IN THE FAIR WORK COMMISSION

Matter No.: D2021/2

Re Application By: Grahame Patrick Kelly

CFMMEU'S OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The applicant applies pursuant to s. 94 of the *Fair Work (Registered Organisation) Act 2009* (Cth) (the **Act**) for a ballot to decide whether the Mining & Energy Division (the **M&E Division**) should be permitted to withdraw from the Construction Forestry Maritime Mining & Energy Union (the **CFMMEU**). The CFMMEU opposes this application.

2. For the purposes of the hearing of the s. 94 issues, the CFMMEU opposes this application, because:

   (a) the M&E Division is not a constituent part of the CFMMEU within the meaning of Chapter 3 of the Act;

   (b) further and/or alternatively, the M&E Division did not become part of the CFMMEU as a result of any amalgamation; and

   (c) if the M&E Division did become part of the CFMMEU as a result of an amalgamation, it was an amalgamation which occurred more than five years ago and no extension of time has been sought.

FACTS

3. The Building Workers Industrial Union (the **BWIU**) was registered on 11 September 1962[1] pursuant to s. 192 of the *Conciliation & Arbitration Act 1904* (Cth) (the **C&A Act**). The BWIU was granted corporate status on registration. That corporate status is confirmed by way of the certificate of registration issued to the BWIU on 11 September 1962.[2] That corporate status has been maintained despite the changes in legislation.[3]

[1] See [7] of the statement of Declan Murphy dated 19 May 2021.
[2] See DVM-1 of the statement of Declan Murphy dated 19 May 2021
[3] On 1 March 1989, the *Industrial Relations (Consequential Provisions) Act 1988* repealed the C & A Act. Section 5 of the *Industrial Relations (Consequential Provisions) Act 1988* provided that: "*an organisation that was, immediately before the commencement, registered*

4. On 20 September 1991, the BWIU amalgamated with the Australian Timber & Allied Industries Union (**ATAIU)**, and was consequently renamed the ATAIU and BWIU Amalgamated Organisation.[4] This change in name was recorded on an amended certificate of registration re-issued to the ATAIU and BWIU Amalgamated Organisation.[5] No new certificate of registration was issued.

5. On 10 February 1992, the ATAIU and BWIU Amalgamated Organisation amalgamated with the United Mineworkers Federation of Australia (the **UMFA**).[6] Pursuant to the scheme of amalgamation, the UMFA was de-registered and the members of the UMFA became part of the amalgamated organisation.[7]

6. Immediately prior to the amalgamation, the eligibility of the UMFA was limited to all workers in the coal and shale industries.[8]

7. On 10 February 1992, the union was re-named the Construction Forestry and Mining Employees Union. This change in name was recorded on an amended certificate of registration re-issued to the Construction Forestry and Mining Employees Union.[9] No new certificate of registration was issued.

8. At this time, pursuant to rules 27 and 42 of the Rules, the union was structured into divisions and a Mining Division was established. The rules allocated the members of the Union who worked in, or in connection with, the coal and shale industries to the Mining Division.[10]

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under the previous Act (a) shall be taken to become registered under the Industrial Relations Act on the commencement, and (b) shall be taken to be, and to have been at all times while registered under the previous Act, a body corporate." The *Industrial Relations Act 1988* was enacted at the same time, and s 192 of that Act provided for the incorporation of registered organisations in identical terms to that which is now provided for in s 27 of the *Fair Work (Registered Organisations) Act 2009* (Cth). In 1996, the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) renamed the *Industrial Relations Act 1988* as the *Workplace Relations Act 1996*. The *Industrial Relations Act 1988* was not repealed, and accordingly there were no transitional or saving provisions. Old section 192 remained in force at section 192 of the *Workplace Relations Act 1996*. In 2002, the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth) amended the *Workplace Relations Act 1996* and renumbered the 'registration of organisations' provisions, including section 192, into Schedule 1B of the *Workplace Relations Act 1996*. There was no change to the text of section 192. Schedule 1B was subsequently renumbered Schedule 1. On 1 July 2009, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* amended the name of Schedule 1 of the *Workplace Relations Act* to the *Fair Work (Registered Organisations) Act 2009*. That Act also repealed the balance of the *Workplace Relations Act*. Because Schedule 1 of the *Workplace Relation Act 1996* was not repealed, but instead survived the transition to the Fair Work era and formed the nucleus of the current *Fair Work (Registered Organisations)* Act, it was not necessary to enact further transitional provisions.

