



DECISION

Fair Work (Registered Organisations) Act 2009

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

United Workers' Union

(E2021/201)

MR ENRIGHT

MELBOURNE, 31 JANUARY 2022

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

[1] On 22 November 2021 the United Workers' Union (**UWU**) lodged with the Registered Organisations Commission (**the Commission**) an application, pursuant to section 183(1) of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**), to be exempted from section 182(1), being the requirement that the Australian Electoral Commission (**AEC**) conducts elections for offices in registered organisations.

[2] The application has been made in respect of the collegiate elections for Member Councillors and National Officers. The exemption is not being sought in relation to the direct election of Convention Delegates by UWU members (the first stage of the UWU elections), which will continue to be conducted by the AEC regardless of the outcome of this application.

[3] On 4 January 2021, a Delegate of the Registered Organisations Commissioner issued a decision, [2022] ROCD 1,¹ to make arrangements for the scheduled quadrennial election of officers of the UWU in accordance with its rules. This is the first scheduled election to be held by the UWU since its registration on 11 November 2019,² as the transitional rules of the UWU specified who would hold office until the scheduled election. The rules of the organisation provide that the quadrennial election of officers is conducted in three stages – the first stage being for the direct election of Convention Delegates by UWU members, the second stage (collegiate) election for Member Councillors and the third stage (collegiate) election for National Officers. It is intended that the application for exemption will apply with effect from the upcoming 2022 collegiate elections for Member Councillors and National Officers.

[4] In the election decision issued by the Delegate of the Commissioner in matter E2021/217, to arrange for the UWU quadrennial election, (E2021/217), the decision (referring to the exemption application, which by that time had been lodged), noted that:

If the exemption was granted, it would therefore have the effect of negating the requirement for the AEC to conduct stages two and three of the election as set out in this decision.³

¹ matter E2021/217

² see Decision of Deputy President Gostencnik of 1 October 2019, [\[2019\] FWC 7672](#), which effected the amalgamation of two registered organisations (United Voice and the National Union of Workers) to form the UWU.

³ [2022] ROCD 1, at para 5

[5] The UWU rules specify that nominations for the direct election of Convention Delegates are required to open on the first business day in March in 2022, and that the elected Delegates are to assume office on 1 July 2022.⁴ The elected Convention Delegates then form the electorate from which Member Councillors and National Officers are nominated and elected.⁵ The UWU rules require that the collegiate elections be conducted at the Quadrennial Convention or the ‘election meeting’,⁶ which is scheduled to occur on 25 July 2022.⁷

Provisions in the UWU rules in relation to the election and the National Convention

[6] In relation to its elections, the UWU rules enable the Returning Officer to utilise either a part-paper/part-electronic balloting system, or to conduct an election purely by an electronic balloting system, where it is practicable to do so.⁸

[7] In respect to the conduct of the electronic balloting system, UWU subrule 69(f) provides that:

The Returning Officer must ensure that the electronic balloting system utilised under sub-rule (e) provides:

- (i) for the security and secrecy of an election ballot to the same extent that these rules provide; and*
- (ii) that each Industrial Member entitled to vote in an election under these rules is given the opportunity to vote*

[8] Subrule 69(g) also imposes similar obligations upon the Returning Officer as those set out in subrule 60(f) above, in the event that an election is conducted partly by means of a paper balloting system and partly by means of an electronic balloting system.

[9] I note that paragraph 3 of the application indicates that, in the event that restrictions relating to the management of the COVID-19 pandemic persist throughout 2022, three possible scenarios for the holding of the National Convention are available. They are that:

- the National Convention is postponed; or
- that it occur by virtual means; or
- it occur by a combination of in person attendance and ‘virtual’/electronic attendance (e.g. online).

The UWU rules do not prescribe the manner in which National Convention meetings are to be held therefore there appears to be no impediment to holding the National Convention by virtual means, if that were required.

[10] This application has been made by the UWU after its representatives had met with AEC staff to discuss the conduct of the 2022 collegiate election stages and the potential challenges that the COVID-19 pandemic may pose in the conduct of those elections. The UWU has advised

⁴ See UWU rule 3 Schedule 4 and rule 78

⁵ See UWU subrules 69(c) and (d)

⁶ See UWU subrules 74(a) (c) and (d)

⁷ See UWU application for election exemption lodged 22 November 2021 at paragraph 6

⁸ See UWU subrules 69(e), (f) and (g)

this Commission that the AEC indicated that it would be unable to conduct the collegiate elections by electronic means.

[11] The apparent inability of the AEC to conduct electronic ballots in these matters means that if the AEC were to conduct the second and third stage elections, the UWU's capacity, under its rules, to utilise a part-paper/part-electronic or a purely electronic balloting system, is unavailable to it. Instead, in the event of the National Convention being held by any means other than in-person, it is anticipated that the AEC would conduct any ballot for Councillors or for National Officers by postal ballot. Even if the Convention were to be held in person, it may be that (in response to COVID safety concerns) the AEC may determine not to conduct an attendance ballot (i.e. in person) but may utilise a postal ballot. It is clear that the turnaround time for the issuing and return of postal ballots would mean that the election could not be commenced and completed during the Convention.

