

IN FAIR WORK COMMISSION

Matter No: D2022/11

Application by Michael O'Connor, withdrawal from amalgamated organisation

CFMMEU OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The CFMMEU opposes the application on the basis that the Constituent Part relied upon by the applicant did not become a part of the CFMMEU within the meaning of s. 94(1)(a) of the *Fair Work (Registered Organisation) Act 2009* (Cth) (the **Act**) as a result of the amalgamation on 27 March 2018. The CFMMEU submits there is no jurisdiction to make the orders sought and the application should be dismissed.

FACTS

2. On 23 September 1991, the Building Workers Industrial Union of Australia and the Australian Timber and Allied Industries Union amalgamated to form the ATAIU and BWIU Amalgamated Union.¹ After the amalgamation, the rules of the ATAIU and BWIU Amalgamated Union provided that there was to be two divisions in the Union being the ATAIU Division and BWIU Division.² The ATAIU had the members allocated to it who were eligible to join the union by virtue of rule 2(C) and the BWIU Division had those members allocated to it eligible by virtue of Rules 2(A) and (B).³
3. On 10 February 1992, the ATAIU and BWIU Amalgated Union amalgamated with the United Mineworkers Federation of Australia to form the CFMEU.⁴ At this time, rule 42 was amended to provide for three divisions being the Mining Division, ATAIU Division and BWIU Division.⁵ Rule 42(iii) also provided that the existing divisions were to be restructured and the ATAIU Division was to be restructured as the Forestry, Forest, Buildings Products Manufacturing Division (the **FFPD**).

¹ See [4] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

² See JDF-1 at r. 42 to the statement of Ms Jessica Dawson-Field dated 21 November 2022.

³ See JDF-1 at r. 42 to the statement of Ms Jessica Dawson-Field dated 21 November 2022.

⁴ See [5] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

⁵ See JDF-3 at r. 42 to the statement of Ms Jessica Dawson-Field dated 21 November 2022.

4. On 23 September 1992, the CFMEU amalgamated with the FEDFA and the Operative Plasterers and Plaster Workers Federation of Australia.⁶ At this time, rule 42 was amended to provide for the creation of two new divisions for those two Unions pending the re-structuring of those Unions into the existing divisions.⁷
5. On 26 March 1993, the CFMEU amalgamated with the Operative Painters and Decorators Union of Australia, The Federated Furnishing Trade Society of Australasia and the Victoria State Building Trades Union.⁸ At this time, rule 42 was amended to create a new division being the FFTS Union Division.
6. On 19 July 2002, rule 42D was inserted into the CFMEU rules which provided a timeline for the restructuring of the FFTS Division into the Construction & General Division and the FFPD.⁹
7. On 26 March 2005, pursuant to rule 42D, the FFTS Division was removed from the CFMEU rules. At this time, the three divisions of the CFMEU were:
 - (a) The Mining & Energy Division;
 - (b) The Construction & General Division; and
 - (c) The FFPD.¹⁰
8. After 26 March 2006, the FFPD rules provided that members who were eligible by rules 2(C) and(F) would be allocated to the FFPD.¹¹
9. On 27 March 2018, the CFMEU amalgamated with the Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia.¹² The Scheme for Amalgamation provided that the TCFUA was to merge into the FFPD which was to be renamed the Manufacturing Division¹³

LEGISLATIVE HISTORY AND SCHEME

10. The legislative history of Part 3 of the Act was set in *Application by Kelly* (2021) 310 IR 270 at [29] to [56] and *Kelly v CFMEU* [2022] FCAFC 130 at [67] to [76].

⁶ See [6] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

⁷ See [6] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

⁸ See [7] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

⁹ See [8] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

¹⁰ See [9] and annexure JDF-7 of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

¹¹ See [10] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

¹² See [11] of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

¹³ See [12] and JDF-10 of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

11. The legislative scheme and proper construction of Part 3 of the Act was also considered in *Application by Kelly* (2021) 310 IR 270 at [88] - [94] and [115] - [116] and *Kelly v CFMEU* [2021] FCAFC 130 at [88] - [100], [104] - [116] and [121] to [137].

