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 ON THE JURISDICTIONAL OBJECTIONS

A. Introduction

1. On 15 September 2022, Grahame Patrick Kelly (**Kelly**) 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 is opposed by the CFMMEU (**the Union**) on the grounds identified in its statement of objections dated 30 September 2022 (**the Jurisdictional Objections**).

3. On 3 October 2022, the Commission issued directions for the Jurisdictional Objections to be heard on 19 and 20 December 2022.[1] Those directions included directions for the filing of outlines of submissions and evidence.

4. This outline is filed pursuant to the Commission's directions. The Applicant relies on the materials filed with the Application. The Applicant also relies on the witness statement of Grahame Patrick Kelly dated 24 October 2022 (**the Second Kelly Statement**).

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[1] There appears to be a typographical error in paragraph 5 of the directions where reference is made to the objections identified in paragraphs 2, 3 and 4 of the objections of the CFMMEU. It appears that the reference to paragraph 2 of the objections (which is in respect of the application for an extension of time) is incorrect given that paragraphs 1 to 4 of the directions deal with this matter. Accordingly, this outline addresses the objections in paragraphs 3 and 4 of the objections of the CFMMEU.

Filed on behalf of Applicant
Prepared by Phillip Pasfield
Tel 02 8267 0613 Fax
Email Phillip.Pasfield@slatergordon.com.au
Address for service (include state and postcode) Level 14, 55 Market Street, Sydney New South Wales 2000

B. The CFMMEU's Jurisdictional Objections

5. The CFMMEU objects to the Application on the basis that "*the Mining and Energy Division did not, within the meaning of s.94 of the Act, become part of the CFMMEU as a result of an amalgamation*" (**the First Objection**).[2]

6. The CFMMEU also objects to the Application on the basis that it "does not admit that the applicant has been authorised by the prescribed number of constituent members" (**the Second Objection**).[3]

7. For the reasons set out below, each of the above objections should be dismissed.

C. The relevant legislative provisions and history

C.1. The relevant provisions

8. 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.

9. 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 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."

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2 Paragraph 3 of the CFMMEU's statement of objections.

3 Paragraph 4 of the CFMMEU's statement of objections.

10. 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.[4]

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

12. 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."*

13. 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 connectionwith 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."*

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

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

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4 Subject to an extension being granted under s.94A.

(a) if an organisation de-registered under Part 2 in connection with the formation of the amalgamated organisation remainsseparately identifiable under the rules of the amalgamatedorganisation 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."

C.2. The legislative history of the withdrawal provisions

15. 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**).[5]

16. 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.[6]

17. 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.[7]

18. 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.[8] These reforms took effect from 31 December 1996.

19. The WR Act included the first provisions for withdrawal from amalgamations. Those provisions were contained in Division 7A of Part IX of the Act. Those provisions were

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5 See sections 158L-158R.
6 See Division 7 of Part IX.
7 See sections 7 of Part IX.
8 See Division 7 of Part IX.

subject to narrow time limits which required that any application for a ballot had to occur between two and five years from the date of amalgamation.

20. 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*
>
> *(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.*

21. Section 253ZJ(1) and s.94 of the RO Act are substantively the same.

22. 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."*

23. 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."

24. The above definition is substantively identical to paragraphs (a) and (b) of the current definition in s.93 of the RO Act. The key difference between the two definitions is that, as explained below, following the introduction of the *Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamation) Act 2020* (**the Amendment Act**), s.93 now also includes a paragraph (c).

25. 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.

26. 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.

27. 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.

28. Critical to the construction of Part 3 as it now stands, are the amendments made to it by the Amendment Act[9] which came into effect on 16 December 2020.

29. The Amendment Act broadened the application of the scheme.

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9 Act No. 131/2020.

30. 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.

31. 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 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 inPart 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."*[10]
> (Underlining added)

32. This meaning of paragraph (c) in the definition was upheld by the Commission in *Re Kelly*[11] and by the Full Court of the Federal Court in *Kelly v CFMMEU.*[12]

D. The First Objection

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10 [15]-[16].

