BACKGROUND DOCUMENT

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)

MELBOURNE, 24 OCTOBER 2022

This document has been prepared to facilitate proceedings and does not purport to be a comprehensive discussion of the submissions made; nor does it represent the concluded view of the Commission on any issue.

Background

[1] Mr Grahame Patrick Kelly is a member of the Central Council of the Mining and Energy Division (**M&E Division)** of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**).

[2] On 15 September 2022, Mr Kelly made an application (the **Application**) under ss.94 and 94A of the *Fair Work (Registered Organisations) Act 2009* (**the Act)** for a ballot to be held to decide whether, in relation to the CFMMEU:

- 'the constituent part formerly constituting the United Mineworkers Federation of Australia (**UMFA**), 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 (**the Constituent Part**), should withdraw from the CFMMEU (**the Ballot**)', or 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**), should withdraw from the CFMMEU (**the Alternative Ballot**).'

[3] The Application and accompanying documents were lodged on 15 September 2022 and comprised:

- a completed Form 2 Application for ballot under Part 3 of Chapter 3 of the RO Act

- a copy of a resolution of the Central Council of the M & E Division authorising Mr Kelly to make the Application
- a written outline of the proposal for the Constituent Part to withdraw from the CFMMEU
- a written outline of the proposal for the Alternative Constituent Part to withdraw from the CFMMEU (**Annexure 4**)
- a copy of the name and rules proposed for the organisation to be registered by the M&E Division once the proposed withdrawal from amalgamation takes effect
- a copy of the name and altered rules for the amalgamated organisation, the CFMMEU, once the proposed withdrawal from amalgamation takes effect
- a Statement of Grahame Patrick Kelly dated 15 September 2022 (the **Kelly Statement**), and
- a Statement of Phillip John Pasfield dated 15 September 2022 (the **Pasfield Statement**).

[4] Mr Kelly has asked the Commission to exercise its discretion pursuant to s.94A of the Act to accept the Application after the period prescribed in s.94(1)(c) of the Act (the **Extension of Time Application**). He seeks that the Commission accept the Application having regard to the following matters set out in s.94A(2) of the Act:

- the extensive record of the CFMMEU not complying with workplace laws
- the negligible contribution of the Constituent Part or the Alternative Constituent Part to the said record of the CFMMEU, and
- the capacity of the proposed new organisation to promote and protect the economic and social interests of its members.

[5] The CFMMEU opposes the Extension of Time Application on grounds that:

- section 94A(3) does not apply because the constituent part, on behalf of which the application has been made, has contributed to the CFMMEU's record of non-compliance with workplace and safety laws, and

- in all the circumstances, it is not appropriate, within the meaning of s.94A(1) of the Act for an extension of time to be granted.[1]

[6] The CFMMEU has also raised other jurisdictional objections to the Application, which are discussed later and go to whether the Application has been validly made under s.94 of the Act.

[7] On 16 September 2022, the President issued a Statement[2] setting out his *provisional view* that the Commission will need to determine as a threshold issue whether, pursuant to s.94A of the Act, it is appropriate to accept the Application.

[8] On 21 September 2022, a Mention was held. Directions were subsequently issued in relation to the Extension of Time Application requiring any person wishing to object to the

[1] Objections of the CFMMEU dated 30 September 2022 at p 1.

[2] [2022] FWCFB 2485.

grant of an extension of time to file notify the Commission and the Applicant by 4.00pm on 30 September 2022, and listing the matter for a further mention on 3 October 2022.

[9] On 30 September 2022, the CFMMEU notified the Commission that it objected to the grant of an extension of time.[3] The CFMMEU also notified the Commission of other jurisdictional objections to the application, which it submitted should be heard and determined before the substantive application.

[10] A further Mention was held on 3 October 2022. Following the Mention, we issued Directions for the filing and service of submissions in relation to the Extension of Time Application by the Applicant and the CFMMEU, and by the Registered Organisations Commissioner in the event that he intended to make submissions in respect of that application.