[12] The UWU has determined that it wishes to avoid any uncertainty which may impact upon the timetabling of the election as set out in its rules. In considering the issue, the UWU has determined that, in order to achieve its preferred outcomes (an in-person ballot or an electronic ballot), an application for exemption needed to be sought – in order to allow it to engage a Returning Officer (other than the AEC) who will have the capacity to utilise the UWU's electronic balloting provisions if the circumstances require that to occur.

Legislation

[13] Section 186 of the RO Act empowers the Registered Organisations Commissioner (**the Commissioner**) to grant exemptions from the requirement that the AEC conduct elections for office.

[14] Section 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 Commissioner 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 Commissioner 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.

[15] Section 183(2) of the RO Act requires 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.

[16] Regulation 133(2) of the *Fair Work (Registered Organisations) Regulations 2009 (the RO Regulations)* provides that, for section 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.

[17] Section 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.

[18] 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; and

(d) be lodged with the Commissioner.

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

Where an application has been made under subsection (1), the Commissioner 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.

[20] Section 184 of the RO Act states that:

(1) 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.

(2) The Commissioner must, as prescribed, hear the application and any objections duly made.

[21] Regulation 135(1) of the RO Regulations provides that:

(1) 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).

[22] Regulation 136 of the RO Regulations states:

(1) *The Commissioner must:*

- (a) *fix a time and place for hearing the application and any objection; and*
- (b) *notify the applicant and any objector of the time and place so fixed.*

(2) *At the hearing, the Commissioner must:*

- (a) *hear the applicant and any objector if they are present and wish to be heard; and*
- (b) *decide the matter.*

[23] Section 343B of the RO Act provides that the Commissioner may delegate particular powers and functions. By an instrument of delegation dated 10 November 2020 (replacing an earlier instrument dated 5 May 2017), the Commissioner 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 s.183(4) which is non-delegable.

Exemptions from AEC-conducted elections

[24] While the conduct of elections of registered organisations by the AEC is the default position under the RO Act, as indicated above the legislation also provides an avenue for seeking exemption from this. Exemptions from AEC-conducted elections are held by a range of registered organisations and their branches, which have been granted following applications to the relevant regulator – currently this Commission and previously the Fair Work Commission (**FWC**) and its predecessors.⁹

[25] Some exemptions apply to the entire organisation and all of the offices therein.¹⁰ Some apply to a specific Branch or Division of an organisation,¹¹ and others apply only to specific offices.¹²

[26] As indicated in the legislative provisions above, in particular section 186, the Commissioner must be satisfied that those organisations and branches holding exemptions conduct 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 Commissioner may revoke an exemption.

[27] Such revocations may be at the instigation of the regulator – as was the case with the Queensland Mining and Energy Divisional Branch of the Construction, Forestry, Mining and Energy Union (as it was then known)¹³ and more recently the Master Builders Association of

⁹ A total of 17 exemptions under s.186 are currently held, spanning nine registered organisations. Separate to this, some organisations and branches (five 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.

¹⁰ Such as the Australian Higher Education Industrial Association, issued 13 August 1990 by the Industrial Registrar in matter R173/1990

¹¹ Such as the Northern Mining and NSW Energy District Branch of the Construction, Forestry, Manufacturing, Mining and Energy Union, issued 2 May 1996 in matter R20022/1996

¹² 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

¹³ [2015] FWCD 7109, a matter involving revocation of a section 186 exemption at the instigation of the then regulator, the Fair Work Commission – a decision affirmed on appeal in [2016] FWCFB 197

the Northern Territory¹⁴— or an organisation or branch may resolve to apply to the Commissioner to relinquish its exemption.¹⁵

[28] Between 2015 and 2017, the Regulatory Compliance Branch of the FWC and then this Commission (upon its establishment in May 2017) undertook a review of election exemptions held by registered organisations and their branches to determine whether those entities were complying with the requirements for holding the exemptions. This review resulted in some organisations relinquishing their exemption¹⁶ and others retaining theirs.

This application for exemption

[29] As set out above, this application seeks an exemption in respect of the second stage (collegiate) election for Member Councillors and third stage (collegiate) election for National Officers. The application lodged by the UWU on 22 November 2021 included a declaration signed by Paul Richardson, member of the UWU National Executive¹⁷ and Director - Finance, Governance and Administration, verifying that the facts set out in the application are true and correct.

[30] The application refers to the resolution of the National Executive on 20 October 2021, authorising Mr Richardson to lodge with this Commission the application for exemption from the AEC conducting the UWU's collegiate stages of the quadrennial elections (including those scheduled for 2022) and attaches a copy of the resolution. The application provides information about the methods used to advise UWU members about the application – namely, via the UWU e-newsletter and by posting a copy of the resolution on the UWU's website.

