

IN THE FAIR WORK COMMISSION

MATTER NO.: D2022/10

**APPLICATION BY GRAHAME KELLY – WITHDRAWAL FROM
AMALGAMATED ORGANISATION – MINING AND ENERGY DIVISION –
CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION**

APPLICANT’S OUTLINE OF SUBMISSIONS

A. Introduction

1. On 15 September 2022, the Applicant applied to the Commission under s.94 and s.94A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) (**the Application**).
2. The Application was initially opposed by the CFMMEU (**the Union**) which raised three jurisdictional objections in its statement of objections dated 30 September 2022 (**the Jurisdictional Objections**).
3. The objections were:
 - (a) That the application was made outside the time prescribed by s 94(1) and that an extension of time should not be granted because it is not appropriate within the meaning in s 94A(1);
 - (b) That the Mining and Energy Division (**M&E Division**) did not, within the meaning of s.94 of the Act, become part of the Union as a result of an amalgamation; and
 - (c) That it is not admit that the Applicant has been authorised by the prescribed number of constituent members.
4. However, on 20 December 2022, the Applicant and the Union agreed that the rules proposed by the Applicant for the MEU and the Union after the withdrawal, were to be

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amended in an agreed form, and subject to the Commission being satisfied that the amended proposed rules met the requirements of the s 95A of the RO Act, the Union would withdraw the Jurisdictional Objections.

5. Pursuant to that agreement, agreed amendments to the proposed rules were filed on 23 December 2022 and further amended rules were filed on 16 February 2023. On 21 February 2023 the Commission delivered a Decision (**the Decision**) in which, at [48] it expressed its satisfaction that the requirements of s 95A(4) of the RO Act were met in relation to the Application as it relates to the Constituent Part.
6. The Commission was not so satisfied in relation to the Application as it relates to the Alternative Constituent Part.
7. In view of the Commission's decision about the proposed rules, the Applicant seeks to adjourn the Application as it relates to the Alternative Constituent Part to a date to be fixed after the hearing and determination of the Applicant in respect of the Constituent Part, and to presently proceed only in relation to the Constituent Part. The Union agrees to this course.
8. In accordance with agreement referred to in paragraph 4 above, the Union will withdraw its Jurisdictional Objections as well as its submissions and all witness statements, and this the matter will proceed, in effect, unopposed.

B. Section 94A

9. Because the Application was made outside the period in s 94(1)(c) it was necessary for the Applicant to seek an acceptance of the Application under s 94A.
10. In the Decision at [19] to [26] the Commission sets out its reasoning in respect of the application for an extension of time under s 94A and at [27], its decision to accept the application.

C. Section 100

C.1 Section 94

11. Section 100(1) sets out the matters about which the Commission must be satisfied in order to make an order for a ballot to decide whether a constituent part of an

amalgamated organisation should withdraw from the organisation. The first of those matters is that an application of a ballot is validly made under s 94.

12. In support of the validity of his Application under s 94, the Applicant relied on the Application and the following Annexures to it, which are:
- (a) Annexure 1 to the Application: Resolution of Central Council dated 14 September 2022;
 - (b) Annexure 3 to the Application: Written outline of the proposal for the Constituent Part to withdraw from the Union (the outline in Annexure 3 is to be amended as set out in the Fourth Kelly Statement at [27] and GK-94 at p64);
 - (c) Annexure 5 to the Application: Copy of the Rules for the new organisation (these rules have been amended); and
 - (d) Annexure 6 to the Application: copy of the altered rules for the Union (these rules have been amended).
13. He also relies on the following statements:
- (a) Statement of Grahame Patrick Kelly dated 15 September 2022;
 - (b) Witness Statement of Grahame Patrick Kelly dated 25 October 2022 (**Second Kelly Statement**); and
 - (c) Witness Statement of Grahame Patrick Kelly dated 27 February 2023 (**Fourth Kelly Statement**); and
 - (d) Witness Statement of Shane Russell Thompson dated 27 February 2023.

C.1.1 The M&E Division became part of the Union as a result of an amalgamation, within the meaning of s.94 of the Act

14. The Applicant has filed written submissions in relation to this issue on 24 October 2022 at paragraphs 38 to 60 and on 5 December 2022 at paragraphs 20 to 24 and 27 to 29, and he relies on those written submissions.