[11] On 11 October 2022 the CFMMEU lodged submissions in relation to the Extension of Time Application (**CFMMEU submissions**)[4] and statements of:

- Ms Jessica Margaret Dawson-Field
- Mr Malcolm McDonald, and
- Mr Noel Washington.

[12] On 18 October 2022 the Applicant lodged submissions in reply (**Applicant's submissions**),[5] and a witness statement of the M&E Division's National Legal Officer, Mr Jack Patrick.

Question for both parties: Are any witnesses required for cross examination? (If so advise the other party and the Commission: chambers.ross.j@fwc.gov.au; by no later than 4:30pm today.)

[13] The Registered Organisations Commissioner has not made a submission in relation to the Extension of Time Application.

[14] Section 94A of the Act provides:

> **94A Accepting applications for ballots more than 5 years after amalgamation**
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> (1) Despite paragraph 94(1)I, the FWC may accept an application made under section 94 after the end of the period referred to in that paragraph if the FWC is satisfied that, having regard to the matters set out in subsection (2), it is appropriate to accept the application.
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> (2) The matters are the following:
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> (a) whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record;
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> Note: ***Workplace or safety law*** is defined for this Part in subsection 93(1).

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[3] Objections of the CFMMEU dated 30 September 2022.

[4] CFMMEU Outline of Submissions concerning section 94A Application dated 11 October 2022 (**CFMMEU submissions).**

[5] Applicant's written submissions for extension of time under s 94A dated 18 October 2022 (**Applicant's submissions**).

(b) the likely capacity, of the organisation that the constituent part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members.

(3) If the FWC considers that an amalgamated organisation has a record of not complying with workplace or safety laws but that the constituent part has not contributed to that record, the FWC must decide that it is appropriate to accept the application.

(4) Submissions in relation to the matters mentioned in subsection (2) may only be made by the following persons:

(a) the applicant or applicants, or any person who could have made an application under subsection 94(3) in relation to the proposed withdrawal;

(b) the amalgamated organisation;

(c) the Commissioner.

[15] Section 94A was added to the Act in December 2020 by item 20 of Schedule 1 to the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (the **Amendment Act**). Prior to December 2020, the Commission could not accept an application under s.94 outside the timeframe specified in s.94(1).

[16] The Explanatory Memorandum for the Bill for the Amendment Act relevantly provides:

'27. New subsection 94A(1) provides that despite paragraph 94(1)(c), which sets out a five year time limit after amalgamation within which an application may be made, the FWC may accept an application made under s 94 if the FWC is satisfied that, having regard to the matters set out in subsection 94A(2), it is appropriate to accept the application.
28. New subsection 94A(2) sets out an exhaustive list of matters the FWC must consider for the purposes of assessing whether it is appropriate to accept the application. These matter are:

- whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record (paragraph 94A(2)(a)); and

- the likely capacity, of the organisation that that constituent part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members (paragraph 94A(2)(b)).

29. To aid the reader, a new note to paragraph 94A(2)(a) explains that a workplace or safety law is defined in subsection 93(1).

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33. … It is not necessary for both of the matters listed in new subsection 94A(2) to be present for the FWC to determine to accept the application. It is possible for the FWC in the exercise of its discretion, to determine that [it] is appropriate to accept the application for ballot, when only one of the matters listed in new paragraphs 94A(2)(–) - (b) are present.'

The scope of the Commission's discretion to accept applications more than 5 years after amalgamation

[17] Section 94A(1) provides the Commission with discretion to accept an application made more than 5 years after an amalgamation if the Commission 'is satisfied that, having regard to the matters in' subsections 94A(2)(a) and (b), 'it is appropriate to accept the application'.

[18] The matters in s.94A(2)(a) and (b) that the Commission must have regard to are:

- 'whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record', and
- 'the likely capacity, of the organisation that the constituent part is to be registered as when the withdrawal from amalgamation takes effect, to promote and protect the economic and social interests of its members'.