[4] See [7] and DVM-3 of the statement of Declan Murphy dated 19 May 2021.

[5] See [7] of the statement of Declan Murphy dated 19 May 2021.

[6] See [18], [19], DVM-6 and DVM-7 of the statement of Declan Murphy dated 19 May 2021.

7 See [16], [20] and DVM-8 of the statement of Declan Murphy dated 19 May 2021.

8 See [16(c) and (d)], [21], [22], DVM-9 and DVM-10 of the statement of Declan Murphy dated 19 May 2021.

10 See [21] and [22] of the statement of Declan Murphy dated 19 May 2021.

9. On 10 February 1992, the UMFA registration was cancelled. The fact of this cancellation was communicated to UMFA on 18 February 1992.[11]

10. On 28 September 1992, the CFMEU amalgamated with the Federated Engine Drivers and Firemans' Association (the **FEDFA**) and the Operative Plasterers and Plaster Workers Federation Australia (the **OPPWF**).[12]

11. Pursuant to the scheme of amalgamation, the FEDFA and the OPPWF were de-registered following their amalgamation with the CFMEU.

12. Upon the amalgamation with the FEDFA and the OPPWF, the name of the union changed to Construction Forestry Mining & Energy Union (the **CFMEU**). This change in name was recorded on an amended certificate of registration re-issued to the CFMEU.[13] No new certificate of registration was issued.

13. Following the amalgamation with the FEDFA and the OPPWF, rules 27 and 42 of the CFMEU National Rules were amended to provide for a Mining Division and a separate Energy Division. The union's rules also referred to the Mining Division as the UMFA Division. The union's rules also referred to the Energy Division as the FEDFA Division.[14] The rules allocated all of the union's members who worked in the mining industry to the Mining Division.[15] Under the rules the Energy Division consisted of all members of the union eligible under National Rule 2(E) other than those employed in the industries covered by the other Divisions (being mining, forest and forest products, pulp and paper, timber and building related manufacturing, and construction). [16]

14. On 5 May 1995, the CFMEU National Rules were amended to combine the Mining Division with the Energy Division.[17] After that internal rule change, the Mining and Energy Division was created and under the rules all members of the union previously covered by the Mining and/or Energy Divisions were allocated to that Division. Prior to that time, in accordance with the rules the Mining Division's members were, consistent with the UMFA's eligibility rule, limited to employees in the mining industry. After that time, in accordance with the rules the Mining and Energy Division's members

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[11] See [20] of the statement of Declan Murphy dated 19 May 2021.
[12] See [27] of the statement of Declan Murphy dated 19 May 2021.
[13] See [7(d)(iii)] of the statement of Declan Murphy dated 19 May 2021.
[14] See [33] of the statement of Declan Murphy dated 19 May 2021.
15 See rule 42(iii)(a) as in force at this time.
16 See [29] of the statement of Declan Murphy dated 19 May 2021. See also rule 42(iii)(d) as in force at this time.
17 See [33] of the statement of Declan Murphy dated 19 May 2021

were all members of the union employed in the mining, energy and exploration industries.[18]

15. On 27 March 2018, the CFMEU amalgamated with the Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia. [19]

16. As part of that amalgamation, the MUA and the TCFUA were de-registered[20] and the CFMEU's name was changed to the Construction, Forestry, Maritime, Mining and Energy Union, the CFMMEU.[21] This change in name was recorded on an amended certificate of registration re-issued to the CFMEU.[22] No new certificate of registration was issued.

