



## DECISION

*Fair Work (Registered Organisations) Act 2009*

s.183—Application for organisation or branch to conduct its elections for office

### **Mining and Energy Union**

(E2023/210 and E2023/211)

MR ENRIGHT

MELBOURNE, 29 FEBRUARY 2024

*Application for organisation or branch to conduct its elections for office.*

[1] On 22 December 2023 the Queensland District Branch (QLD Branch) and Victorian District Branch (VIC Branch) of the Mining and Energy Union (MEU) each lodged with the Fair Work Commission (Commission) applications, pursuant to section 183 of the *Fair Work (Registered Organisations) Act 2009* (RO Act) for an exemption from subsection 182(1) – being the requirement that the Australian Electoral Commission (AEC) conducts elections for offices in registered organisations.

[2] As the applications were lodged at the same time for two branches of the one registered organisation, the matters were considered together.

[3] The applications are in respect of all offices of the QLD Branch and all offices of the VIC Branch.

[4] I note that the MEU and other constituent branches hold exemptions from AEC-conducted elections by virtue of decisions of the Commission’s predecessors.

### **Legislation**

[5] Section 186 of the RO Act empowers the General Manager of the Commission (the General Manager) to grant exemptions from the requirement that the AEC conduct elections for office.

[6] Subsection 186(1) of the RO Act provides that:

Where an application in relation to an organisation or branch has been lodged under subsection 183(1) and, after any objections duly made have been heard, the General Manager is satisfied:

- (a) that the rules of an organisation or branch comply with the requirements of this Act relating to the conduct of elections for office; and

(b) that, if the organisation or branch is exempted from subsection 182(1), the elections for the organisation or branch, or the election for the particular office, as the case may be, will be conducted:

(i) under the rules of the organisation or branch, as the case may be, and this Act; and

(ii) in a manner that will afford members entitled to vote at such elections or election an adequate opportunity of voting without intimidation;

the General Manager may exempt the organisation or branch from subsection 182(1) in relation to elections for the organisation or branch, or the election for the particular office, as the case may be.

**[7]** Subsection 183(2) of the RO Act requires that particular steps be taken in the relation to the making of an exemption application, including that:

An application may not be made by a committee of management of an organisation or branch of an organisation unless the committee of management:

(a) has resolved to make the application; and

(b) has notified the members of the organisation or branch, as prescribed, of the making of the resolution.

**[8]** Regulation 133(2) of the *Fair Work (Registered Organisations) Regulations* 2009 (the RO Regulations) provides that, for subsection 183(2)(b) of the RO Act:

a member of an organisation or branch is notified of the making of the resolution if:

(a) the member is given a copy of the resolution; or

(b) a notice of the making of the resolution is published:

(i) if the organisation or branch published a journal that is circulated among its members--in the next journal; and

(ii) if the organisation or branch has a web site--on that web site within 14 days after the resolution is made.

**[9]** Subsection 183(3) of the RO Act requires that:

An application under subsection (1) must be accompanied by a declaration by a member of the committee of management concerned stating that subsection (2) has been complied with.

**[10]** Regulation 133(1) of the RO Regulations prescribes that an application must:

(a) be in writing; and

(b) state the grounds for seeking the exemption; and

(c) contain a declaration signed by a member of the committee of management verifying the facts set out in the application.

**[11]** Applications for exemption must be advertised. Relevantly, subsection 183(4) of the RO Act requires that:

Where an application has been made under subsection (1), the General Manager must cause a notice setting out details of the application to be published, as prescribed, for the purpose of bringing the notice to the attention of members of the organisation or branch concerned.

**[12]** Section 184 of the RO Act states that:

(a) Objection may be made to an application under subsection 183(1) by a member of the organisation or branch of the organisation in relation to which the application was made.

(b) The General Manager must, as prescribed, hear the application and any objections duly made.

**[13]** In relation to the objections referred to in section 184 of the RO Act, subregulation 135(1) of the RO Regulations provides that:

An objection under subsection 184(1) of the Act may be made by lodging a notice of objection with the FWC no later than 28 days after the publication of the notice mentioned in subregulation 134(1).

**[14]** Regulation 136 of the RO Regulations requires that:

(a) The General Manager must:

(i) fix a time and place for hearing the application and any objection; and

(ii) notify the applicant and any objector of the time and place so fixed.

(b) At the hearing, the General Manager must:

(i) hear the applicant and any objector if they are present and wish to be heard; and

(ii) decide the matter.

(c) The General Manager may permit the applicant and any objector to call oral evidence.