[19] A 'workplace or safety law' is defined in s.93(1) of the Act as any of the following:

- the Act
- the *Fair Work Act 2009* (**Fair Work Act**)
- the *Building and Construction Industry (Improving Productivity) Act 2016*
- the *Work Health and Safety Act 2011*
- a State or Territory OHS law (within the meaning of the Fair Work Act.

[20] Section 94A(3) sets out a circumstance in which the Commission *must* decide that it is appropriate to accept an application. Mr Kelly does not rely on that section.

[21] The parties disagree about the operation of ss.94A(1) and (2), and particularly about whether the matters set out in s.94A(2)(a) and (b) are the only matters the Commission can take into account when deciding whether or not to exercise its discretion.

[22] The CFMMEU submits that the mandatory considerations contained in s.94A(2): 'do not exclude the range of other matters which may be taken into account by the Commission when deciding what is *appropriate* in the circumstances and whether to exercise discretion to accept the application out of time'.[6]

[23] In support of this proposition, the CFMMEU submits:

- the question of what matters can be taken into account in exercise of the discretion conferred is a question of the proper construction of the Act, and this involves a consideration of the text of s.94A(1), the context provided for by the surrounding provisions and the context of the Act as a whole[7]

[6] CFMMEU submissions at [2].

[7] CFMMEU submissions at [8], citing *The Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39 per Mason J.

- the words used in s.94A(1) do not limit who can seek to have an application accepted. Any person who has validly made an application under s.94(1) can seek to have that application accepted outside of the timeframe specified in s.94(3) of the Act[8]

- the matters listed in s.94A(2) are mandatory considerations, but not jurisdictional requirements. It is not necessary that the relevant constituent part be a part of an amalgamated organisation that has a record of non-compliance. If the constituent part is not part of such an organisation, the consideration in s.94A(2) is not apposite but that does not preclude a state of satisfaction that it is appropriate to accept the application outside the time specified in s.94(3)[9]

- the mandatory considerations do not exclude the range of other matters which may be taken into account when deciding what is appropriate in the circumstances, and such a conclusion would require words to be read into s.94A(1)[10]

- what is appropriate within the meaning of s.94A(1) is informed by s.94A(3), which 'bespeaks a legislative intention which values compliance with the law', as Parliament has decided that if a constituent part is part of an organisation with a record of non-compliance to which the constituent part has not contributed, an application for a ballot under s.94 should be automatically accepted out of time,[11] and

- the corollary of s.94A(3) is that if an amalgamated organisation has a record of non-compliance and the constituent part has contributed to that record, that is a matter that counts against the discretion being exercised in favour of the application being accepted out of time.[12] However, s.94A 'cannot be construed as creating some type of regime which provides an advantage to a constituent part with only a moderate record of non-compliance'.[13]

[24] Matters which the CFMMEU identifies as other relevant considerations include:

- whether granting the application would undermine confidence in the amalgamation provisions and act as a disincentive to other organisations to enter into amalgamations, including the extent to which decisions were taken by the amalgamated organisation in respect of the conduct of its affairs and its internal administration on the assumption that the time for withdrawal from amalgamation had passed. On this point, the CFMMEU submits that the purpose of the amalgamation provisions in the Act was to facilitate and encourage amalgamations[14]

- in the case of an application to withdraw from an organisation with a record of non-compliance with workplace and safety laws:

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[8] Ibid at [9].

[9] Ibid at [10].

[10] Ibid at [11].

[11] CFMMEU submissions at [12].

[12] Ibid at [13].

[13] Ibid.