[31] On 4 December 2021, in accordance with s.183(4) of the RO Act, the Commissioner published a notice in *The Weekend Australian* newspaper, setting out the details of the application, for the purpose of bringing the notice to the attention of the members of the UWU nationwide.

[32] The notice provided for any objectors to lodge notices of objection with the Fair Work Commission (FWC) no later than 28 days after the notice was published, and to provide a copy of that objection to this Commission. The expiry date to lodge objections was 4 January 2022. Commission staff have confirmed that no notices of objection have been lodged.

[33] On 24 December 2021, Commission staff advised the UWU that the Commission's hearing of the application would take place on 27 January 2021 at 10:30am and would be conducted online.

[34] On 7 January 2022, the UWU advised this Commission, via email, that:

¹⁴ [2018] ROCD 146

¹⁵ Such as Master Builders Association of Victoria [2020] ROCD 71; Master Builders Association of South Australia Incorporated [2020] ROCD 141

¹⁶ Motor Inn & Motel Accommodation Association [2018] ROCD 72; Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) [2017] FWCD 515; United Voice [2016] FWCD 1512

¹⁷ National Executive is the committee of management of the UWU – see UWU rule 36(a)

... in the event that there are no objections, the UWU does not intend to make any [further] submissions in support of the application. The UWU will of course attend the hearing and address any questions or concerns the Delegate may have.

[35] On 10 January 2022, Commission staff notified the UWU, via email, that no notices of objection had been lodged. The email also confirmed the 27 January 2022 hearing date. The email communication again gave the UWU the opportunity to prepare any further written submissions that it wished to make.

[36] On 27 January 2022, I conducted an online hearing, via Microsoft Teams, in which the UWU was represented by Mr Richardson. I was also assisted in the hearing by Mr Bill Steenson, the Commission's Principal Lawyer Compliance, and by Andrea O'Halloran, Senior Adviser Compliance.

[37] During the hearing, Mr Richardson responded to questions that I raised about the specifics of the application and matters associated with it. Relevantly, the UWU has conferred with the proposed Returning Officer and has satisfied itself as to her willingness to be engaged in the role and her capacity to fulfil the requirements of the UWU for in-person and/or electronic ballots. Mr Richardson indicated, on behalf of the UWU, that the organisation intends to notify this Commission of the results of elections conducted under the exemption in a similar manner to the AEC reporting of the results of industrial elections.

[38] The UWU has also made detailed enquiries with providers of electronic ballots in order to confirm that their systems can satisfy the UWU's requirements. In response to my enquiries as to what the UWU would do if the nominated Returning Officer was unable to conduct or complete the application, Mr Richardson confirmed that the UWU had considered this issue and had identified potential alternative providers of Returning Officer services.

[39] The application for exemption, and in particular the resolution of the National Executive authorising the making of the application, indicated that the exemption sought was 'from the requirement to utilise the AEC as the Returning Officer in the collegiate quadrennial election scheduled for 2022'. During the hearing, Mr Richardson confirmed that the UWU seeks to have the proposed exemption remain in place while difficulties existed as to the holding of in-person (i.e. physical) meetings of the Convention and ensuring that the collegiate elections could be conducted in conjunction with Convention meetings, consistent with the UWU rules.

[40] Mr Richardson indicated that the UWU supports the default position that the AEC conduct industrial elections, that the UWU's application was made after much consideration and was not made lightly. Mr Richardson foreshadowed that it is possible that, at some time in the future, the UWU might apply to this Commission for a return to AEC-conducted elections for the collegiate-elected offices that are the subject of this application.

[41] In the circumstances, and in light of the information provided by the UWU regarding the operation of the exemption (if granted), I have considered the application on the basis that the exemption is not necessarily made on a 'one off' basis, i.e. that the exemption would remain beyond the 2022 election and continue in force until such time as the UWU sought to relinquish the exemption, subject to the Commissioner remaining satisfied that the matters in section 186(1) are complied with.

[42] I note that UWU rules 2 and 68 provide that both an AEC-appointed Returning Officer and a Union-appointed Returning Officer may be utilised to conduct the UWU's elections. For example, subrule 68(c) provides that:

The Union's Returning Officer will be responsible for the conduct of ballots of the Union as required under these rules, except where an election for an office must be conducted by the Australian Electoral Commission.

An examination of the rules confirms that there is no requirement in the UWU rules¹⁸ for an AEC-appointed Returning Officer to conduct the second and third stage collegiate elections under consideration in this application for exemption.

[43] On the basis of the material in the application and the information provided at the hearing, I am satisfied that the application has complied with section 183 of the RO Act, and with the RO Regulations.

[44] Under section 186(1) of the RO Act, I hereby grant the application made by the UWU and exempt it from subsection 182(1) of the RO Act in relation to the second stage collegiate election for the offices of Member Councillors and the third stage collegiate election for the offices of National Officers of the UWU.



DELEGATE OF THE COMMISSIONER

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¹⁸ as distinct from the requirements of s.182 of the RO Act