**[15]** Section 343B of the RO Act provides that the General Manager may delegate particular powers and functions. By an instrument of delegation dated 6 March 2023, the General Manager has delegated to me a range of functions, including those in relation to dealing with applications for exemption from AEC-conducted elections, excluding the function under subsection 183(4), the publication of a notice of the application, which is non-delegable.

### **Exemptions from AEC-conducted elections**

**[16]** While the conduct of elections for registered organisations by the AEC is the default position under the RO Act, exemptions from AEC-conducted elections are held by a range of registered organisations and their branches, which have been granted following applications to the regulator.<sup>1</sup>

**[17]** Some exemptions apply to the entire organisation and all of the offices therein.<sup>2</sup> Some apply to a specific Branch or Division of an organisation,<sup>3</sup> and others apply only to specific offices.<sup>4</sup>

**[18]** As indicated in the legislative provisions above, in particular section 186, the General Manager must be satisfied that those organisations and branches holding exemptions conduct

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<sup>1</sup> Some 20 exemptions under s.186 of the RO Act (and the equivalent predecessor provisions) are currently held, spanning 14 registered organisations. Separate to this, some organisations and branches (six in total) also hold exemptions from the FWC in relation to the requirement in section 144 of the RO Act for 'direct voting system' (DVS) elections to be conducted by postal ballot; see, for example, *Local Government and Shires Association* [2013] FWCG 1322.

<sup>2</sup> Such as the *Australian Higher Education Industrial Association*, issued 13 August 1990 by the Industrial Registrar in matter R173/1990.

<sup>3</sup> Such as the *Northern Mining and NSW Energy District Branch of the Construction, Forestry, Manufacturing Employees Union* (as it then was), issued 2 May 1996 in matter R20022/1996.

<sup>4</sup> Such as the *Shop, Distributive and Allied Employees Association* in relation to national office-bearers, which it has held since 1990 following the Industrial Registrar's decision in matter R320/1990.

their elections in accordance with the RO Act and the organisation's rules. This is not simply a 'static' determination at the time that the exemption is granted. That much is clear from subsection 186(2) which sets out the circumstances in which the General Manager may revoke an exemption, and from matters in which revocation has occurred.

[19] Such revocations may be at the instigation of the regulator – as was the case with the Master Builders Association of the Northern Territory<sup>5</sup> – or an organisation or branch may resolve to apply to the General Manager to relinquish its exemption.<sup>6</sup>

[20] Between 2015 and 2017, this Commission and then the former Registered Organisations Commission (upon its establishment in May 2017) undertook a review of exemptions held by registered organisations and their branches in relation to elections, in order to determine whether those entities were complying with the requirements for holding the exemptions. This review resulted in some organisations relinquishing their exemption and others retaining theirs.

### **The applications for exemption**

[21] As indicated above, the applications seek exemptions in respect of the elections for all offices of the QLD Branch and the VIC Branch of the MEU. The application lodged by the QLD Branch on 22 December 2023 included a declaration signed by Glenn Power, the QLD Branch Secretary, setting out the grounds for seeking the exemption. The application lodged by the VIC Branch on 22 December 2023 included a declaration signed by Mark Richards, the VIC Branch Secretary, setting out the grounds for seeking the exemption. Both applications were also accompanied by a statement from Grahame Kelly (Mr Kelly), the MEU General Secretary, dated 22 December 2023, in support of the applications.

[22] The QLD Branch application stated that the QLD Branch Board of Management (QLD Board) had resolved, at its meeting on 11 December 2023, to make the application. It further stated that on 12 December 2023 the QLD Board notified the members of the QLD Branch of the making of the resolution by publishing a notice on its website.

[23] The VIC Branch application stated that the VIC Branch Board of Management (VIC Board) had resolved, at its meeting on 6 December 2023, to make the application. It further stated that on 6 December 2023 the VIC Board notified the members of the VIC Branch of the making of the resolution by publishing a notice on its website.

[24] The MEU is a federally registered organisation, with a registration date of 1 December 2023, following its withdrawal from its amalgamation with the Construction, Forestry and Maritime Employees Union (CFMEU). The MEU is a union of employees connected to the mining and energy industries. It has 6 branches in total, including the QLD Branch and VIC Branch, which are the subject of this decision.