C.1.2 The relevant legislative provisions and history

15. Withdrawal from amalgamation under Part 3 of Chapter 3 of the RO Act is initiated by an application to the Commission under s 94 of the RO Act for an order that a secret ballot be held to decide whether a section 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.”

16. 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 - subject to an extension being granted under s 94A.

17. The key terms in s 94 are defined.

18. 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.”*

19. 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.”

20. 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.”*

21. The history of the legislative scheme for amalgamation and withdrawal from amalgamation is set out in the decision of the Full Bench in *Re Kelly* (2021) 310 IR 270 at [29]-[52].

C.1.3 The Constituent Part

22. The Application is made in respect of the constituent part which formerly constituted the United Mineworkers Federation of Australia (UMFA), which was deregistered on 10 February 1992 in connection with the formation of the Union, and which is contended by the Applicant to remain separately identifiable under the rules of the Union as the M&E Division (**the Constituent Part**).

23. Adapting the words of paragraph (a) of the definition of *separately identifiable constituent part* to the circumstances of this application, the inquiry is whether UMFA, being an organisation deregistered in connection with the formation of the Union, remains separately identifiable under the rules of Union as a Division or part of the organisation.
24. It is submitted that the Constituent Part falls within the paragraph (a) of the definition of separately identifiable constituent part because UMFA was an organisation that was de-registered under a predecessor law in connection with the formation of the amalgamated organisation, and remains separately identifiable under the rules of the Union.
25. The Applicant contends that UMFA is separately identifiable under the rules of the Union as the M&E Division.
26. Although the M&E Division has coverage which extends beyond that of UMFA, there is a question as to whether the requirement to be separately identifiable under the rules of the amalgamated organisation, requires that the constituent part must be completely identical in all respects with the deregistered organisation, UMFA.
27. The Applicant submits that complete identity is not necessary. He relies on the reasoning of Lee J in *Gilchrist*¹.
28. In *Gilchrist* the Court was considering whether a constituent part fell within the definition of separately identifiable constituent part in s 253ZI(1) of the WR Act. That provision is substantively identical to paragraphs (a) and (b) of the current definition in s.93 of the RO Act.
29. In *Gilchrist* at [19], Lee J observed:

“The submission of the Union must be rejected. 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

¹ *Gilchrist v Australian Municipal, Administrative, Clerical & Services Union* [2001] FCA 644.

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. (See: *Williams v Hursey* (1959) 103 CLR 30 per Fullagar J at 54-55.) 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.” (Underlining added)

30. It may be accepted that the facts in that case were different, however the Applicant relies upon the analysis and reasoning of the judge in that case. His Honour rejected the need for exact identity between the constituent part seeking withdrawal and the part that existed immediately prior to the amalgamation.
31. At paragraph 19 of the judgment, his Honour rejected the objector’s argument that the constituent part was not the same as it had been before the amalgamation, because its rules had been changed. He held that “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 section 253ZI(1).”
32. He went on to hold, by reasoning which is directly apposite to the present case, that “the issue whether a branch created under the rules of a deregistered organisation remains separately identifiable under the rules of an amalgamated organisation as, *inter alia*, a branch of that organisation, is a matter of 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.
33. A change of name is in itself irrelevant.

34. Consistently with the reasoning in *Gilchrist*, what is required is an assessment or evaluation of the actual makeup of the separately identifiable constituent part in order to determine whether it can be said to be the same or substantially the same as it had been upon amalgamation.
35. The history of the Division of the Union that is currently known as the M&E Division is detailed in the Second Kelly Statement at paragraphs 25 to 61. The Commission's attention is directed in particular to the following parts of that history.
36. The Constituent Part has its genesis in the Australasian Coal Miners Association which in 1913 was registered under the *Conciliation and Arbitration Act 1904* (Cth).² In 1916 this entity changed its name to the Australasian Coal and Shale Employees' Federation.³
37. In 1990 the Australasian Coal and Shale Employees' Federation amalgamated with the Federated Mine Mechanics' Association of Australia and became known as UMFA.⁴
38. 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**).⁵ This is the amalgamated organisation that is now known as the CFMMEU.
39. As a result of the 1992 Amalgamation UMFA was de-registered⁶ and under the rules of the CF&MEU the Constituent Part became a separate division of the CF&MEU. At that time the Division was called the Mining Division.⁷
40. 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 to form the Construction, Forestry, Mining

² Second Kelly Statement, [25].