11 *Re Kelly* (2021) 310 IR 270 at [80]-[94].

12 *Kelly v CFMMEU* [2022] FCAFC 130 at [78]-[100].

33. By the First Objection the CFMMEU calls into question whether the Application meets the requirement in s.94(1)(a) of the RO Act that the constituent part became part of the amalgamated organisation as a result of an amalgamation.

34. The First Objection is framed as follows:

> "*…the Mining and Energy Division did not, within the meaning of s. 94 of the Act, become part of the CFMMEU as a result of an amalgamation*"

35. The CFMMEU mischaracterises the constituent part relied upon by the Applicant. The First Objection refers to the "Mining and Energy Division". This is not the constituent part relied upon. The Application is made on a primary and an alternative basis. The Application is made in respect of:

    (a) the constituent part which formerly constituted the United Mineworkers Federation of Australia, which was deregistered on 10 February 1992 in connection with the formation of the CFMMEU, and remains separately identifiable under the rules of the CFMMEU as the Mining and Energy Division (**the Constituent Part**), (**the Primary Ballot Application**); or

    (b) in the alternative, the constituent part constituted by that part of the membership of the CFMMEU that would have been eligible for membership of the UMFA if it had not been de-registered on 10 February 1992 in connection with the formation of the CFMMEU (**the Alternative Constituent Part**), (**the Alternative Ballot Application**).

36. In determining the First Objection the Commission should first consider whether each of the Constituent Part and/or the Alternative Constituent Part:

    (a) is a constituent part within the definition of constituent part in section 93 of the RO Act; and

    (b) became a part of the CFMMEU as a result of an amalgamation.

37. We deal with the above matters separately in respect of the Constituent Part and then the Alternative Constituent Part.

D.1. The Constituent Part

D.1.1. The Constituent Part is a Constituent Part within the meaning of s.93 of the RO Act

38. The Constituent Part is a separately identifiable constituent part of the CFMMEU within the meaning of paragraph (a) and/or (c) of the definition of separately identifiable constituent part in s.93 of the RO Act.

39. It is submitted that the Constituent Part falls within the paragraph (a) of the definition of separately identifiable constituent part because UMFA 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 CFMMEU.

40. Further, it is submitted that if the Commission concludes that the Constituent Part does not fall within paragraph (a) of the definition of separately identifiable constituent part it would still be a separately identifiable constituent part as it would fall within paragraph (c) of the definition. This is on the basis that the Constituent Part is a "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."

41. The issue of whether a constituent part remains separately identifiable under the rules of an organisation received judicial attention in *Gilchrist v Australian Municipal, Administrative, Clerical & Services Union*.[13]

42. 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. This provision, which is set out above at paragraph 23, is substantively identical to paragraphs (a) and (b) of the current definition in s.93 of the RO Act.

43. In *Gilchrist*, 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"

13 [2001] FCA 644.

> of the FMU as taken into the Union upon amalgamation. The scope of eligibility for membership of the FMU before amalgamation is not the determinant of the identity of a separately identifiable constituent part as defined in s 253ZI(1). Of course, a branch has no separate rules in respect of eligibility, and has no existence independent of the organisation. Eligibility for membership relates to membership of the organisation. (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)

44. It is submitted that, consistent with the reasoning 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.

45. It is necessary to begin by considering the history of the Division of the CFMMEU that is currently known as the Mining and Energy Division. The relevant history is detailed in the Second Kelly Statement at paragraphs 25 to 61. The key parts of this history are as follows.

46. 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).[14] In 1916 this entity changed its name to the Australasian Coal and Shale Employees' Federation.[15]

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14 Second Kelly Statement, [25].