[25] For the purpose of this decision, it is noted that, when the Mining and Energy Union was amalgamated with the CFMEU, it was a division of the CFMEU known as the 'Mining and Energy Division' (ME Division). During that time, the parent organisation was known as the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

[26] On 5 January 2024, the General Manager made the necessary arrangements pursuant to section 183(4), to publish a notice in The Australian newspaper, setting out the details of the applications, for the purpose of compliance with the legislative notice requirement for bringing the notice to the attention of members of the QLD Branch and VIC Branch of the MEU and notifying the objection period for the applications.

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<sup>5</sup> [2018] ROCD 146

<sup>6</sup> Master Builders Association of Victoria [2020] ROCD 71

## **No objections lodged**

[27] The notice provided for any objectors to lodge notices of objection with the Commission no later than 28 days after the notice was published, and to provide a copy of that objection to the MEU. The expiry date for lodging notice of objection was 2 February 2024. No notices of objection were lodged.

[28] As no notices of objection had been lodged, the Commission arranged for the hearing of the applications to take place on 19 February 2024. The Commission invited the MEU to provide any further submissions in relation to the exemption applications.

## **Consideration**

[29] The applications lodged by the QLD Branch and VIC Branch both set out the grounds which are relied upon for the exemption applications. Both applications submitted that the General Manager could be satisfied that if the exemption is granted, elections will be conducted within the rules of the MEU, will afford members an adequate opportunity to vote without intimidation, and will encourage democratic participation by members, on the following bases:

1. The ME Division of the CFMMEU has previously conducted its own elections in National Divisional offices and offices in various branches in accordance with its rules, under exemptions previously granted.
2. The ME Division (as it then was) recently conducted a ballot in relation to the withdrawal from the CFMEU, and this was completed without any irregularities.

## **Consideration specific to the QLD Branch**

[30] It is relevant to discuss the QLD Branch application in further detail. The QLD Branch previously held an exemption which was revoked by the Commission on 30 October 2015.<sup>7</sup>

[31] The concerns that led to the revocation of the exemption were outlined in the revocation decision, following a Show Cause Notice regarding the issues, as follows:

- i. Postal voting has occurred in Branch elections for many years contrary to rule 17.
- ii. The Branch has not always appointed Returning Officers in accordance with Rule 17(a).
- iii. The relevant Returning Officer for the Branch has not appointed a Local Returning Officer at each lodge or locality to conduct attendance ballots for every election under rule 17(a).
- iv. The Branch President issued a direction to the Returning Officer in a by-election for the Branch Executive Vice President in 2011 (the 2011 election) regarding when the ballot should close at a particular lodge and subsequently determined that irregularities had occurred in the election (where both such actions by the Branch President appeared to have been done without relevant authority under the rules or the RO Act).
- v. The Branch's Board passed a resolution to deem the 2011 election invalid without relevant authority under the rules or the RO Act.
- vi. The effect of the Board's resolution in the 2011 election was to declare, in effect, that a person who had been purportedly elected in that election had not been elected.<sup>8</sup>

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<sup>7</sup> [2015] FWCFD 7109.

<sup>8</sup> Ibid at [18].

[32] It was outlined in the current QLD Branch application that the General Manager could be satisfied that the concerns that resulted in the QLD Branch revocation would not arise again, because under the newly registered MEU rules, any elections for offices in the QLD Branch will be conducted by the National Returning Officer (rather than the QLD Branch being able to directly appoint its own returning officer, as was the case previously). The National Divisional office of the ME Division of the CFMMEU (now the MEU) has held an exemption since 1996 and, it was submitted, has always conducted elections in accordance with the rules.

[33] In further submissions provided by the MEU (through their legal representative Slater and Gordon Lawyers) on 16 February 2024, it was stated that the issue (i) in the 2015 matter outlined above – relating to postal voting being used when it was not permitted under the rules – is no longer applicable when considering the current exemption application, as the relevant MEU rules now allow for the use of postal ballots as an option. Further, the MEU submitted that issues (ii) to (vi) noted above were related to conduct by the QLD Branch at a time where the rules allowed the elections to be conducted by the QLD Branch. Relevantly, under the MEU rules, any elections for offices in the QLD Branch will be conducted by the National Returning Officer.

[34] Concern was also outlined in the revocation decision in regard to:

whether senior officers in the QLD Branch might seek, without appropriate power or authority, to impinge upon future branch elections and the capacity of the Division to prevent, or adequately deal with such interference if or when it was to occur.<sup>9</sup>

[35] The MEU submitted that, as the recent ballot for the withdrawal of the ME Division from the CFMEU was conducted without any irregularities or any interference, the General Manager can be satisfied that the same will occur for the QLD Branch elections for offices.