17. Rules 27 and 42 of the CFMMEU's rules were amended to provide for the creation of the MUA Division and for the inclusion of the TCFUA in the Manufacturing Division. However, no changes were made to the composition of the Mining & Energy Division or to the Mining & Energy Division Rules, including the membership and eligibility rule, as a consequence of that amalgamation.[23] Further, all of the pre-existing officers of the Mining & Energy Division maintained their offices after the amalgamation. Those officers did not need to undergo a ballot for their positions, and nor was any transitional rule governing the continuity or otherwise of their offices introduced into the Mining & Energy Division Rules.[24]

Summary

18. The CFMMEU was created as a corporation when the BWIU was registered on 11 September 1962 and in each of the amalgamations which has followed that original registration, the amalgamating union has joined that original corporate entity and the amalgamating union has subsequently been de-registered.

19. In 1992, UMFA had eligibility for all employees in the coal and shale industry. UMFA amalgamated with the BWIU and ATAIU Amalgamated Organisation and the union was re-named the Construction Forestry & Mining Employees Union. Subsequently in 1992, the union amalgamated with the FEDFA. At that time the Energy Division was

18 See 34 of the statement of Declan Murphy dated 19 May 2021.
19 See [42] of the statement of Declan Murphy dated 19 May 2021.
20 See [43] of the statement of Declan Murphy dated 19 May 2021.
21 See [7] and [43] of the statement of Declan Murphy dated 19 May 2021.
22 See [7(d)(iv)] of the statement of Declan Murphy dated 19 May 2021.
23 See [44] of the statement of Declan Murphy dated 19 May 2021.
24 See [45] of the statement of Declan Murphy dated 19 May 2021.

created within the union and was separate and distinct from the Mining Division. In 1995, as a consequence of an internal rule change, and not as a result of any amalgamation, the Mining Division was combined with the Energy Division. This was not an amalgamation within the meaning of Chapter 2 of the Act or any predecessor law. As a consequence, the M&E Division had members which extended beyond the respective eligibilities of the UMFA or the FEDFA.

20. In 2018, the MUA and TCFUA amalgamated with the union and a new division called the MUA Division was created in respect of that amalgamation. No change was effected to the M&E Division within the union and the CFMMEU's pre-existing corporate status was unaffected.

QUESTIONS TO BE DETERMINED

21. In circumstances where there should be no dispute as to the foregoing facts, the following questions fall to be determined:

    (a) Is the M&E Division a constituent part within the meaning of s. 94 of the Act? and

    (b) If the answer to the first question is yes, did the M&E Division become part of the CFMMEU as a result of amalgamation?

LEGAL PRINCIPLES

22. The questions to be determined are matters of statutory construction.

23. The principles of statutory construction are settled. In short, they require consideration of text, context and purpose. The task begins and ends with the statutory text, read in context.[25] That context includes the general purpose and policy of the provision under consideration,[26] which purpose is to be derived from the statutory text and not from any assumption about the desired or desirable operation of the provision.[27] It is also accepted that the history of a legislative provision can be used as an aid in construction.[28]

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[25] See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539 [47]; *Flori v Winter* [2019] QCA 281, 3 QR 22, [22].

[26] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41].

[27] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26]; *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at [37].

[28] Brennan CJ did just that in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 366-8 and *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

24. Where the issue is resolution of perceived tension between different statutory provisions in an Act, key guidance is found in *Project Blue Sky v ABA* (1998) 194 CLR 355 in the plurality's judgment at [69] and [70], including the following (footnotes omitted):

> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.*
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> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.*

LEGISLATIVE HISTORY

25. The *Conciliation & Arbitration Act 1972* (Cth) contained various provisions which provided for the possible amalgamation of registered organisations. In 1985, the Committee of Inquiry on the Australian Industrial Relations Law and Systems (the Hancock Committee) made recommendations to the effect that there were too many registered organisations, and the legislative provision should be amended so as to facilitate amalgamations.[29]

26. The *Industrial Relations Amendment Act 1991* (Cth) created a new scheme for the amalgamation of organisations. In the second reading speech for the amending Bill, the Minister stated:

> *"The voluntary restructuring of the union movement should be encouraged. To assist unions to rationalise, the Acts Amalgamation provisions are to be completely revised. Their operation will be quicker and more adaptable. Mechanisms for avoiding or minimising difficulties and other problems will be provided."*[30]

27. Further, the supplementary explanatory memorandum to the amending Bill provided:

> *"The intention of the new division is to provide for speedier, more flexible processes leading to a determination by members whether an amalgamation is to proceed. This is to be achieved by a revised procedures and measures designed to minimise, as far as possible, delays or difficulties arising from technical problems or defects and steps taken by organisations which are seeking to amalgamate."*

[29] Parliamentary Paper No. 236/1985. *Australian Industrial Relations Law and Systems, Report of the Committee of Review*, 1985.
[30] Cth Hansard, Senate, 23 August 1990 at p 2079).

28. In *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223 the Full Court of the Federal Court concluded that a primary purpose of the 1991 amendments to the amalgamation regime was to encourage and facilitate union amalgamations, including by avoiding or minimising impediments to amalgamation.[31]

29. Despite the significant changes providing for a regime for amalgamations, no provisions were included for withdrawal from those amalgamations.

30. The substance of Part 3 of Chapter 3 the Act was first introduced by the *Workplace Relations & Other Legislation Amendment Act 1996* (Cth). That Act provided for the insertion of s. 253ZJ(1) of the *Workplace Relations Act 1996* (Cth). The structure of that provision was substantially the same as s. 94 of the Act.

31. Section 253ZH of the *Workplace Relations Act 1996* (Cth) provided for the purpose of the relevant disamalgamation provisions. Section 253ZH was in materially the same terms as s. 92 of the Act.

32. Paragraph 15.40 of the explanatory memorandum to the *Workplace Relations & Other Legislation Amendment Bill 1996* (Cth) provided as follows:

> *Proposed subsection 253ZJ(1) provides for an application to be made to the Federal Court for a secret ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation. An application may be made only if the requirements of paragraphs (1)(a), (b) and (c) are satisfied. The purpose of those requirements is to limit the provisions to amalgamations which occurred after 1 February 1991 when amendments designed to encourage and facilitate amalgamations came into effect, provide a reasonable period for the amalgamation to work, and to specify a period after which the amalgamation cannot be undone.*
>
> (Emphasis added)

33. The objectively identifiable purpose of the amalgamation and withdrawal provisions was to create a simplified process for registered organisations to amalgamate and, within set periods, for de-registered organisations, or parts of de-registered organisations, to withdraw from those amalgamations and be re-registered or obtain registration.

34. The original disamalgamation provisions only contained a definition of constituent part – see s.253ZI of the *Workplace Relations Act 1996* (Cth). The effect of this definition was

[31] See [135].

that only a part of the membership which reflected either the old de-registered organisation or a state branch of the old de-registered organisation, could apply to withdraw. In 1997, the *Workplace Relations & Other Legislation Amendment Act 1997* (Cth) amended the withdrawal scheme by introducing the notion of a separately identifiable constituent part, being an administrative unit of the amalgamated organisation, which bore a relationship to either the de-registered organisation or a state branch of the de-registered organisation.

35. The effect of this change was to extend the category of persons who could make an application to withdraw, from a group of members to an administrative unit. However, the administrative unit still needed to bear a connection with the old de-registered organisation.

36. In 2002, the *Workplace Relations Legislation Amendment (Registration & Accountability Organisation)* (*Consequential Provisions) 2002* (Cth) repealed the provisions of the *Workplace Relations Act 1996* relating to registered organisations and the *Workplace Relations Amendment (Registration & Accountability Organisations) Act 2002* (Cth) enacted those very same provisions as a schedule to the *Workplace Relations Act 1996*. As part of that re-enactment in the schedule, the provisions were renumbered and bear the same numbers adopted in the Act.

37. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) affected a series of amendments to the timing for which an application for a ballot must be made. Further, changes to the definition of constituent part and constituent member were also made. Paragraph 15.79 of the explanatory memorandum provided:

> *"The definitions assist in ensuring that the Division applies only to amalgamations which occurred under Division 7, irrespective of whether there had been subsequent amalgamations leading to the formation of the existing amalgamated organisation."*

38. In 2009, the *Fair Work (Transitional & Consequential Amendments) Act 2009* (Cth) deleted the entirety of the *Workplace Relations Act 1996* (Cth) save for Schedule 1 and re-named that Schedule "the Act". Accordingly, the relevant provisions in the Act are the same provisions described above.

39. In 2020 the *Fair Work (Registered Organisation) Amendment (Withdrawal from Amalgamations) Act 2020* (Cth) amended Chapter 3 in three ways, being:

(a) changing the definition in s. 93 of a separately identifiable constituent part;

(b) providing a range of provisions which allowed for the extension of time for the making of an application in certain circumstances – see s. 94A; and

(c) including a range of new provisions dealing with the rules of any newly registered organisation and how the eligibility of that organisation would be ascertained.

40. Importantly, whilst s. 92 of the Act was amended in a minor way, there was no substantive change to the purpose of the Chapter. Further, the operative part of s. 94 of the Act was not amended, save for the change to the definition of s*eparately identifiable constituent part*. The operative provision still provided that it was only a constituent part (which had become part of an organisation as a result of an amalgamation), that could apply for a ballot to withdraw.

THE MINING & ENERGY DIVISION IS NOT A CONSTITUENT PART

41. To properly construe the definitions of *constituent part* and *separately identifiable constituent part*, it is necessary to read those provisions in the context of Part 3 of Chapter 3 and the Act as a whole and to understand the statutory purpose of the Act and Chapter 3.

42. Section 92 provides that the object of Part 3 of Chapter 3 is to permit the reconstitution and re-registration of de-registered organisations, or parts of those organisations, which participated in amalgamations. That is, the purpose of the part is to undo an amalgamation which led to the de-registration of an organisation and re-register that organisation or a constituent part of that organisation. Whilst s. 92(b) was amended in 2020 to include the words "divisions or parts", those words were limited by the final words being "of that kind". Those words indicate that words "branches, division or parts", must be "branches, division or parts" of the organisations described in (a), being organisations that participated in amalgamations and need to be re-registered.

43. Part 3 is not concerned with providing a broader process for the dissolution of registered organisations.

44. The purpose of Part 3 is confirmed by s. 94 which permits a constituent part which became part of an organisation, *as a result of an amalgamation*, to apply for a ballot to

withdraw. The conditioning on the power to apply, being the fact that the constituent part became a part of the organisation as a result of amalgamation, is entirely consistent with the stated purpose of the Chapter.

45. The definition of *constituent part* contained in s. 93 of the Act is also consistent with the purpose identified by s. 92. Section 93(b) refers to a group of members of the amalgamated organisation who would have been eligible for membership of either a de-registered organisation, or a state branch of a de-registered organisation. That is, it is not just any group of members of an amalgamated organisation which can apply to withdraw, the group of members must be referrable to an organisation which amalgamated with the amalgamated union and was de-registered.

46. Consistent with this, the definition of *separately identifiable constituent part* in s. 93 contains three limbs. Those limbs are:

(a) an administrative unit of the amalgamated organisation which is identifiable as the organisation that was de-registered during the amalgamation;

(b) an administrative unit of the amalgamated union which is separately identifiable as a state or territory branch of the de-registered organisation; and

(c) other administrative unit(s) not caught by (a) or (b).

47. The debate between the parties relates to the proper construction of sub-paragraph (c) of that definition.

48. The CFMMEU submits that having regard to the purpose of the Part, the text of s. 94, the text of the definition of constituent part and the list contained in the definition of *separately identifiable constituent part*, sub paragraph(c) should be read consistent with the *ejusdem generis* rule, being any administrative unit bearing the necessary relationship with the de-registered organisation. That is, (c) should be construed as extending the notion in (b) of an administrative unit to a separately identifiable administrative unit of the de-registered organisation that was not a state branch (but which was something less than the "organisation" in (a)). That is, if a Division, Branch or part (which is not limited to a single State or Territory) of a formerly de-registered organisation, is still separately identifiable under the rules of the amalgamated organisation, that Division, Branch or part will answer the description of a separately identifiable constituent part.

