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 REPLY SUBMISSIONS ON THE JURISDICTIONAL OBJECTIONS

1. The Commission has before it three jurisdictional objections raised by the CFMMEU in its notice of objections dated 30 September 2022 (**Objections Notice**).

2. In Part A of this Outline of Submissions the Applicant will make his reply submissions in relation to the CFMMEU's second jurisdictional objection which is at paragraph 3 of the Objections Notice.

3. In Part B of this Outline of Submissions the Applicant will make his reply submissions in relation to the CFMMEU's third jurisdictional objection which is at paragraph 4 of the Objections Notice.

4. In Part C of this Outline of Submissions the Applicant will make his reply submissions in relation to the CFMMEU's first jurisdictional objection which is at paragraph 2 of the Objections Notice.

5. These Submissions adopt the definitions used in the Applicant's earlier submissions in this matter. Along with these Submissions the Applicant relies on: the witness statements of:

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Part A: The Second Jurisdictional Objection – Is UMFA Separately Identifiable

6. The Applicant filed his submissions in chief on this and the third objection, on 24 October 2022 (**AS**) and the CFMMEU filed its answering submissions on this and the third objection, on 21 November 2022 (**RS).**

7. At RS [1] the CFMMEU has reframed its second objection to now claim, firstly, that UMFA does not remain separately identifiable as the M&E Division within the definition in sub-paragraph (a) of the definition in s 93, and secondly, that UMFA does not fall within sub-paragraph (c) of the definition in s 93.

8. This new objection is addressed at RS [12]-[28].

9. The Applicant identified and explained the Constituent Part at AS [35(a)] as being the former UMFA which remains separately identifiable under the Rules of the CFMMEU as the M&E Division.

10. Further, as is explained at AS [41]-[44], in reliance on the reasoning of Lee J in *Gilchrist*, it not necessary for there to be absolute identity between the separately identifiable constituent part and the deregistered identity which it succeeds.

11. At RS [16] the CFMMEU states that the decision in *Gilchrist* does not assist and that the facts in that case were distinguishable from the present case.

12. 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.

13. 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 have 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)."

14. 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."

15. The Applicant rejects the submission made in RS [18] that the decision in *Gilchrist* should not be taken as establishing matters of general principle. What the decision does is identify the appropriate analysis that is to be applied in determining whether a separately identifiable constituent part remains as such following an amalgamation.

16. In particular, the third and fourth sentences of RS [19] are directly at odds with the reasoning in *Gilchrist* which is referred to above.

17. At RS [14], the submission makes reference to the dictionary definitions of "separately". There is no dispute that the separately identifiable constituent part must be identifiable as a distinct unit within the registered organisation.

18. But, the real argument is not about the word separately, rather, it is about the extent to which the separately identifiable constituent part must be completely identical with the entity that was the deregistered as part of the amalgamation.

19. A change of name is in itself irrelevant.

20. 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.

21. 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 predominantly 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.

22. That evidence is summarised in AS [55].

23. The distinctions between the M&E Division and UMFA as it existed in February 1990, which are set out in RS [21], are misguided and are basically splitting hairs. The search is not for whether there are any differences, but where there are any significant differences between the two entities. The Applicant's submission is that the bare fact that there are differences does not preclude a finding that the M&E Division is substantially the same as UMFA which amalgamated with the union, and that therefore it may properly to be described as a separately identifiable constituent parts within the meaning of the Act.

24. RS [23] is unclear. The acknowledgement that many members of the FEDFA would have been eligible to have joined UMFA is correct. But the conclusion that is drawn from that fact is not. Indeed, that fact supports the Applicant's contention about the substantial identity of the M&E Division with UMFA. A large number of the members of the FEDFA who became members of the

M&E Division were entitled to be members of that Division in any event. Therefore, their absorption into the M&E Division cannot sensibly be said to have change the character of the Division as compared to UMFA.

25. The submissions in RS [24] and [25] proceed on the erroneous analysis previously identified, in that they failed to address the question of the level of identity between UMFA and the present M&E Division.

26. RS [26] appears to be at odds with the approach previously outlined by the CFMMEU. In its preceding submissions, the Union stressed that the appropriate inquiry is whether there is a separately identifiable constituent part *under the rules* of the Union which must be the same as UMFA.

27. National Rule 42(xv)(d) is a rule of the union which 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 in the present and for the past.

28. That is a clear expression and recognition in the rules of the Union of the identity of the M&E Division with UMFA, in line with the requirement which the Union itself advances in its submissions.

