



DECISION

Fair Work (Registered Organisations) Act 2009
s.189—Arrangement for conduct of an election

Finance Sector Union of Australia
(E2023/48)

MR ENRIGHT

MELBOURNE, 8 MAY 2023

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

[1] On 14 March 2023, the Finance Sector Union of Australia (FSU) lodged with the Fair Work Commission (the Commission) an application, 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] The application is in respect of particular offices, namely the collegiate election for National President, National Secretary, National Assistant Secretaries and National Executive Members, by and from members of the FSU National Congress. The application is for the exemption to apply from, and including, the 2023 election for these offices, for which nominations are due to be called in May 2023.

[3] The application indicated that prescribed information for this election was lodged on 10 November 2022 and a decision from a Delegate of the former Registered Organisations Commissioner was issued on 24 November 2022 (E2022/206), with an Amending Decision issued on 13 January 2023, to make arrangements for the conduct of the election by the AEC. While the first stage of that election process – the election of National Congress Delegates by and from the FSU’s membership – has been completed, the next stage (being the one to which this exemption application relates) has not yet commenced. If the exemption application was to be rejected, the AEC would then need to conduct the collegiate election of offices by and from the National Congress. If the exemption was granted, there would be no requirement for the AEC to do so.

[4] Under the FSU’s rules, nominations for the collegiate election stage are called prior to the National Congress and, in the event that a ballot is required, the election is to take place as an attendance ballot (i.e. an in-person ballot) at the meeting of Congress. The FSU has advised that this year’s Congress is scheduled for June 2023. It was submitted that the AEC indicated to the FSU that an AEC-conducted election would take the form of a postal ballot rather than an attendance ballot. The FSU has expressed a strong preference for an in-person ballot process for these offices.

Legislation

[5] Section 186 of the RO Act empowers the General Manager of the Fair Work 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.¹

[17] Some exemptions apply to the entire organisation and all of the offices therein.² Some

¹ Some 19 exemptions under s.186 of the RO Act (and the equivalent predecessor provisions) are currently held, spanning 12 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.

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

apply to a specific Branch or Division of an organisation,³ and others apply only to specific offices.⁴

[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 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 Queensland Mining and Energy Divisional Branch of the Construction, Forestry, Mining and Energy Union (as it was then known)⁵ and more recently the Master Builders Association of the Northern Territory⁶ – or an organisation or branch may resolve to apply to the General Manager to relinquish its exemption.⁷

[20] Between 2015 and 2017, this Commission and then the former Registered Organisation 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 exemption⁸ and others retaining theirs.

This application for exemption

[21] As indicated above, this application seeks an exemption in respect of the election for particular offices of the FSU, namely the collegiate election for National President, National Secretary, National Assistant Secretaries and National Executive Members. The application, which was lodged by the FSU on 14 March 2023, included a statutory declaration signed by Julia Angrisano, the National Secretary of the FSU, setting out the grounds for seeking the exemption. It stated that the FSU National Executive had resolved, at its meeting on 28 February 2023, to make the application.

[22] The Application also declared that the relevant resolution was placed on the FSU's website within 14 days of the relevant resolution. Members of the FSU had also been subsequently notified on 24 March 2023, via email, of the making of the resolution to apply for the exemption and of the results of the stage 1 election conducted by the AEC. The FSU also confirmed to the Commission on 17 March 2023 that the organisation does not publish a journal.⁹

³ 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.

⁴ 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.

⁵ [2015] FWCD 7109, a matter involving revocation of a section 186 exemption at the instigation of the Fair Work Commission – a decision affirmed on appeal in [2016] FWCFB 197.

⁶ [2018] ROCD 146.

⁷ Such as *Master Builders Association of Victoria* [2020] ROCD 71 and *Master Builders Association of South Australia Incorporated* [2020] ROCD 141.

⁸ *Motor In & Motel Accommodation Australia* [2018] ROCD 71; *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.

⁹ Sub-regulation 133(2)(b)(i) of the RO Regulations requires a notice of the resolution to be published in the next journal, if the organisation or branch publishes a journal that is circulated among its members.

[23] The FSU is a federally registered organisation comprised of membership from around Australia although it does not have any branches in the States or Territories. In those circumstances, on 24 March 2023, the General Manager made the necessary arrangements pursuant to s.183(4), to publish a notice in *The Australian* newspaper, setting out the details of the application, for the purpose of compliance with the legislative notice requirement for bringing the notice to the attention of members of the FSU and notifying the objection period for the application.

No objections lodged

[24] 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 FSU. The expiry date for lodging notice of objection was 21 April 2023. No notices of objection were lodged.

[25] On 27 April 2023, staff of the Commission notified the FSU, via email, that no notices of objection had been lodged with the Commission. The email communication also formally notified the FSU that the hearing of its application would take place on 2 May 2023 and invited the FSU to provide any further submissions in relation to the exemption application.

Consideration

[26] The FSU's application indicated that Mr John Payne was appointed as the Returning Officer on 12 December 2022 by the FSU National Executive (for elections other than AEC-conducted elections) in accordance with Rule 67 of the FSU rules. The application notes that Mr Payne has extensive experience in conducting elections as a Returning Officer for State-registered associations in accordance with the *Industrial Relations Act 1996* (NSW) and the *Industrial Relations Act 2016* (QLD) as well as unincorporated associations, not-for-profit associations and superannuation entities.¹⁰

[27] The FSU confirmed that Mr Payne is not the holder of any office in, or an employee of, the organisation or any constituent part of it. This statement satisfies the criteria stated in subsection 143(b) of the RO Act that the returning officer not be an office holder or employee of the relevant organisation, its branches, divisions or sections.