[36] In its submissions for these applications, the MEU also referred to the submission by the CFMEU in response to the Trade Union Royal Commission Issues Paper No 3 “Funding of Trade Union Elections”. This response outlined the model used by the ME Division in National Divisional elections and its elections for offices in its Northern Mining and NSW Energy District Branch, Tasmanian District Branch and Western Australian District Branch. In the statement made by Mr Kelly in support of these exemption applications, he states that the model has been “very successful in encouraging member participation in elections, with ME Division attendance ballots routinely achieving double or triple the participation rates of union postal ballots conducted” by the AEC.

[37] The MEU also outlined in submissions that the recent ballot for the withdrawal of the ME Division resulted in participation rate of 53.11%.

[38] On 19 February 2024, I conducted a hearing, via video-conference, in which Counsel for the MEU Herman Borenstein KC appeared, assisted by Yasser Bakri and instructed by Geoff Borenstein of Slater and Gordon. I was also assisted in the hearing by Bill Steenson, Director of Governance and Protected Disclosures, of this Commission.

[39] During the hearing, Counsel addressed each concern outlined in paragraph 18 of the revocation decision (noted as items (i) to (iv) above) that led to the revocation of the QLD Branch election exemption.

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<sup>9</sup> Ibid at [281].

[40] In regard to the issue of postal voting<sup>10</sup>, Counsel submitted that this is no longer of concern given the MEU rules now provide for postal voting to occur.<sup>11</sup> As such, any election conducted that involves postal voting will be in accordance with the rules.

[41] In respect of the issue of not appointing Returning Officers in accordance with the rules<sup>12</sup> and not appointing Local Returning Officers at each lodge or locality,<sup>13</sup> Counsel submitted that subrules 17(i)(a) and 17(i)(b) of the MEU rulebook<sup>14</sup> address these issues. Subrule 17(i)(a) outlines that there will be a single National Returning Officer appointed by the national Central Council, and that the Central Council must be satisfied that the Returning Officer has had sufficient training and/or experience to understand their duties and obligations. Subrule 17(i)(b) provides that the National Returning Officer shall appoint Local Returning Officers, and may appoint one or more Assistant Local Returning Officers, to ensure proper conduct of elections at each Lodge or locality. Counsel submitted that these subrules overcome the previous issues whereby the QLD Branch of the ME Division failed to appoint local returning officers in accordance with the rules, as it will now be the National office that deals with this (along with the other Branch elections which the MEU already holds exemptions for).

[42] In relation to the issue of ensuring the election is conducted without interference or involvement of senior officials of the Branch,<sup>15</sup> Counsel submitted that subrule 17(i)(d) outlines that the Returning Officer shall carry out their duties free from direction or influence of any officer or employee of the MEU. The subrule also provides that the Returning Officer may obtain independent, expert advice as to their duties and obligations, that any legal advice provided to the Returning Officer shall be paid for by the MEU and that the client-lawyer relationship shall exist between the Returning Officer and the lawyer. Counsel further submitted that, as a breach of the rules is included in the definition of an ‘irregularity’ for the purposes of an election inquiry under section 200, members would therefore be able to seek remedies relating to this. This includes both internal sanctions (through the MEU) and external sanctions (through the Federal Court).<sup>16</sup>

[43] In relation to this particular issue and during the hearing, I canvassed the availability of and access to complaint handling processes and procedures within the MEU. Counsel submitted the following:

1. Subrule 17(i)(g) provides that the National Returning Officer can take such action and give such directions as they consider necessary to ensure the secrecy of the ballot and prevent or remedy an irregularity.
2. Subrules 17(xi)(b)(2) and 17(xi)(e), respectively, relate to the ability of appointed scrutineers to direct the attention of the National Returning Officer to any irregularity, and to the powers of the Returning Officer to extend the period during which ballots must be cast if they believe such a step is necessary to avoid the improper disenfranchisement of voters or to remedy an irregularity.
3. Rule 22 allows members to lay a disciplinary charge against another member or officer of the MEU if the member or officer has failed to observe the rules, which could be used by members to raise complaints regarding conduct in relation to elections.
4. Generally, the National Returning Officer would have the same rights and responsibilities that AEC staff have in relation to complaints regarding elections and election conduct.

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<sup>10</sup> Ibid at [18](i).

<sup>11</sup> Rulebook NSD1120/2023, rule 17(xiii).

<sup>12</sup> [2015] FWCFD 7109 at [18](ii).

<sup>13</sup> Ibid at [18](iii).

<sup>14</sup> Rulebook NSD1120/2023.