³ Second Kelly Statement, [26].

⁴ Second Kelly Statement, [26].

⁵ Second Kelly Statement, [40].

⁶ Second Kelly Statement, [40].

⁷ Second Kelly Statement, [40].

and Energy Union (CFMEU).⁸ This amalgamation resulted in no changes to the Mining Division other than the Division changing its name to the UMW Division.⁹

41. From 23 September 1992, the CFMEU included a division known as the FEDFA Division. The FEDFA Division faced financial difficulties and some of its senior officials were accused of corruption.¹⁰
42. By October 1993, with the exception of the Victorian FEDFA Divisional Branch, members of the FEDFA Division were transferred from that division to the UMW Division and the Building Unions Division according to the industries in which they worked.¹¹ It is to be noted that 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 remained in that branch pursuant to a transitional arrangement until 2003.¹²
43. On 5 May 1995, the UMW Division was renamed the Mining and Energy Division and the scope of its eligibility was expanded to include the coverage of the FEDFA Division in the Mining, Exploration and Energy Industries.¹³ This rule change effectively updated the rules to formally recognise the matters referred to in the previous paragraph.
44. The Victorian Branch of the FEDFA Division continued its separate existence and was incrementally integrated into the M&E Division and the Construction and General Division.¹⁴ This process was completed in 2003.
45. As explained by Lee J in *Gilchrist*, the Commission should assess the issue of whether the Constituent Part remains separately identifiable by considering the continuity of the status of the Constituent Part as a division and the continuity of the character of the Constituent Part. In addition to the above history, the Applicant relies on the following:

⁸ Second Kelly Statement, [45].

⁹ Second Kelly Statement, [45].

¹⁰ Second Kelly Statement, [51]-[54].

¹¹ Second Kelly Statement, [56].

¹² Second Kelly Statement, [61]. The transitional arrangements were provided for in Rule 42A.

¹³ Second Kelly Statement, [57].

¹⁴ Second Kelly Statement, [61].

- (a) The overwhelming majority of members of the M&E Division are members who would have been eligible to join UMFA. As explained by Kelly, of the 21,146 members of the M&E Division,¹⁵ 18,027 would have been eligible to join UMFA.¹⁶
- (b) In respect of key matters such as eligibility, governance structures and offices, the rules of the M&E Division (both currently and historically) are closely aligned to the rules of UMFA prior to its de-registration.¹⁷
- (c) The strong financial position of the M&E Division is almost entirely attributable to the assets brought into the Division by UMFA.¹⁸
- (d) The overwhelming majority of the current members of the governance bodies of the M&E Division would have been eligible to join UMFA.¹⁹
- (e) The overwhelming majority of the current and historical members of the committee of management of the M&E Division (the Central Council) would have been eligible to join UMFA.²⁰
46. The evidence adduced by the Applicant demonstrates that the M&E Division has remained as a Division of the Union since the amalgamation of the UMFA. The evidence also establishes that it has overwhelmingly retained the character of UMFA and that it is overwhelmingly representative of employees engaged in or in connection with the coal and shale mining industry. That is demonstrated by the preponderance of the numbers of members in that industry and the makeup of the various governing bodies of the division.
47. Further it is to be noted that paragraph (a) of the definition requires the deregistered organisation to remain identifiable “under the rules of the amalgamated organisation”. One of those rules is National Rule 42(xv)(d) which states “*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.*”²¹

¹⁵ Second Kelly Statement, [63].

¹⁶ Second Kelly Statement, [8].

¹⁷ Second Kelly Statement, [87].

¹⁸ Second Kelly Statement, [88].

¹⁹ Second Kelly Statement, [126]-[129].

²⁰ Second Kelly Statement, [90]-[125].

²¹ Second Kelly Statement, Annexures GK-6, p156.

48. National Rule 42(xv)(d) deems the M&E Division to be the Division of the Union which corresponds with UMFA which amalgamated with the Union. It does so both for the past and the present.
49. It is a clear expression and recognition in the rules of the Union of the identity of the M&E Division with UMFA.
50. In summary, the Commission should conclude that that UMFA is separately identifiable as the M&E Division and the latter is a separately identifiable constituent part within the meaning in paragraph (a) of the definition in s 93.