29. For all of the above reasons, and the reasons set out in the AS, it is submitted in answer to the CFMMEU's objection, 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.

30. If this submission of the Applicant is accepted, then it follows that the Constituent Part and the Alternative Constituent Part each became a part of the union as a result of the amalgamation in 1992.

Part B: The Third Jurisdictional Objection – The Authorisation

31. The CFMMEU challenges the validity of the authorisation of the Alternative Application by the Central Council of the M&E Division. However, the substance of the challenge as stated in RS [33] and [34] is unclear.

32. The Applicant submits that when read together with the paragraph (b) of the definition of constituent part in s 93, as it must be, s 94(3)(b) is clear in its purpose and intent. It clearly envisages that the constituent members referred to in the definition may not constitute the entirety of the membership of a relevant administrative unit in an amalgamated organisation. For that reason, s 94(3)(b) allows the committee of management of the administrative unit to authorise a withdrawal application by constituent members even if it has not been elected only by those constituent members, as long as it has been elected substantially by them. That is the factual situation in the present case as the Applicant's evidence amply demonstrates.

33. With regard to the CFMMEU's submission about the Central Council's powers under rule 8 of the M&E Division's rules, it is based on an erroneous interpretation of that rule.

34. The M&E Division's rules are Annexure GK-7 to the Kelly's Second Statement and rule 8 commences at page 8 of that statement.

35. Sub-rule 8(i)(a) establishes the Central Council as the Committee of Management of the Division. Sub-rule 8(vi) sets out the several powers of the Central Committee and paragraph (o) empowers it "to do all other acts, business or things which the Central Council decides are proper for the achievement of the Objects established in Rule 4.

36. Rule 4 commences at page 176 of Kelly's Second Statement. Relevant objects are in paragraphs (b), (x) and (y).

37. Allowing for a generosity of interpretation of union rules, the combination of rules 8 and 4 provide ample powers for the Central Council to authorise the Alternative Application.

38. With regard to RS [35]-[42], the Applicant rejects the evidentiary objections taken. They are completely inapposite in a tribunal that is not bound by the rules of evidence.

39. However, and without making any concessions about his previous evidence, the Applicant has filed further evidence in reply to those submissions, and that evidence meets the objections completely.

40. The Applicant relies on the reply statements listed in paragraph 6 above which establish that the requisite number of constituent members have authorised the application.

41. The Commission can be well-satisfied that the requisite number of constituent members have authorised the Alternative Application and that the Union's objection can be dismissed.

PART C: The First Jurisdictional Objection – Extension of Time under s 94A

42. On 3 October 2022 the Commission issued directions for the hearing of the application for extension of time under s 94A to be heard on 25 October 2022, separately and in advance of the other jurisdictional objections raised by the CFMMEU.

43. In accordance with the Commission's directions, the CFMMEU filed an outline of submissions dated 11 October 2025 (**Union's Submissions**), the applicant filed an outline of submissions dated 18 October 2022 (**Kelly's Submissions**) and the CFMMEU filed reply submissions dated 24 October 2022 (**Union's Reply Submissions**).

44. On 25 October 2022 the Commission heard submissions from the parties on the CFMMEU's objection to the grant of an extension of time pursuant to section 94A.

45. Oral submissions in chief were made on behalf of Mr Kelly and oral submissions in response were made on behalf of the CFMMEU. However, before reply submissions made on behalf of Mr Kelly could be completed, the Commission decided that, having regard to what had emerged during the submissions that had been made, it would be more appropriate to deal with the application under section 94A together with the other jurisdictional objections that had been raised by the CFMMEU.

46. Accordingly, on 15 November 2022, the Commission issued amended directions for (i) the oral hearing of the extension application to be adjourned part-heard until 19 December 2022 and (ii) the Applicant to file and serve any submissions in reply to the submissions of the CFMMEU made in the hearing on 25 October 2022. These submissions are filed pursuant to that direction. They should be read together with the Kelly's Submissions and the oral submissions made on behalf of the Applicant at the hearing on 25 October 2022.

47. At the hearing on 25 October 2022, counsel for the CFMMEU indicated at PN353, that he would divide his submissions on behalf of the CFMMEU into four parts. **Firstly**, he would deal with the question of the two alternative constituent parts and the relevance for the purposes of the extension application. **Secondly** he would address the two questions of construction, namely, whether the mandatory considerations in section 94A(2) are the only considerations to be taken into account by the Commission, and the proper approach to the record of non-compliance by the Constituent Parts. **Thirdly** he would address the mandatory considerations. **Fourthly** he would address other considerations that the union says are to be taken into account, and also whether the Applicant has made a case that the Commission can be satisfied it is appropriate to accept the application.

