MUA and TCFUA were to be merged with the CFMEU and upon amalgamation they were to be deregistered (clause 2).

(d) Upon amalgamation the Maritime Union of Australia Division would be created in the CFMEU (clause 6.1).

(e) Upon amalgamation the TCFUA would merge with the FFPD and it would be renamed as the Manufacturing Division (clause 6.2).

(f) TCFUA members would become members of the Proposed Amalgamated Organisation and be attached to the Manufacturing Division (clauses 6.6 & 17.1). Their TCFUA membership would be recognised as membership of the Proposed Amalgamated Organisation and the Manufacturing Division and the TCF Sector for all purposes under the rules (clause 17.2).

(g) Current TCFUA Branches were to be integrated into the Manufacturing Division structures (clause 6.7).

---

9 Borenstein's statement, annexures GB-4 and GB-5.

10 Defined in s 35 of the RO Act.

11 Defined in s 35 of the RO Act.

(h) A textile, clothing and footwear sector (TCF Sector) was to be created within the Manufacturing Division constituted on the amalgamation day by members of the TCFUA and then by all TCF Sector members (clause 6.8).

(i) A TCF Sector Council would be established with specific roles and responsibilities in respect of policy and industrial issues relating to the TCF industry (Clause 6.9).

(j) Specific TCF positions and offices in the Proposed Amalgamated Organisation and the Manufacturing Division would be established (clause 6.10).

(k) Upon amalgamation, the assets and liabilities of the TCFUA would become the assets and liabilities of the Proposed Amalgamated Organisation. Whilst the Proposed Amalgamated Organisation will hold all assets and liabilities at law, the use of assets and meeting of liabilities of the TCFUA would be subject to the governance processes of the Manufacturing Division (clause 8).

(l) Upon amalgamation, the National Funds of the TCFUA would form part of the Divisional Funds of the Manufacturing Division (clause 11).

(m) Until 31 December 2022, a subcommittee of the TCF Sector Council comprised of TCF Sector members must approve the use of a TCF Special Fund. The TCF Special Fund is to be managed by the new Manufacturing Division Divisional Executive on behalf of and in the interests of and for the benefit of TCF Sector members and with the approval of the subcommittee, the members of the Division. The Special Fund is to comprise the TCFUA's interest in its NSW Union building (and any proceeds of its sale) (clause 12).

(n) The TCF Mortality Fund would be managed, maintained and expended for the benefit of the class of member for whom the fund was established and for the purposes for which it was established or as approved by the TCF Sector Council subcommittee (Clause 13).

35. In relation to the structures of the Proposed Amalgamated Organisation, the Scheme provided, relevantly for the present matter:

(a) The TCFUA would form part of the Manufacturing Division (clause 19).

(b) The new Manufacturing Division rules would provide for its management and governance by:

- a Divisional Conference
- a Divisional Executive
- a TCF Sector Council with responsibilities for TCF industry and industrial disputes and policy, TCF and related awards and industrial instruments, TCF legal issues, campaigns, outwork and supply chain matters, TCF international matters and setting of TCF Sector dues.
- Divisional Districts (integrated former FFPD Districts and TCFUA Branches, except in the case of Victoria until no later than 1 January 2019).
- A Victorian TCF district on a transitional basis until no later than 1 January 2019, after which time there will be an integrated former FFPD and TCF District in Victoria.
- Committees of Management of Divisional Districts.
- Office holders including specific TCF Sector representation upon the relevant governing bodies of the Division.
- A TCF Sector Council subcommittee (comprised of TCF Sector members) will have responsibility for endorsing any future changes to the Manufacturing Division rules that affect the representation of the TCF Sector.

(Clause 20.9).

(c) The Divisional Districts in the Manufacturing Division to which TCF Sector members would be attached based on their place of residence or work location would be as follows (Clause 20.10):

- TCF Victorian District (until 1 January 2019) and thereafter Victorian District
- NSW District (NSW, ACT and Qld TCF Sector members)

- SA District
- Qld/NT/WA District (NT and WA TCF Sector Members)
- Tasmanian District
- Greater Green Triangle District (TCF Sector members employed within specified Greater Green Triangle municipalities) 19.10 Upon the amalgamation taking effect offices will be established under the Manufacturing Division Rules for TCF officers including

(d) Upon the amalgamation taking effect offices will be established under the Manufacturing Division Rules for TCF officers including (Clause 20.11):

- TCF National Secretary
- Divisional Senior Vice President (TCF)
- Divisional Executive positions (5 positions including 3 transitional positions)
- NSW Divisional District Secretary and Assistant Secretary
- TCF Victorian Divisional District Secretary, President and Assistant Secretary.