C.1.4 The Constituent Part became a part of the Union as a result of an amalgamation

51. If the Commission accepts that UMFA remains separately identifiable as the M&E Division under paragraph (a), then it follows that that Constituent Part became a part of the Union as a result of the amalgamation in 1992.
52. The UMFA became a part of the Union as a result of an amalgamation between the ATAIU and BWIU Amalgamated Organisation and UMFA which took effect on 10 February 1992 (**the 1992 Amalgamation**).²²
53. UMFA was deregistered as a result of the 1992 Amalgamation.²³
54. The 1992 amalgamation was an amalgamation under Division 7 of Part IX of the *Industrial Relations Act 1988* (Cth) which is a predecessor law within the meaning of s.94(1)(a).²⁴
55. Accordingly, the Commission should conclude that the Constituent Part which is presently described in the rules of the Union as the M&E Division, became part of the Union as a result of the 1992 amalgamation as required under s.94(1)(a).

C.2 Section 95

56. Section 100(1)(b) requires that the Commission be satisfied that the outline under s 95 meets the criteria set out in sub-paragraphs (i) and (ii).

²² Application at paragraph 4 and the Second Kelly Statement at [40].

²³ Application at paragraph 4 and the Second Kelly Statement, [40].

²⁴ See the definition of predecessor law in s.93 at paragraph (c).

57. The Applicant applies pursuant to s 98(2) of the RO Act for leave to amend the outline in the form of Annexure GK-94 to the Fourth Kelly Statement at p64. The Applicant seeks to amend paragraph 11 so that the ballot question is consistent with the ballot question in the proposed ballot order. Further, the Applicant seeks to amend paragraph 47 to address the matters required by s 95(1)(c) of the Act and Regulation 83(b) and (d) as explained below.
58. The Applicant submits that the outline as proposed to be amended is a fair and accurate representation of the proposal for withdrawal of the Constituent Part from the Union.
59. Further, in relation to the matters in s 95(1)(b), the outline as proposed to be amended, addresses them as required by s 100(1)(ii), at paragraphs 35 to 45, and in particular paragraphs 43 and 44, which contain the proposed apportionment of the assets and liabilities of the Union and the Constituent Part.
60. Finally, in relation to s 95(1)(c), regulation 83 prescribes a number of matters which must be addressed by the outline as proposed to be amended. Those matters are addressed in the following parts of the outline:
- (a) is addressed in paragraph 7;
 - (b) is addressed in paragraph 47(b);
 - (c) is addressed in paragraphs 33(a) and 47(c);
 - (d) is addressed in paragraph 47(d);
 - (e) is addressed at paragraphs 35 to 42;
 - (f) is addressed at paragraph 46 and 39(a);
 - (g) is addressed at paragraphs 37 and 38;
 - (h) there are no such other matters.

C.3 Section 95A

61. The Commission has, in the Decision, dealt with s 100(1)(ba) and satisfied itself about compliance with s 95A in respect of the Constituent Part.

C.4 Section 100(1)(c)

62. The proposal for withdrawal from the organisation complies with the requirements contained in the RO Regulations. Namely:
- (a) Regulation 82: the Applicant complies with each of the listed requirements.
 - (b) Regulation 83: outline of the proposed withdrawal is compliant for the reasons explained at paragraph 60 above.
63. The Commission should conclude that the requirement in s.100(1)(c) of the RO Act is met.

D. The Ballot

64. For the reasons set out above, the Commission should make an order for a ballot under s 100.
65. In paragraph 13 of the Application, the Applicant seeks an order pursuant to s.102(1A) allowing the ballot to be conducted by a designated official. Application is also made for an order under s.102(4) that the designated official have power to conduct an attendance ballot. The evidence in support of these applications is in the Fourth Kelly Statement at paragraphs 2 to 15²⁵ and the statement of Shane Russell Thompson.
66. Annexed to these submissions as “**Annexure 1**” is a proposed Order which the Applicant asks the Commission to make. The Order provides for the ballot as follows.
67. *Paragraphs 2(a) and 2(b)* of the Proposed Ballot Order explain in clear terms the parameters of the ballot with reference to the Constituent Part and the Constituent Members.
68. *Paragraph 2(c)* sets out the question to be put to members in the ballot. The question is framed clearly and in accordance with the format of the question in the prescribed ballot paper (Schedule 3 to the Regulations, Form 3).
69. *Paragraph 2(d)* sets out the proposed ballot period which is different from the default ballot period set out in Regulation 84. Pursuant to s.100(3) the Commission has the power to order a ballot period which is different from the default ballot period. It is submitted that that the dates in the proposed order will, in all the circumstances, be

²⁵ See in particular Annexure GK-86 of the Fourth Kelly Statement at pages 41-46.

more conducive to maximising returns in the ballot than the default timetable. The Applicant relies on evidence of Mr Kelly²⁶ and Mr Thompson²⁷ in relation to this matter.