15 Second Kelly Statement, [26].

47. In 1990 the Australasian Coal and Shale Employees' Federation amalgamated with the Federated Mine Mechanics' Association of Australia and became known as UMFA.[16]

48. 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**).[17] This is the amalgamated organisation that is now known as the CFMMEU.

49. As a result of the 1992 Amalgamation UMFA was de-registered[18] 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.[19]

50. 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 and Energy Union (**CFMEU**).[20] This amalgamation resulted in no changes to the Mining Division other than the Division changing its name to the UMW Division.[21]

51. 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.[22]

52. 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.[23] 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

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16 Second Kelly Statement, [26].
17 Second Kelly Statement, [40].
18 Second Kelly Statement, [40].
19 Second Kelly Statement, [40].
20 Second Kelly Statement, [45].
21 Second Kelly Statement, [45].
22 Second Kelly Statement, [51]-[54].
23 Second Kelly Statement, [56].

shale industries. Members of the Victorian Branch remained in that branch pursuant to a transitional arrangement until 2003.[24]

53. 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.[25] This rule change effectively updated the rules to formally recognise the matters referred to in the previous paragraph.

54. The Victorian Branch of the FEDFA Division continued its separate existence and was incrementally integrated into the Mining and Energy Division and the Construction and General Division.[26] This process was completed in 2003.

55. 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:

    (a) The overwhelming majority of members of the Mining and Energy Division are members who would have been eligible to join UMFA. As explained by Kelly, of the 21,146 members of the Mining and Energy Division,[27] 18,027 would have been eligible to join UMFA.[28]

    (b) In respect of key matters such as eligibility, governance structures and offices, the rules of the Mining and Energy Division (both currently and historically) are closely aligned to the rules of UMFA prior to its de-registration.[29]

    (c) The strong financial position of the Mining and Energy Division is almost entirely attributable to the assets brought into the Division by UMFA.[30]

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

25 Second Kelly Statement, [57].

26 Second Kelly Statement, [61].

27 Second Kelly Statement, [63].

28 Second Kelly Statement, [8].

29 Second Kelly Statement, [87].

30 Second Kelly Statement, [88].

(d) The overwhelming majority of the current members of the governance bodies of the Mining and Energy Division would have been eligible to join UMFA.[31]

(e) The overwhelming majority of the current and historical members of the committee of management of the Mining and Energy Division (the Central Council) would have been eligible to join UMFA.[32]

(f) Rule 42(xv)(d) of the CFMMEU 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.*"

56. In summary, the Commission should conclude that the Constituent Part is a separately identifiable constituent part of the CFMMEU within the meaning of paragraph (a) or alternatively (c) of the definition of separately identifiable constituent part in s.93 of the RO Act.

D.1.2. The Constituent Part become a part of the CFMMEU as a result of an amalgamation

57. The Constituent Part became a part of the CFMMEU as a result of an amalgamation between the ATAIU and BWIU Amalgamated Organisation and the United Mineworkers Federation of Australia (**UMFA**) of Australia which took effect on 10 February 1992 (**the 1992 Amalgamation**).[33]

58. The Constituent Part was previously constituted by the registered organisation known as the UMFA. UMFA was deregistered as a result of the 1992 Amalgamation.[34]

59. 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).[35]

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31 Second Kelly Statement, [126]-[129].
32 Second Kelly Statement, [90]-[125].
33 Application at paragraph 4 and the Second Kelly Statement, [40].
34 Application at paragraph 4 and the Second Kelly Statement, [40].
35 See the definition of predecessor law in s.93 at paragraph (c).

60. Accordingly, the Commission should conclude that the Constituent Part became part of the CFMMEU as a result of the 1992 amalgamation.