48. Before making his substantive submissions, counsel for the CFMMEU made submissions in support of the receipt into evidence of the statements of Noel Washington and Malcolm McDonald. The Applicant had objected to that evidence on the grounds set out in paragraph 4 of the Kelly's Submissions, namely that their evidence was not relevant and further their content was speculative and therefore not probative of any relevant facts.

49. Counsel for the CFMMEU responded to the objections at PN356 and 357. At PN356, he conceded that if the Commission accepts that the two mandatory considerations in sub-section (2) are exhaustive of the considerations to be taken into account by the Commission, then the evidence of Washington and McDonald would be irrelevant.

50. At PN357, Counsel responded to the objection that the evidence was speculative. The submission that he made do not meet the objection. Both witnesses assert that if they had known that there was an ability to withdraw from the amalgamation, that might have affected the outcome of the amalgamation. That is speculation based on a hypothetical, none of which is supported by any evidence based on facts. It is all based on surmise by these two persons about what members may or may not have done if certain circumstances were or were not in place. Such evidence is completely lacking in any probative value and should not be received. The suggestion that the Applicant should have cross-examined these men on this unsatisfactory evidence, is nonsensical. It is not for the Applicant to facilitate the CFMMEU's witnesses to try and rescue evidence which is otherwise of no value.

51. The Applicant presses his objection to the receipt of the evidence of Washington and McDonald.

52. At PN358, counsel for the CFMMEU then turned to the first of his substantive arguments referred to above, and made his submissions about the Alternative Ballot Application in respect of the members of UMFA. This is not a submission which was made in the two written outlines filed by the CFMMEU.

53. The objection is that the organisation which the Alternative Constituent Part would seek to have registered following withdrawal, is framed with an eligibility rule which extends beyond the eligibility rule of UMFA. That eligibility rule is replicated in National Rule 2(D) of the National Rules of the CFMMEU. It is not an objection that was raised in the Objections Notice.

54. The Applicant has made submissions paragraphs 7 to 24 above to the effect that the Alternative Constituent Part is not required to be precisely identical in terms of eligibility rules to the deregistered organisation in question. As indicated above, the Applicant relies on the reasoning in the *Gilchrist* case which is explained in paragraphs 41 to 44 of the Applicants submissions dated 24 October 2022.

55. For the reasons set out in the in those submissions, it is submitted that the Alternative Application is validly made. When the Commission comes to consider the matters in s 94A(2) it should do so in relation to or in respect of the Alternative Constituent Part as it has been framed in the Application.

56. Parenthetically, it should be noted that in sub-section (2)(b), the object of consideration is the organisation that is to be registered after withdrawal, and that accommodates the analysis and reasoning in the *Gilchrist* case, which the Applicant seeks to have applied in this case.

57. On that basis, the queries raised by members of the Commission about the case of *Sayed*,[1] fall away.

58. At PN368 to PN371, counsel for CFMMEU then addresses the issue of capacity under s 94A(2)(b). All of his submissions are dependent on the acceptance of the CFMMEU's primary argument that the Alternative Constituent Part must be strictly confined to the eligibility rule of UMFA. If that primary argument is rejected, the submissions must fail.

[1] Transcript PN336-339, PN367

59. At PN372, counsel for the CFMMEU commences the second part of his submissions which he foreshadowed, dealing with the two construction questions.

60. In relation to the issue of the proper construction of s 94A(1), Kelly relies on paragraphs 16 to 28 of Kelly's Submissions and the oral submissions made on his behalf at PN221 to PN244.

61. In response to the CFMMEU's oral submissions the following answers are made.

62. At PN373 the CFMMEU makes a submission which distorts the Commission's allocated functions under sub-sections 94A(1) and (2) based on an incorrect reading of those provisions. That incorrect reading is based on a failure to give proper regard to the grammatical structure of sub-section (1).

63. Properly construed, sub-section (1) requires the Commission to be satisfied about a limited subject, namely, appropriateness. That subject is limited by the words of the provision. The appropriateness referred to in the provision is conditioned and limited by the phrase which immediately precedes it. Thus, the Commission is required to reach satisfaction about appropriateness "having regard to the matters set out in sub-section (2)".

64. The error in the CFMMEU's submission is that it seeks to isolate "appropriate" from the limiting phrase which precedes it.