70. **Paragraph 2(e)** would permit the ballot to be conducted by Mr Thompson as a designated official instead of by the Australian Electoral Commission. The Commission has the power to make such an order under sections 100(3) and 102(1A).
71. Section 102(1A)(a) provides that there must be an exemption in force under s.186 of the RO Act in relation to elections for offices of the Constituent Part. This requirement is met.²⁸
72. Additionally, s.102(1A) also requires that the proposed designated official be an officer of the constituent Part. This requirement is also met.²⁹
73. The Applicant submits that the Commission should exercise its discretion to allow Mr Thompson to conduct the ballot because doing so would be likely to increase the participation of constituent members in the ballot. This is because it is proposed that Mr Thompson would conduct the ballot primarily as an attendance ballot. The Applicant relies on the evidence in the Fourth Kelly Statement at [4]-[6].
74. On the basis of the evidence set out in the Fourth Kelly Statement and the Thompson Statement the Commission should be confident that if Mr Thompson is appointed as the designated official he will be able to properly conduct the ballot in accordance with the RO Act, the Regulations and any orders made. As is evident considerable preparatory work has been undertaken so that Mr Thompson can successfully conduct the ballot.
75. **Paragraph 2(f)** would permit Mr Thompson to conduct the ballot in part as an attendance ballot and in part as a postal ballot. As explained by Mr Kelly at [8] of the Fourth Kelly Statement, where an attendance ballot is not practical or appropriate a postal ballot will be conducted.
76. **Paragraphs 2(g) and 1(h)** address the two ballot papers that have been prepared by the Applicant. It is proposed that there be two ballot papers that are used in the ballot. A

²⁶ Fourth Kelly Statement, [23]-[26].

²⁷ Thompson Statement, [10].

²⁸ Fourth Kelly Statement, [3] and GK-85(p7).

²⁹ Thompson Statement, [1].

ballot paper for use in the attendance ballot, and a ballot paper used in the postal ballot. The proposed ballot papers will be identical except that the ballot paper for use in the attendance ballots contains a box in which an assisting official will endorse their initials, whilst the the ballot paper for use in the postal ballot contains a box with the letter “P” which signifies postal ballot.

77. It is submitted that the Commission should approve the proposed ballot papers. The proposed ballot papers are in accordance with the prescribed ballot paper (see Regulation 90A and Schedule 3 to the Regulations, Form 3).
78. It should also be noted that as an additional security measure it is proposed that the ballot papers be printed on paper that has been watermarked.³⁰
79. *Paragraphs 2(i) and 1(j)* are aimed at putting beyond any doubt that Mr Thompson does not have to send each of the constituent members hard copies of the rules of the outline of proposed withdrawal, the proposed Mining and Energy Union and the altered rules of the Union, which are voluminous. It is submitted that the proposed course of providing each member with access to electronic copies of these documents via a QR code, and the option of requesting a hard copy of the documents, is a practical and reasonable approach that should be endorsed by the Commission.
80. *Paragraph 3* addresses the “yes” case. The “yes’ case proposed by the Applicant is in Annexure GK-90 of the Fourth Kelly Statement at p50. The Applicant submits that the Commission ought to permit the Applicant to file the “yes” case under s.96(2)(b). The Commission should conclude that in accordance with s.96(1) the document is under the 2,000 word limit. The Commission should also conclude that there is no need for any amendments to be made to the “yes” case under s.96(3) as it is factually correct and complies with the RO Act.

E. Disposition

81. The Commission should conclude that:
- (a) the Constituent Part is a separately identifiable constituent part of the Union within the meaning of paragraph (a) of the definition in s.93 of the RO Act; and

³⁰ Fourth Kelly Statement, [11].