[14] Ibid at [14]

- the extent to which the constituent part signified its support for the amalgamated organisation's conduct which creates the record of non-compliance and any steps taken to disassociate itself from that conduct[15]
- the extent that the constituent part has contributed to any non-compliance, but also the nature of the constituent part's contribution, including whether that contribution includes contempt of court.[16]

[25] Mr Kelly agrees with the CFMMEU's statement of the principles of statutory construction,[17] but otherwise submits that:

- the evident purpose of the Amendment Act was to expand the scope to make applications for withdrawal from amalgamations and in keeping with s.15AA of the *Acts Interpretation Act 1901*, the amendments should be best construed to achieve that purpose[18]

- the matters prescribed in s.94A(2) must be taken into account, and are the only matters that may be taken into account, by the Commission when deciding whether it is appropriate to exercise its discretion under s.94A(1)[19]

- the CFMMEU's interpretation of s.94A(1) requires words to be read into that subsection, so that it is read as: 'having regard to matters including the matters set out in subsection (2)'[20]

- the way s.94A(1) is drafted 'makes clear that the list of matters in subsection 2 is not an inclusive list but exhaustive'. That construction is confirmed by paragraph 27 of the Explanatory Memorandum,[21] and

- on an amalgamated organisations' record of non-compliance with workplace and safety laws and a constituent part's contribution to that, the legislature has legislated that a comparative evaluation be undertaken by the Commission of the constituent part and amalgamated organisation's respective records.[22] This is an evaluative process by the Commission as to what is appropriate in a given case, and if, as submitted by the CFMMEU, there is a legislative intention or purpose that values compliance with the law, 'then directing the Commission's consideration to that matter and taking into account of the level of compliance or non-compliance in deciding what is appropriate, is entirely consistent with that intention and purpose'.[23]

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[15] Ibid

[16] Ibid at [23].

[17] Applicant's submissions at [22].

[18] Ibid at [12].

[19] Ibid at [18].

[20] Ibid at [19].

[21] Ibid

[22] Ibid at [23].

[23] Ibid.

[26] On the CFMMEU's submission that the purpose of the amalgamation provisions in the Act was to facilitate and encourage amalgamations, Mr Kelly submits that the withdrawal from amalgamation provisions in Part 3 of the Act date back to 1996, and the purpose of Part 3 must be given equal weight as that of Part 2 of the Act, which deals with amalgamation.[24]

[27] In respect of the other relevant considerations that the CFMMEU identifies in its submissions as being matters the Commission should consider in deciding whether to exercise its discretion, Mr Kelly submits that these are irrelevant to the operation of s.94A and are not one of the matters that the legislature has prescribed for the Commission to take into account.[25] Mr Kelly submits that if the Commission's discretion 'were expressed in general terms or if subsection (2) was not exhaustive, the Union's submissions might be worth of some consideration. But that is not the type of discretion given to the Commission by s.94A'.[26]

[28] Mr Kelly submits that the Commission should make a finding that the CFMMEU has an extensive record of not complying with workplace or safety laws.[27] In support of this submission, he refers to the Pasfield Statement, which annexes summaries of civil penalty contraventions in 110 proceedings.[28]

[29] Mr Kelly acknowledges that the CFMMEU's record has been contributed to by the Constituent Part and the Alternative Constituent Part, but submits that contribution has been 'absolutely minimal and insignificant'.[29]

[30] The CFMMEU submits that the Constituent Part has contributed to the CFMMEU's record of non-compliance with workplace and safety laws, and that contribution is not insignificant.[30] The CFMMEU cites *Sayed v CFMEU* [2015] FCA 27 (***Sayed***), *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109 (***Queensland District Branch***), and cases in which orders were made under s.418 of the *Fair Work Act 2009* and s.127 of the *Workplace Relations Act 1996*.[31]

[31] In relation to *Sayed*, Mr Kelly submits that the nature and circumstances of the case call for it to be given limited weight in the Commission's assessment of the matters in s.94A(2).[32] He submits that the case is 'not a typical case of non-compliance by a union', concerning a contravention of s.351 of the FW Act arising from the M&E Division's adverse action as an employer against Mr Sayed.[33]

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[24] Ibid at [27].