49. The CFMMEU submits that (c) should be read in this way for three reasons.

50. *Firstly*, the purpose of Part 3, the text of the primary provision s. 94, the text of the definition of *constituent part* and the text of sub paragraphs (a) and (b) (of the definition of separately identifiable constituent part) are all referrable to the notion of the *constituent part* having a relationship with the de-registered organisation.

51. *Secondly*, the text of (c) expressly refers to the definitions in sub-paragraphs (a) and (b). That cross-referencing, indicates that the sub-paragraph is meant to catch units of the type described in (a) or (b), but which are not caught by those provisions.

52. *Thirdly*, and most importantly, if (c) is not read consistent with the *ejusdem generis* rule, then there would be no reason to include sub paragraphs (a), (b) or the introductory words to (c). The unconfined words of sub-paragraph (c) would be capable of catching every administrative unit contained in an amalgamated organisation. That reading would destroy the need for sub-paragraphs (a) and (b) - see *Brownsea Haven Properties Limited v. Poole Corporation* [1958] Ch 574 at 507 per Lord Evershed MR, 609 per Romer LJ and 614 per Ormerod LJ.

53. Whilst dealing with the earlier definition, in *Gilchrist v Australian Municipal, Administrative, Clerical & Services Union* [2001] FCA 644 Lee J considered whether a state branch bore the necessary connection with a state branch of a de-registered organisation. At [19] his Honour held:

> *19 The submission of the Union must be rejected. The State branch of the FMU as it existed on the day before amalgamation, was reformed after amalgamation as the Branch, by provisions of the Union Rules that stipulated that members of the FMU allocated or attached to the "State branch" became attached to the Branch on amalgamation and by providing further that thereafter members of the Union would be attached to a branch of the Union that would traditionally have represented those employees if there had been no amalgamation. That is, the Branch was to carry on the former role of the "State branch". The Rules invested in the Branch the character of the "State branch" of the FMU as taken into the Union upon amalgamation. The scope of 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] HCA 51; (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.*

54. Consistent with what Lee J said in *Gilchrist* and upon the proper construction of *separately identifiable constituent part*, the M&E Division is not a separately identifiable

constituent part. The M&E Division does not bear the necessary relationship to a de-registered organisation. The M&E Division represents an administrative unit covering members which no previous registered organisation was, on its own, eligible to cover. The M&E Division is an administrative unit which has previously not existed in federal industrial relations.

55. If the Commission accepts that the M&E Division is not a constituent part of the CFMMEU within the meaning of Part 3 of the Act, the application must fail.

THE M&E DIVISION DID NOT BECOME PART OF THE CFMMEU AS A RESULT OF AN AMALGAMATION

56. If the Commission is against the CFMMEU in respect of the first question, it becomes necessary to answer the second question.

57. The second question turns on the meaning of the phrase "as a result of an amalgamation". The CFMMEU contends that the phrase should be given its ordinary meaning.

58. There should be no dispute that the M&E Division did not become a part of the CFMMEU as a result of an amalgamation - the M&E Division was created out of an administrative rule change, unconnected with an amalgamation.

59. The applicant's argument is that any amalgamation undertaken involving the existing union involves all of the existing constituent parts *becoming a part* of the amalgamated organisation all over again as a result of the most recent amalgamation. There are a number of difficulties with this contention.

60. *Firstly*, s. 94(1)(a) refers to the constituent part becoming a part of the "organisation". The definition of "organisation" in s. 6 makes clear that it is the organisation which is registered under the Act.