D.2. The Alternative Constituent Part

D.2.1. The Alternative Constituent Part is a Constituent Part within the meaning of s.93 of the RO Act

61. The Alternative Constituent Part is a "constituent part" of the CFMMEU within the meaning of sub-paragraph (b)(i) of the definition of "constituent part" in s.93 of the RO Act. This is on the basis that the Alternative Constituent part is constituted by the members of the CFMMEU who would have been eligible for membership of UMFA had it not been deregistered on 10 February 1992.[36]

62. The constituent members of the Alternative Constituent Part are currently eligible to be members of the CFMMEU under rule 2(D) of the Rules of the CFMMEU. This eligibility rule was rule 2 of the Rules of UMFA immediately prior to its deregistration.[37]

D.2.2. The Alternative Constituent Part become a part of the CFMMEU as a result of an amalgamation

63. The Alternative Constituent Part became a part of the CFMMEU as a result of the 1992 Amalgamation.[38]

64. As submitted above, 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).[39]

65. Accordingly, the Commission should conclude that the Alternative Constituent Part became part of the CFMMEU as a result of the 1992 amalgamation.

E. The Second Objection

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36 Second Kelly Statement, [40].
37 Second Kelly Statement, Annexure GK-8.
38 Application at paragraph 4 and the Second Kelly Statement, [40].
39 See the definition of predecessor law in s.93 at paragraph (c).

66. By the Second Objection, which relates only to the Alternative Ballot Application, the CFMMEU calls into question whether Kelly has been authorised by the prescribed number of constituent members. For the reasons set out below this objection should be dismissed, and the Commission should conclude that the application has been properly authorised in accordance with the RO Act.

67. As explained in the Application[40] the Alternative Ballot Application has been authorised in two ways.

68. *First*, pursuant to s.94(3)(b), the Alternative Ballot Application has been authorised by the Central Council of the Mining and Energy Division which is a committee of management elected entirely or substantially by the Constituent members of the Alternative Constituent Part.

69. On 14 September 2022, The Central Council passed a resolution authorising Kelly to make the Alternative Ballot Application.[41] The CFMMEU does not make any challenge to the Alternative Ballot Application having been authorised by the Central Council pursuant to s. 94(3)(b).

70. *Second*, pursuant to s.94(3)(a) the Alternative Ballot Application has been authorised by the prescribed number of constituent members of the Alternative Constituent Part.

71. A total of 2,496 constituent members have signed documents stating that they authorise Kelly to make the Alternative Ballot Application (**the Written Authorisations**).[42] There are 18,027 constituent members.[43] As such the 2,496 constituent members is well above the prescribed minimum number of 901 constituent members.[44]

72. On the basis of the Written Authorisations, the Commission should find that the Alternative Ballot Application was authorised by 2,496 constituent members and that that satisfies the requirement in s.94(3)(a).

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40 See paragraph 3.

41 The resolution is annexed to the Application as Annexure 1.

42 The Written Authorisations are annexed to the Application as Annexure 2.

43 Application at paragraph 3(b) and the Second Kelly Statement, [8].

44 Regulation 81 of the *Fair Work (Registered Organisations) Regulations 2009* provides that the prescribed number of constituent members is 5% of the constituent members or 2000, whichever is the lesser.

73. In summary, the Commission should find that the Alternative Ballot Application was authorised pursuant to both s.94(3)(a) and s.94(3)(b) of the RO Act. However, it is only necessary for the Commission to be satisfied that the Alternative Ballot Application was authorised under one of sections 94(3)(a) and s 94(3)(b) in order for it to be accepted as a valid application.

F. Disposition

74. The Commission should conclude that:

    (a) the Constituent Part is a constituent part of the CFMMEU within the meaning of s.94(1) of the RO Act; and

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

75. In the alternative, the Commission should conclude that:

    (a) the Alternative Constituent Part is a constituent part of the CFMMEU within the meaning of s.94(1) of the RO Act; and

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

76. Further, the Commission should conclude that the application for the Alternative Ballot Application has been authorised in accordance with sections 94(3)(a) and/or s 94(3)(b) of the RO Act.

77. Accordingly, the Commission ought to dismiss the First Objection and the Second Objection.

H Borenstein

Y Bakri

Counsel for the Applicant

24 October 2022