[28] The FSU also confirmed that if its application was granted, the collegiate election would be conducted in accordance with the FSU rules; that its conduct would be in a manner that will afford members entitled to a vote an adequate opportunity, without intimidation, to do so in a secret ballot; and that it would occur at the Inaugural National Congress meeting scheduled for 6 to 8 June 2023 in Victoria.

[29] On 2 May 2023, I conducted a hearing, via video-conference, in which the FSU was represented by Hall Payne Lawyers and Julia Angrisano, National Secretary of the FSU. I was also assisted in the hearing by Mr Bill Steenson, Principal Lawyer Compliance, of this Commission.

[30] During the hearing, I noted that that there appeared to be at least the potential for a perception of conflict of interest where Hall Payne Lawyers provide legal services and advice to the FSU and/or its officers and may be required to provide legal advice to members of the FSU specifically about elections in general or the next or future elections while Mr John Payne

¹⁰ See Paragraph 31 of the Application by the Finance Sector Union of Australia.

acted as the returning officer. In responding to that issue, the FSU representatives noted that the National Executive had appointed Mr Payne as returning officer for the inaugural Congress election based on his detailed knowledge of the rules establishing the Congress and associated offices and elections.

[31] In addition, it was confirmed that Mr Payne is a consultant and no longer a director or owner of Hall Payne; that the size and composition of the firm is such that it is able to create an informational barrier; and that the firm intends to put in place a number of steps, including through the use of an advice line, quite separate and distinct from Mr Payne, in circumstances where advice may need to be provided to the union and its members in relation to Congress elections. This issue and the intention both of Mr Payne and the FSU to ensure the availability of legal advice entirely independent of Mr Payne was the subject of satisfactory discussion during the hearing.

[32] In its application and during the hearing, the FSU outlined details of how the Returning Officer proposes to conduct the election if the exemption were granted, including that it is intended to conduct the ballot on the same dates as the National Congress meeting, that the ballot will be conducted in a secure location and will be via a paper ballot physically completed by delegates who will be in attendance at the Congress location. I note that under subsection 144(1) of the RO Act a postal ballot is not mandatory for a collegiate election.

[33] During the hearing, the FSU's representatives also clarified that the application for exemption – while prompted by the AEC being unable to conduct the 2023 Collegiate National Executive election in the manner and timeframe sought by the FSU in accordance with its rules – is sought on an ongoing, rather than 'one off' basis. The FSU has concluded that conducting the elections in the manner which is the subject of this application is consistent with providing for the democratic functioning and control of organisations.

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

[35] In response to a question I raised during the hearing about how any complaints about the election process (including anonymous complaints) could properly be raised by FSU members, its representatives gave an undertaking to develop and implement a process to ensure that such complaints could properly be made and properly addressed. In addition, it was submitted that the returning officer would explain to and advise the Congress how the integrity of the election process would be maintained.

[36] I note the parallels between the FSU's exemption application and that made by the United Workers Union in relation to the election of its Member Councillors and National Executive by and from Delegates to its National Convention.¹¹ In both cases, the first stage of the election, conducted by the AEC, involves the direct election of representatives to a national convention or congress by rank-and-file members of the organisation; and the subsequent stage(s) involving a collegiate election of office-bearers by and from those representatives, with the rules indicating that any ballot takes place in conjunction with the holding of the national convention or congress.

[37] I also note that the wording of rule 67 of the FSU rules, dealing with the appointment of a

¹¹ *United Workers Union* [2021] ROCD 183 in matter E2021/201, in particular paragraphs [2]-[3], 5 and 12

Returning Officer, already makes provision for both an AEC-appointed Returning Officer and for circumstances where an AEC Returning Officer may not be required. The FSU noted that rule 67 would be sufficient to accommodate circumstances where an exemption from an AEC-conducted election is approved, and that it could also be used to appoint another Returning Officer if, in the event that the application is granted, the person appointed by the Branch was unable or unwilling to carry out the role. I accept that submission.

[38] During the exemption hearing, in light of the COVID19-related restrictions on gatherings having been a significant feature in recent years, I asked the FSU what it proposed to do if the in-person National Congress meeting at which it was proposed to conduct the election could not be held. The FSU's representatives indicated that, while the FSU had not determined which specific approach to take in those circumstances, there were alternatives available for conducting the election, including postponing it to a later National Congress meeting or conducting it via another means, such as a postal ballot, consistent with the FSU rules.

[39] On the basis of the material in the application and the additional detail provided by the FSU, including at the hearing, I am satisfied that the application has complied with section 183 of the RO Act, and with the RO Regulations.

[40] The FSU have also informed the Commission that if this application was granted, in recognition of the need for the General Manager to continue to be satisfied that the organisation is complying with the obligations under its Rules and in accordance with the RO Act, that the FSU undertakes to provide the Commission with copies of the Returning Officer's declarations of results for the elections subject to this application.

[41] I am also satisfied that the rules of the FSU comply with the requirements of the RO Act relating to the conduct of elections for office and that, if exempted from subsection 182(1), the FSU will conduct the collegiate election under and in accordance with the rules of the FSU, and in a manner which will afford members entitled to vote at the collegiate election an adequate opportunity of voting without intimidation.

[42] Under subsection 186(1) of the RO Act, I therefore grant the application made by FSU and exempt it from the requirement, in subsection 182(1) of the RO Act, for AEC-conducted elections in relation to collegiate elections for the offices of National President, National Secretary, Assistant National Secretaries and National Executive Members.

[43] A certificate to this effect will be issued separately to the organisation.



DELEGATE OF THE GENERAL MANAGER

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