65. Kelly submits, that the on a proper construction of the terms of sub-section (1), the assessment of appropriateness is not at large but is limited by the matters in sub-section (2), and secondly, it is to be determined only by reference to those matters because that is the plain meaning of the limiting phrase.

66. The CFMMEU seeks to argue backward from a proposition that "appropriate" is a term which imports a wide meaning and therefore the Commission is unconstrained in the matters that it can take into account. However, that involves reading "appropriate" in isolation and out of context.[2] As submitted above, the context in which the word appears in sub-section (1) provides the limitation on its meaning for the purposes of this provision. That limitation, in turn, affects the satisfaction which the Commission is requires to reach.

67. The CFMMEU's submission is effectively rewriting sub-section (1) as explained in paragraph 19 of Kelly's Submissions.

68. Then at PN374 and following, the CFMMEU posits an argument that there is a "conventional method" of indicating that a list is to be exhaustive. The example of s 15A(2) of the *Fair Work Act 2009* (**FWA**) is pointed to.

69. But that single example is insufficient to establish a general rule about a "conventional method".

70. Further, the example referred to by Gostencnik DP at PN382 does not have the effect suggested by the Deputy President and accepted by the CFMMEU. Section 394(3) of the FWA has been considered by the Commission on several occasions and on none of them has it been suggested or held that the enumerated matters are not exhaustive.[3]

71. At PN379 the CFMMEU sought to dismiss Kelly's references to sections 226(b) and 387 of the FWA as examples of how the legislation provided for inclusive, as opposed to exhaustive, lists. Its response to s 226(b) misses the point; the provision qualifies "appropriate" by language which is <u>in its terms</u> expansive and particularly by the truly conventional method of using the word

2 See *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69].

3 For example, *Mihajlovic v Lifeline Macarthur* [2014] FWCFB 1070 at [20], followed in *Appeal by Ozsoy* [2014] FWCFB 2149 at [49]. In *Ozsoy*, a ground of appeal that the DP Gostencnik has not taken into account a matter which was not in the list, was rejected on the basis that the terms of the section precluded it.

"including". The phrase "in all the circumstances" is also a phrase of expansion, and that is not found in s 94A(1). The CFMMEU also has no meaningful response to the further example of s 387, where the statute again uses a clear and explicit phrase of expansion in paragraph (h) at the end of a long list of matters to be taken into account by the Commission. These examples demonstrate the error of the CFMMEU's "conventional method" contention because the legislation uses many different drafting techniques.

72. The last three sentences of PN 380 are completely misconceived. The list in s 387 is also mandatory, except for paragraph (h). Next, in the penultimate sentence, it is suggested that if a mandatory list is enacted without any express additional words of limitation, then one may assume that they are not the only matters to be considered. The Applicant says that that is an unnatural approach to the reading of such a list unless there is something in the legislation which calls for a wider consideration of matters, and for the reason already explained, the Applicant submits that there is nothing of that kind. Then in the final sentence of PN380, the CFMMEU seeks to gain support from the Explanatory Memorandum. However, the quote from the Explanatory Memorandum is wrong. Clause 28 of the Explanatory Memorandum does not say, as submitted by CFMMEU, that it is "an exhaustive list of the <u>mandatory</u> considerations", thereby leaving room for non-mandatory considerations. In fact, clause 28 states that s 94A(2) sets out "an exhaustive list of the matters", which makes clear that it is an exhaustive list of all matters for consideration. That puts paid to the CFMMEU's erroneous submission and confirms the construction of s 94A(1) and (2) which Kelly advances.

73. Then, at PN381, the CFMMEU refers to an example given in paragraph 2 of the Union's Reply Submissions and seeks to add to it.

74. The example in paragraph 2 of the Union's Reply Submissions is itself unsound. It suggests that the Commission must be able to take into account matters beyond those in s 94A(2) because a contrary interpretation would create a possibility that an application for extension might be made where the

amalgamated organisation did not have a record of non-compliance, and therefore there would be nothing to consider under sub-section (2)(a). It is then submitted that such an outcome would almost completely defeat the purpose of section 94(3), (which we assume is intended to refer to the time limit in section 94(1)(c)) though it is not explained why that should be so. It is not clear what is meant by "almost completely defeat". The inferences which the CFMMEU submits should be drawn, are completely answered by the Explanatory Memorandum. At paragraph 33, it directly and explicitly recognises the possibility that only one of the matters listed in sub-section (2) may be present.