61. Section 73(3)(a) of the Act provides that on amalgamation day *if* the proposed amalgamated union is not registered it must be registered. Further s. 73 (3)(b) provides that on amalgamation day any changes to an existing organisation's rules take effect. Consistent with those provisions the scheme for amalgamation which applied to the MUA and TCFUA amalgamation provided that

(a) the rules of the CFMEU (including its name) would be altered;

(b) the members of the MUA and TCFUA would become members of the CFMEU; and

(c) the assets and liabilities of the TCFUA and MUA would become those of the CFMEU.

62. The scheme for amalgamation did not provide for any new entity to be registered or for the CFMEU to be de-registered. This was because, consistent with section 73(3)(a), it is only necessary to register the proposed amalgamated union if the amalgamated organisation is not already registered. In the present case, the CFMMEU was already registered as the CFMEU and accordingly all that had to be done was to amend the name and the rules of that body corporate.

63. Properly understood in the context of s. 73 of the Act, when the amalgamation took place, whilst the CFMEU underwent changes, it remained the same legal entity. In this case, there can be no dispute that the M&E Division became a part of that legal entity in 1995 and not as the result of an amalgamation.

64. *Secondly*, s. 93(4) provides that *for the purposes of this part, a reference to a constituent part becoming part of an amalgamated organisation includes a reference to a constituent part becoming part of that organisation as it existed before any subsequent amalgamations under Part 2 or a predecessor law*. That provision directly counts against the applicant's construction. If the applicant's construction were correct, any subsequent amalgamation would have the effect of making the constituent part a part of the amalgamated organisation from that date. Section 93 (4) would be wholly unnecessary.

65. *Thirdly*, the applicant's contention is not consistent with the ordinary meaning of the words used. The natural meaning of the words "as a result" is "because or as a consequence of". In this case the M&E Division has been a part of the legal entity that is the CFMMEU since 1995. The amalgamation of the MUA and TCFUA did not create a new legal entity or have any material effect on the relationship between the CFMEU and the M&E Division.

66. *Fourthly*, the effect of the applicant's construction would be that upon any amalgamation, no matter how large or small, each and every administrative unit of an amalgamated organisation would be entitled to apply to withdraw and obtain separate registration. That is not what the provision says. Further, it is inconsistent with the

stated purpose of Part 3. It is also inconsistent with the legislative history which indicated that the purpose of the Chapter 3 provisions was to facilitate amalgamations and to rationalise the number of unions. The applicant's argument would mean that each and every administrative unit, irrespective of its provenance, would, upon each and every amalgamation, be entitled to leave the amalgamated organisation and strike out on its own. This would be so even if the amalgamation did not affect the eligibility coverage, offices, structures or rules of the administrative unit. This construction would drastically expand the circumstances in which the withdrawal from amalgamation provisions could be utilised. If such a radical departure from the existing regime was intended, clear words would have been used.

67. Accordingly, the CFMMEU submits that the M&E Division did not become a part of the CFMMEU as a result of amalgamation and accordingly, the application should be dismissed.

TO THE EXTENT THE M&E DIVISION BECAME PART OF CFMMEU AS A RESULT OF AN AMALGAMATION IT WAS IN 1992

68. If, contrary to the foregoing, the Commission does not accept that the M&E Division did not become a part of the CFMMEU by way of an administrative rule change, then it is submitted that M&E Division became a part of the CFMMEU either by way of the UMFA amalgamation on 10 February 1992 or the FEDFA amalgamation on 28 September 1992. On either case, the amalgamation was more than five years ago and no extension of time is sought pursuant to s.94A of the Act.

CONCLUSION

69. For the reasons set out above, the M&E Division is not a constituent part.

70. Further, in the event that the Commission is against the CFMMEU on that question, the M&E Division did not become part of the CFMMEU as a result of an amalgamation. The M&E Division became a part of the CFMMEU as a result of an administrative rule change in 1995.

71. Further and/or alternatively, in the event that the Commission considers that the M&E Division became a part of the CFMMEU as a result of an amalgamation, that amalgamation was in 1992 and the application is out of time.

72. The application should be dismissed.

19 May 2021

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