<sup>15</sup> [2015] FWCFD 7109 at [18](iv).

<sup>16</sup> As provided for by section 164 of the RO Act.

[44] In relation to the issues around the QLD Branch declaring the 2011 election invalid<sup>17</sup> and therefore, in effect, declaring those who had been elected as not elected,<sup>18</sup> Counsel submitted that it is not available under the rules for any officials of the Branch or the National office to make declarations relating to elections. The rules explicitly provide that the National Returning Officer will declare the results of the election and provide a post-election report.<sup>19</sup>

[45] The issue of what would occur if a Returning Officer vacates office during an election was raised, as this was noted in the revocation decision,<sup>20</sup> due to the rules at the time not adequately addressing this situation. Counsel submitted that subrule 17(i)(h) provides that if the National Returning Officer resigns after the commencement of the ballot process but before the declaration of the ballot, or is otherwise unable to conclude the ballot, the Central Council will appoint a new Returning Officer.

[46] It was also noted in the revocation decision that the rules at the time did not require post-election reports to be lodged with the Commission.<sup>21</sup> Counsel advised that this is now provided for in subrule 17(xii)(c).

[47] Counsel also submitted that allowing the exemption would better facilitate participation in the election. He noted that attendance ballots in the MEU and the ME Division have a higher participation rate than postal ballots. Counsel made reference to a letter dated 4 October 2016 from an AEC Returning Officer to the then General Secretary of the ME Division in relation to E2016/79 (being an election conducted by the AEC) which outlined that the postal vote participation rate for the election was 40.20% and the attendance ballot participation rate was 58.80%. Counsel also referred to E2023/148, being a casual vacancy election conducted by the AEC for the ME Division QLD District President, with the number of voting packs returned being only 17% of the number of eligible voters on the roll.

[48] Further, Counsel referred to the AEC post-election report from E2016/79, which stated that the requirement under the rules for attendance at the mine or work site for an attendance ballot is difficult for the AEC to apply due to the various shifts at local Lodges, and obtaining permission from the employer to attend the various sites. Counsel submitted that, given the AEC is limited by their staffing and resources, and with the number of isolated worksites in the industry, the QLD Branch would benefit from the MEU being able to conduct its own elections in that Branch, as it would be better resourced to provide attendance ballots, which in turn would lead to higher participation in elections.

[49] It should also be noted that, in relation to the VIC Branch, Counsel submitted that the original exemptions held by the MEU were granted prior to the VIC Branch being formed. Counsel submitted that the VIC Branch is not materially different in its character from the other Branches of the MEU which currently hold exemptions and for the reasons earlier advanced, the exemption application for the VIC Branch should also be granted.

[50] The holding of an exemption from AEC-conducted elections is subject to the General Manager remaining satisfied that the matters in subsection 186(1) are complied with by the entity holding the particular exemption.

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<sup>17</sup> Ibid at [18](v).

<sup>18</sup> Ibid at [18](vi).

<sup>19</sup> Rulebook NSD1120/2023, rule 17(xii).

<sup>20</sup> [2015] FWCFD 7109 at [151].

<sup>21</sup> Ibid at [151].



[51] On the basis of the material in the applications and the additional detail provided, including during the hearing, I am satisfied that the applications have complied with section 183 of the RO Act, and with the RO Regulations.

### **Exemptions granted**

[52] Under subsection 186(1) of the RO Act, I therefore grant the application made by the QLD Branch and exempt it from the requirement, in subsection 182(1) of the RO Act, for AEC-conducted elections in relation to elections for all offices.

[53] Under subsection 186(1) of the RO Act, I therefore grant the application made by the VIC Branch and exempt it from the requirement, in subsection 182(1) of the RO Act, for AEC-conducted elections in relation to elections for all offices.

[54] During the course of these applications, the MEU requested that if the exemptions are granted to the QLD Branch and the VIC Branch, a certificate is issued to that effect and that a single exemption certificate includes reference to all branches of the MEU exempted from the requirement under section 182. While I am prepared to issue a single certificate exempting the QLD Branch and the VIC Branch from the requirement under section 182, I decline to include reference to other branches of the MEU who currently hold exemption certificates. I do so because in my view, that would require previously issued exemption certificates to have been revoked and a proper application to do so is not before me.

[55] Further, there is a timing issue involved in upcoming MEU elections and the Commission has proactively responded to being urged by the MEU to deal with these current applications as expeditiously as possible.

[56] The exemption certificate issued will encompass only the QLD Branch and the VIC Branch.



DELEGATE OF THE GENERAL MANAGER

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