[25] Ibid at [27] and [28].

[26] Ibid at [27].

[27] Ibid at [29].

[28] Ibid at [30].

[29] Ibid at [37].

[30] CFMMEU submissions at [15] and [17].

[31] Ibid at [15].

[32] Applicant's submissions at [41].

[33] Ibid at [39] and [40].

[32] In relation to *Queensland District Branch,* Mr Kelly submits that the decision should be disregarded as irrelevant or, if the Commission concludes that the decision can be taken into account, it should be given limited weight in the Commission's assessment of matters under s.94A(2). Mr Kelly submits that the decision, made by a delegate of the General Manager of the Commission, concerned the proposed revocation of an exemption granted in 1996 to the Queensland District Branch of the M&E Division to conduct its own elections. Mr Kelly submits that properly understood, the decision is not an instance of a finding of failure to comply with workplace or safety laws. Rather, the General Manager's delegate decided he was no longer satisfied of the matters in s.186(1)(b) of the Act, (that elections for the Branch would be conducted under the rules or the Branch). [34]

[33] In respect of matters in which orders were made under s.418 of the Fair Work Act, the CFMMEU submits that the requirement in s.94A(2) is not only concerned with declarations or contravention or the imposition of pecuniary penalties. It says that the s.418 orders made represent non-compliance with s.417 of the Fair Work Act, because in each case where the industrial action occurred, there was an in-term enterprise agreement.[35]

[34] In reply, Mr Kelly submits that any orders made under s.418 of the Fair Work Act are not to be considered under s.94A(2)(a) for three reasons:[36]

- the language 'record of not comply with' in s.94A(2)(a) indicates that the provision is referring to findings of contravention of a civil penalty provision[37]

- when the Commission makes an order under s.418, it has not made a finding of non-compliance with the FW Act but rather has 'conducted an evaluative assessment whether, to the Commission, it "appears" (by reaching a state of satisfaction) that industrial action is "happening", "threatening, impending or probable", or "is being organised". Relevantly, as a matter of law, there is no conclusion by the Commission that the industrial action is as a matter of fact "happening", "threatening, impending or probable" or "is being organised",[38] and

- s.418 'must be considered in the context of s 421 which explicitly allows in subsection (2) of the order under s 418 to be relitigated'.[39]

[35] Further, Mr Kelly submits that if s.418 orders were taken into account, this would add a further 32 instances of non-compliance by the Construction Division and only 4 by the M&E Division.[40]

[36] In respect of contempt convictions and associated fines, Mr Kelly submits that these are not relevant to s.94A(1) because they do not fall within the definition of workplace or safety

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[34] Ibid at [42] and [43].

[35] CFMMEU submissions at [16].

[36] Applicant's submissions at [45].

[37] Ibid at [46].

[38] Ibid at paragraph 47, citing *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* (2013) 237 IR 1.

[39] Ibid at [49].

[40] Ibid at [50].

laws in s.93(1).[41] However, he identifies 6 matters involving contempt convictions against other Divisions of the CFMMEU with fines totalling $1,637,000,[42] which he contrasts with two matters involving the M&E Division where fines for contempt totalled $150,000.[43]

[37] The Explanatory Memorandum for the Bill for the Amendment Act relevantly provides:'

> '30. Matters that would go to informing the FWC as to whether an amalgamated organisation has a record of not complying with workplace or safety laws within the meaning of paragraph 94A(2)(a) include the presence of any of the following:
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> - findings by a court of contraventions of relevant civil penalty or civil remedy provisions of workplace and safety laws;
> - findings by a court of criminal offence against provisions of workplace and safety laws; and
> - findings by a court or tribunal in relation to the taking of industrial action (other than protected industrial action).'