75. That also provides an answer to the additional submissions made at PN381.

76. At PN390, the CFMMEU then seeks to address the construction of s 94A(2)(a) dealing with the record of non-compliance.

77. In this submission, as with many of its other submissions, the CFMMEU ignores the actual words of the provision and their ordinary meaning.

78. The Applicant has submitted that what is required in relation to paragraph (a) is an assessment and evaluation of the relative behaviours of the organisation and the constituent part.

79. In answer, at PN391, the CFMMEU submits that that submission of the Applicant is negated by the presence s 94A(3). It submits that that provision could easily have accommodated a situation where the constituent part made a contribution. However, the Applicant submits that that is not a valid or logical approach to the construction of the legislation. The Commission is confronted by what the legislation does actually provide for, and it is that which needs to be construed. It is incorrect and inutile to speculate about how various provisions might have been drafted differently if certain assumptions without any foundation in the legislation, were accepted. It is an exercise of unhelpful circular reasoning.

80. Paragraph (a) makes clear that the matter to be considered is the record of the amalgamated organisation and any contribution made to that record by the constituent part.

81. The purpose of the provision is also clear. It is to assess the relative behaviours of the two entities in order to decide whether it is appropriate to allow the extension.

82. Section 49A(3) deals with a distinct situation to that in sub-section (2)(a) and, importantly, imposes a different duty on the Commission in that different situation. Section 49A(1) requires an evaluative exercise and sub-section (3) does not. The CFMMEU's submissions do not take account of this significant difference and compound their error.

83. At PN392, the CFMMEU seeks to diminish the significance of the word "contribution" in paragraph (a), but its submission is entirely unsound. The Applicant further submits that the final conclusion in that paragraph is also wrong about the result which is asserted to flow from the assessment which the Applicant says is required. It is for the Commission to assess what significance is to be attributed in any particular case to the level of contribution which the constituent part has made to the overall record of the registered organisation. It will not necessarily be a purely mathematical analysis. There is no formula, as is implied in the CFMMEU's submissions.

84. At PN411, counsel for the CFMMEU commences his submissions dealing with the record of non-compliance.

85. He makes no submissions about the CFMMEU's own record of non-compliance, and in relation to that, the Commission's attention is directed by the Applicant to paragraphs 29 to 37 of Kelly's Submissions.

86. The submissions made at PN411 and following are all directed to the record of non-compliance by the Constituent Parts. In response to that, the Applicant refers to and relies on paragraphs 39 to 54 of Kelly's Submissions.

87. It is submitted by the Applicant that any assessment of the respective records of the registered organisation and the Constituent Parts' contribution, demonstrates that the contribution of the Constituent Parts is at a very low level and that it would not weigh against an extension of time for making the application being appropriate.

88. At PN429, counsel for the CFMMEU commences his submissions on sub-section (2)(b).

89. In reply, the Applicant refers to paragraphs 55 to 57 of Kelly's Submissions and the evidence referred to there, which establish that the Constituent Part or the Alternative Constituent Part would have ample capacity to promote and protect the economic and social interests of their members, if they are able to withdraw and become registered as an organisation.

90. The evidence adduced in the application by Kelly demonstrates that overwhelmingly, the resources, membership, officials and administrative employees are those which have been brought into the Constituent Parts by UMFA and members eligible to be members of UMFA. That should be sufficient for the Commission to be satisfied about this consideration.

91. At PN431, the CFMMEU makes a submission about section 109, in response to a question posed to Mr Kelly at p.12 in the Commission's Background Document dated 24 October 2022.

92. When counsel for the Applicant addressed this question in his oral submissions, it was submitted that consideration of what the Court might do under that section was not a relevant factor for the Commission to take into account on the application for extension of time.

93. At PN302 and following it was submitted by the Applicant that having regard to the functions of the Court in the way they are expressed in section 109 and following, the Commission should not be addressing those matters.

94. It is submitted by the Applicant that it would be inappropriate for the Commission to seek to presume or pre-empt what the Court might or might not do in giving effect to the outcome of the ballot under Division 3.

95. The CFMMEU criticises the Applicant at PN431 for not providing information to the Commission about the assets and liabilities and other arrangements that might be relevant in the Court. The applicant disputes that he has not provided the Commission in the document supporting the application with information of the kind referred to by the CFMMEU.[4] But beyond that, it is not a matter for the Commission to be concerned about – they are matters to be addressed by the Court and at that point the Applicant would be able to provide any and all material that would be regarded as being relevant to the functions which the Court, as opposed to the Commission, has to exercise.