(e) For a transitional period until the 2021 Divisional Conference the TCF Sector Council will comprise (Clause 20.12):

- TCF National Secretary
- Divisional Senior Vice President (TCF)
- District Secretary, South Australian District
- Three Transitional Ordinary TCF Sector Council Members

Thereafter, the TCF Sector Council will comprise:

- TCF National Secretary
- Divisional Senior Vice President (TCF)
- The Secretary of any Division with 20% or more of TCF members or 20% or more of the total TCF Sector membership of the Division
- At least four additional TCF Sector Council members.

(f) Upon amalgamation date, specific offices would be established in the rules of the CFMMEU and the Manufacturing Division for FFPD and TCFUA officers as set out in the Table in Clause 20.13.

36. All existing arrangements, understandings and agreements binding on the MUA and TCFUA would apply in the same terms upon the amalgamation on the Proposed Amalgamated Organisation (Clause 26).

C.3. The Manufacturing Division became a constituent part of the amalgamated organisation as a result of the 2018 Amalgamation

37. The CFMMEU is the relevant amalgamated organisation in this matter.

38. By reason of the matters set out in Parts C.1 and C.2 above, it is apparent that the Manufacturing Division which forms part of the CFMMEU, became part of the CFMMEU as a result of the 2018 Amalgamation for the purposes of s 94(1) of the RO Act.

39. From Parts C.1 and C.2 it is to be seen that the Manufacturing Division did not exist prior to the 2018 Amalgamation.

40. As a result of the 2018 Amalgamation, the Manufacturing Division was formed by the merger of the FFPD and the TCFUA which occurred as part of the 2018 Amalgamation, and which was manifested in the ways that are identified above by reference to the Scheme for the Amalgamation.

41. Its formation involved the changes in structure in terms of governance, membership and assets which have been outlined above and which can be seen from a comparison

of the rules of the FFPD as they were immediately before the 2018 Amalgamation and the rules of the Manufacturing Division as they were after the 2018 Amalgamation.

42. The circumstances of the Manufacturing Division stand in contrast to that of the Mining and Energy Division which were examined *Re Kelly*[12] . That application was rejected because the was no demonstration of any change in the constituent part as a result of the amalgamation; it continued to exist unaltered.[13] The position of the Manufacturing Division was relevantly distinguished from that of the Mining and Energy Division by the Full Court in *Kelly v CFMMEU* at [138]:

> *"The scheme for the 2018 Amalgamation stated that the registered organisations proposing to amalgamate were the CFMEU, the MUA and the TCFUA, The CFMEU was to remain registered and to be the amalgamated organisation. The MUA and the TCFUA were to be deregistered. The name of the CFMEU was to be changed to the CFMMEU. The rules were to be altered, including by creating a new MUA Division and creating a new Manufacturing Division by merging the TCFUA with the Forestry Division. The rules of the M&E Division were not altered"* (Underlining added)

43. Their Honours concluded at [139] that:

> *"As the M&E Division was already part of the CFMEU and the rules applying to it remained unchanged, it did not "become part of" the CFMEU "as a result of" the 2018 Amalgamation."*

44. The contrast with the position of the Manufacturing Division is clear, and the Applicant relies on the reasoning of the Commission and the Full Court to submit that as the precursor of the Manufacturing Division in the CFMEU changed as a result of the 2018 Amalgamation to become the constituent part called the Manufacturing Division, the Commission should find that it satisfies the requirement of s 94(1)(a) of the RO Act.

45. The jurisdictional objection should be dismissed.

---

12 (2021) 310 IR 270.

13 Ibid at [119] and [122].

DATED: 24 October 2022

H BORENSTEIN

Y BAKRI

Counsel for the Applicant