Questions for the CFMMEU:

- **Does the CFMMEU accept that as the amalgamated organisation it has a record of not complying with workplace or safety laws for the purposes of s.94A(2)(a)?**
- **Assuming the Commission were to determine that it can take into consideration the purpose of the amalgamation provisions in the Act in deciding whether to exercise its discretion under s.94A(1), why would the Commission not give equal weight to Part 3 of the Act, which provides for withdrawal from amalgamation?**
- **Whilst noting the CFMMEU's submission that s.94A cannot be construed as creating 'some type of regime which provides an advantage to a constituent part with only a moderate record of non-compliance', does the CFMMEU accept that, compared with the compliance records of other Divisions of the CFMMEU, the M&E Divisions' record of non-compliance with workplace and safety laws is moderate?**

The likely capacity of the organisation to be registered to promote and protect the economic and social interests of its members

[38] The Explanatory Memorandum for the Bill for the Amendment Act relevantly provides:

> '31. In determining for the purposes of paragraph 94A(2)(b), whether a constituent part has the capacity to promote and protect the economic and social interests of its members should it withdraw from the amalgamated organisation, the FWC could, for example, have regard to:
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> - any statement that describes how the constituent part intends to operate on behalf of its members for their benefit; and

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[41] Ibid at [67].

[42] Ibid at [64] to [65].

[43] Ibid at [65].

- any demonostrated [sic] ability of the part to influence, advocate and promote the wellbeing of its members.'

[39] The CFMMEU accepts that, 'insofar as the Constituent Part is said to be the Mining and Energy Division, the evidence discloses a capacity to promote and protect the economic and social interests of its members'.[44]

[40] The CFMMEU takes a different view in relation to the Alternative Constituent Part, submitting that it is not the same as the M&E Division and there is no evidence before the Commission to permit it to be satisfied that the Alternative Constituent Part would receive under a s.109 order the assets of the M&E Division, nor material to identify which officers and staff of the M&E Division would become part of the newly registered Union.[45]

[41] Mr Kelly submits that '[t]he Constituent Part (and the Alternative Constituent Part) is proposed to be registered as the Mining and Energy Union (**MEU**) when the withdrawal from amalgamation takes effect. It is proposed that the MEU will, to the extent possible, maintain the status quo as it currently exists in the M&E Division'.[46] Mr Kelly submits that the M&E Division has 'a proud and well-known ability of successfully influencing, advocating and promoting the interests of its members',[47] and that that tradition will be taken up by the MEU.[48]

[42] In response to the CFMMEU's submissions that the Constituent Part and the Alternative Constituent Part are fundamentally different and that there is no evidence before the Commission which would permit the Commission to be satisfied that the Alternative Constituent part would receive a s.109 order for the assets of the M&E Division, Mr Kelly submits that the CFMMEU 'misunderstands the Application. It has failed to have regard to Annexures 3 and 4',[49] and 'ignores the fact that the outlines (which are annexures 3 and 4 to the Application) clearly explain that it is proposed that all of the funds, assets and property of the Mining and Energy Division would transfer to the newly registered organisation'.[50]

[43] Mr Kelly further submits that:

- it is not for the Commission to speculate how the Federal Court may deal with any application ultimately made under s.109 of the Act. Rather the Commission must form an opinion on the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members,[51]

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[44] CFMMEU submissions at [18].

[45] Ibid at [19] to [21].

[46] Applicant's submissions at [55].

[47] Ibid at [56].

[48] Ibid.

[49] Ibid at [58].

[50] Ibid at [59].

[51] Ibid at [60].