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

82. The Commission should make an order in the form of Annexure 1.

28 February 2023

H Borenstein
Y Bakri
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Annexure 1**DRAFT ORDER**

Fair Work (Registered Organisations) Act 2009

s 94(1) RO Act - Application for ballots for withdrawal from amalgamated organisation

Mr Grahame Patrick Kelly

(D2022/10)

PRESIDENT HATCHER

DEPUTY PRESIDENT GOSTENCNIK

DEPUTY PRESIDENT MASSON

MELBOURNE, 1 March 2023

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

The Fair Work Commission being satisfied that:

- a. the application dated 15 September 2022 (**the Application**), for a ballot to decide whether the constituent part referred to in paragraph 1(a) of the Application (**the Constituent Part**), is validly made under s 94 of the *Fair Work (Registered Organisations) Act 2009* (**the Act**);
- b. the outline of the proposed withdrawal which is annexure 3 to the Application meet the requirements in s 100(1)(b);
- c. the rules of the proposed Mining and Energy Union as amended on 16 February 2023, when the proposed withdrawal of the Constituent Part takes effect, meet the requirements in s 100(1)(ba);
- d. the altered rules for the CFMMEU as further amended on 16 February 2023 meet the requirements in s 100(1)(ba); and
- e. the proposal for withdrawal complies with any requirements specified in the *Fair Work (Registered Organisations) Regulations 2009*.

THE FAIR WORK COMMISSION ORDERS THAT:

1. The application in respect of the Alternative Constituent Part referred to in paragraph 1(b) of the Application, be adjourned to a date to be fixed after the hearing and determination of the application in respect of the Primary Constituent .
2. Pursuant to s 100 of the *Fair Work (Registered Organisations) Act 2009* (**the Act**):
 - a. A vote be taken by secret ballot (**the Ballot**), to decide whether, in relation to the amalgamated organisation known as the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), the constituent part formerly constituting the United Mineworkers Federation of Australia, which was deregistered on 10 February 1992 in connection with the formation of the CFMMEU, and remaining separately identifiable under the rules of the CFMMEU as the Mining and Energy Division (**Constituent Part**), should withdraw from the CFMMEU.
 - b. The persons to be balloted are the members of the Constituent Part (**Constituent Members**).
 - c. The question to be put in the Ballot is:

Do you approve the proposed withdrawal of the constituent part currently known as the Mining and Energy Division from the Construction, Forestry, Maritime, Mining and Energy Union, and its registration as a separate organisation under the Fair Work (Registered Organisations) Act 2009 (Cth)?
 - d. The commencing day of the Ballot shall be 17 May 2023 and the closing day of the ballot shall be on 19 June 2023.
 - e. The Ballot is to be conducted by Shane Russell Thompson (**the Designated Official**), with the expenses of the Ballot to be borne by the Constituent Part.
 - f. The Ballot is to be conducted in part as an attendance ballot and in part as a postal ballot. The Designated Official may elect to conduct a postal ballot in respect of any Constituent Members for whom he considers it is not practical or appropriate to conduct an attendance ballot.

- g. The ballot paper to be used for the attendance ballot shall be in the form annexed to this Order as “**Annexure 1**”.
 - h. The ballot paper to be used in the postal ballot shall be in the form annexed to this Order as “**Annexure 2**”.
 - i. Despite sections 102(2)(a) and 102(2)(aa) of the Act, when conducting any postal ballot, instead of including with the ballot paper sent to the Constituent Members, hard copies of the outline of proposed withdrawal, the rules of the proposed Mining and Energy Union and the altered rules for the CFMMEU when the proposed withdrawal of the Constituent Part takes effect, the ballot paper may be accompanied by a document directing Constituent Members to a QR code which provides a URL link to the said documents.
 - j. Despite Regulation 94B(2) of the *Fair Work (Registered Organisations) Regulations 2009*, when conducting any attendance ballot, instead of the Constituent Members being sent hard copies of the outline of proposed withdrawal, the rules of the proposed Mining and Energy Union and the altered rules for the CFMMEU when the proposed withdrawal of the Constituent Part takes effect, they may be sent a document directing Constituent Members to a QR code which provides a URL link to the said documents.
3. Pursuant to s.96(2)(b) of the Act the Applicant is granted leave to file the “yes” case which is annexed to the witness statement of Grahame Kelly dated 27 February 2023 as annexure GK-90.
4. Pursuant to s.98(2) of the Act the Applicant is granted leave to file an amended outline of proposed withdrawal in the form annexed to the witness statement of Grahame Kelly dated 27 February 2023 as annexure GK-94.