THE MANUFACTURING DIVISION DID NOT BECOME A PART OF THE CFMMEU AS A RESULT OF 2018 AMALGAMATION

12. The CFMMEU accepts that the effect of the Full Bench's decision in *Application by Kelly* (2021) 310 IR 270 and *Kelly v. CFMEU* [2022] FCAFC 130 is that the Manufacturing Division is a separately identifiable constituent part within the meaning of subparagraph (c) of the definition contained in s. 93 of the Act.
13. Accordingly, the question for determination is whether the Manufacturing Division became a part of the CFMMEU as a result of the 2018 amalgamation?
14. The facts recounted above reveal that the Manufacturing Division has been a part of the CFMMEU since the initial amalgamation between the BWIU and the ATAIU. The effect of the 2018 amalgamation was to rename the FFPD to the Manufacturing Division and to make some changes to the rules of that division. The scheme for amalgamation at [6.2] makes clear that a new division was not being created, but simply that the FFPD was being *renamed*. This fact can also be seen by the changes made to the divisional rules and the transitional rules contained at rule 44 of the Manufacturing Divisions rules.
15. The changes made to the FFPD's rules were set out in Annexure G to the Scheme for Amalgamation.¹⁴ Those changes can be summarised as the allocation of additional TCFUA members to the FFPD, the creation of new officers for the existing TCFUA officials and the creation of a TCF sector council. The existing:
- (a) management organs of the Division such as the Divisional Conference, Divisional Executive remained, subject to the addition of new officers from the TCFUA;¹⁵
 - (b) districts of the Division remain unchanged, subject to the inclusion of additional TCFUA members;¹⁶

¹⁴ See [12] and JDF-10 of the statement of Ms Jessica Dawson-Field dated 21 November 2022.

¹⁵ See rules 8 and 9 of the Manufacturing Division's Rules.

¹⁶ See rule 18 of the Manufacturing Division's Rules.

- (c) governance of the districts remained relevantly unchanged subject to the inclusion of a TCFUA officer for the Victorian district;¹⁷
 - (d) officers of the Forestry Division continued in their positions, unaffected by the amalgamation;¹⁸
 - (e) duties of the Divisional President and Secretary remained relevantly unchanged;¹⁹
 - (f) election provisions, aside from provisional relating to the new TCFUA officers, remained unchanged;²⁰ and
 - (g) members allocated to the Forestry Division remained allocated to the division.²¹
16. The absence of any need for a transitional provision providing for the re-allocation of existing member to the Manufacturing Division is a telling factor against the contention that the 2018 amalgamation created a new division. Similarly, the terms of rule 44 (xiii) which states that a transitional rule is only included in respect of existing FFPD officers “for the avoidance of doubt”, counts against the contention that a new division was created. Further, aside from the transitional rules concerning the TCF Special Fund, no transitional provision was made to transfer the funds of the FFPD to the Manufacturing Division.
17. An examination of the rules of the Manufacturing Division reveals that whilst changes were made to accommodate the new TCFUA members and officers, those changes proceeded on the basis that the existence of the FFPD was to continue unaffected, subject to addition of new members and officers. In those circumstances, the Manufacturing Division did not *become a part of* the CFMMEU as a result of the *amalgamation*. It was always a part of the CFMMEU; It was simply altered by reason of the 2018 amalgamation.
18. The applicant’s reliance on *Kelly v CFMMEU* [2022] FCAFC 130 at [138] does not assist. Paragraph [138] was simply directed at the point that the M&E Division was

¹⁷ See rule 30 of the Manufacturing Division’s Rules.

¹⁸ See rule 44 (xiii) of the Manufacturing Divisions rules.

¹⁹ See rule 13 of the Manufacturing Division’s Rules.

²⁰ See rule 32 of the Manufacturing Division’s Rules.

²¹ See rules 2 and 44(iii) of the Manufacturing Divisions rules.

unaffected by the 2018 Amalgamation. No part of the matter before the Full Court involved a consideration of the nature of the changes made to the FFPD. Any assumption made as to the proper characterisation of the scheme of amalgamation without argument is not binding - see *CSR Ltd v Eddy* (2005) 2226 CLR 1 at [13].

19. In circumstances where the Manufacturing Division did not become a part of the CFMMEU as a result of the 2018 amalgamation the application should be dismissed.

CONCLUSION

20. For the reasons set out above, the application should be dismissed.

CW Dowling

CA Massy

21 November 2022