- the proposed Rules of the MEU contain detailed transitional rules which provide that elected officers of the M&E Division will on a transitional basis hold office in the proposed MEU,[52]

- it is intended that all existing professional and administrative staff of the M&E Division would transfer to the newly registered organisation. Whilst not strictly necessary but for the avoidance of doubt, Mr Kelly amends Annexure 4 to include at the end of paragraph 6: '*The existing officials, professional and administrative staff would transfer to the to* [sic] *the newly registered organisation*".[53]

Questions for Mr Kelly:

- **On what basis do you say that there is a likely capacity of the Alternative Constituent Part that is to be registered as when the withdrawal from the amalgamation takes effect, to promote and protect the economic and social interests of its members?**

- **Why do you say that the likelihood of a s.109 order being made in respect of the constituent part is not a relevant factor that the Commission should take into account for the purpose of s.94A(2)(b)?**

Other jurisdictional objections

[44] The CFMMEU:

- objects to the Application on the basis that the M&E Division did not, within the meaning of s.94 of the Act, become part of the CFMMEU as a result of an amalgamation, and

- does not admit that Mr Kelly has been authorised by the prescribed number of constituent members, because after having made reasonable enquiries it does not know the truth of the allegation.

[45] For the Commission to be able to exercise its discretion under s.94A it must have before it an application 'made under section 94'. The CFMMEU's objections go to whether the requirements in s.94(1)(a) and s.94(3) are met such that the Application is one 'made under section 94'.

[46] Section 94(1)(a) provides that an application may be made for a secret ballot if 'the constituent part became part of the organisation as a result of an amalgamation under Part 2 or a predecessor law' (emphasis added).

[47] On this point, Mr Kelly says that both the Primary Ballot Application and the Alternative Ballot Application rely on the amalgamation that took effect on 10 February 1992,[54] and that

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[52] Ibid at [61].

[53] Ibid at [62].

[54] Applicant's submissions at [7].

in both cases, 'the part of the Union that presently constitutes the Constituent Part and the Alternative Constituent Part is the Mining and Energy Division of the Union'.[55]

[48] As noted at paragraphs [39] and [40] above, the CFMMEU distinguishes between the Constituent Part and the Alternative Constituent Part and their connection with the M&E Division.

[49] Section 94(3) of the Act sets out who may make an application under s.94. Relevantly, s.94(3)(aa) provides that an application may be made by 'a person authorised to make the application by the prescribed number of constituent members'.

[50] 'Constituent member' is defined in s.93(1):

> **93 Definitions etc**
> (1) In this Part, unless the contrary intention appears:
> ***constituent member***, in relation to a constituent part of an amalgamated organisation, means:
> (a) In the case of a separately identifiable constituent part – a member of the amalgamated organisation who is included in that part; or
> (b) In any other case – a member of the amalgamated organisation who would be eligible for membership of the constituent part if:
> (i) the constituent part; or
> (ii) the organisation of which the constituent part was a branch;
> as the case requires, were still registered as an organisation with the same rules as it had when it was de-registered under Part 2 or a predecessor law.

[51] In support of the Application, Mr Kelly has lodged a copy of a resolution of the Central Council of the M & E Division authorising Mr Kelly to make the Application.

Question for the parties:

- **Can the Commission determine the Extension of Time Application before the CFMMEU's other jurisdictional objections are determined?**

Questions for Mr Kelly:

- **On what basis do you say that the part of the CFMMEU which presently constitutes the Constituent Part and the Alternative Constituent Part is the M&E Division?**
- **On what basis do you say that the Constituent Part and the Alternative Constituent Part became part of the CFMMEU as a result of an amalgamation?**
- **On what basis do you say that, in respect of the Constituent Part and the Alternative Constituent Part, you are authorised by the prescribed number of constituent members such that you can make an application under s.94?**

Questions for the CFMMEU:

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[55] Ibid at [8].

- **Does the CFMMEU accept that either or both the Constituent Part and Alternative Constituent Part meet the definition of a 'constituent part' as defined in s.93?**

- **The CFMMEU objects to the Application on the basis that the M&E Division did not, within the meaning of s.94 of the Act, become part of the CFMMEU as a result of an amalgamation. Noting that the CFMMEU distinguishes between Constituent Part and the Alternative Constituent Part, does the CFMMEU maintain this objection in relation to both the Constituent Part and the Alternative Constituent Part? On what basis?**