96. At PN432, counsel for the CFMMEU commences to deal with the fourth part of his submissions, namely, other considerations which are said to be relevant to the application for extension.

97. These submissions, of course, are only relevant if the Commission accepts the CFMMEU's construction of the matters that can be taken into account under sub-section (2).

98. The first of the other matters that is referred to is the two contempt cases which are identified as involving the constituent parts.

99. These are matters that were raised in paragraph 24 of the Union's Submissions and were responded to in Kelly's Submissions.

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[4] See paragraph 92 above.

100. In relation to the specific case of Hardy, Kelly's Submissions at paragraph 66 make the point that the contempt finding and penalty in that case were against Mr Hardy personally. The findings of the trial judge, which are reported at [2017] FCA 420, make this clear. At paragraph 2 of the judgment, the judge notes that he made a search order permitting a search of Mr Hardy's home. At paragraph 5, the judge explains that he made the order because he was persuaded that there was a strong prima facie case that Mr Hardy organised industrial action at the Loy Yang power station in breach of the general protections provisions of the Act. The judge was persuaded that there was sufficient evidence that Mr Hardy possessed important evidentiary material and there was a real possibility that he might destroy such material or cause it to be made unavailable. The judge goes on to record that Mr Hardy refused to allow members of the search party to enter his premises. It is that refusal which constituted the contempt.

101. As is noted at paragraph 64 of Kelly's Submissions, that leaves one instance which occurred in 2001, which is the BHP Steel case, and even if it were able to be taken into account, it is submitted that it is of such remote significance to the present application, that it should be given no weight.

102. The next additional consideration which is addressed by counsel for the CFMMEU at PN438, is that there has been no effort by the constituent parts to dissociate themselves from the conduct of the Construction and General Division. Again, this consideration finds no basis or support in the terms of the legislation and Kelly submits that it is entirely irrelevant.

103. Then, at PN440 it is submitted by the CFMMEU that it was required of the Constituent Parts to effectively provide some justification for the application for an extension of time, in terms of adverse effects on them by the behaviour of the registered organisation. Again, there is no hint of a requirement of this kind in the legislation.

104. The reference to Kelly seeking an "indulgence" from the Commission is misconceived and mistaken. The legislature has deliberately and specifically identified the ability to seek an extension of time on specified grounds, and Kelly has invoked s 94A to seek such an extension. He has sought to do so within the terms of the enabling legislation and he has addressed the requirements which the legislation specifies. There is no requirement for him to do more than that. There was no requirement for him to engage in an exercise of recounting a general history of adverse behaviour by the registered organisation. Where the Parliament has directly identified one aspect of "misbehaviour" and no other, it would be quite improper to imply a requirement to do anything of that kind.

105. Next, at PN444, the CFMMEU addresses the question of extant proceedings.

106. It is not clear on what basis the CFMMEU submits such proceedings should or could be taken into account within the parameters of an application under s 94A. Section 94A operates by reference to a "record" of non-compliance which clearly means established non-compliance not a contingent or possible future record. The matter is also addressed in paragraph 70 to 72 of Kelly's Submissions and the statement of Mr Patrick which is referred to there. This is an issue which is a complete distraction from the function which is given to the Commission under section 94A and it should be rejected.

107. At PN447, the CFMMEU seeks to rely on the evidence of Washington and McDonald about the circumstances of the amalgamation by the FEDFA.

108. As has already submitted above, their evidence should not be received by the Commission because of its non-probative nature and because it is of no relevance to the matters which the Commission is required to give attention.

109. To speculate about what various people may have done if the statutory scheme under which they were operating was different, is a pointless exercise and of no utility.

110. It is not a matter that goes to the appropriateness of the extension application within the parameters that are prescribed in s 94A(1), even if it did have some probative value, which is strongly disputed.

111. Finally in answer to PN455, it is wrong to say that the Applicant has not articulated why it is appropriate for the Commission to accept the application for extension of time. The Commission's deliberations on the extension of time are to be undertaken within the parameters expressly set by s 94A(1) and the Applicant has directly addressed the matters which the Commission is required to take into account. The Applicant is not required to do any more than that. It is on the basis of that material that the Commission is required to decide whether the extension of time is appropriate.

Disposition

112. The Applicant submits that the CFMMEU's jurisdictional objections should be dismissed and the Commission should accept Kelly's application pursuant to s 94A.

H Borenstein
Y Bakri
Counsel for the Applicant
5 December 2022