Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant

These are the details of the person who is making the application.

Title	[ ] Mr [ ] Mrs [ ] Ms [X] Other please specify: a committee of management of a branch of a registered organisation		
Applicant	The Victorian District Board of Management of the Victorian District Branch of the Mining and Energy Union		
First name(s)			
Surname			
Postal address	5 Lignite Court		
Suburb	Morwell		
State or territory	VIC	Postcode	3840
Phone number	03 5134 3311	Fax number	
Email address	info@meuvic.org.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	Mark Richards

How would you prefer us to communicate with you?

[X] Email (you will need to make sure you check your email account regularly)

[ ] Post

Does the Applicant have a representative?

A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

[X] Yes – Provide representative's details below

[ ] No

Applicant's representative

These are the details of the person or business who is representing the Applicant.

Name of person	Geoff Borenstein		
Firm, union or company	Slater and Gordon Lawyers		
Postal address	L12, South Tower, 485 La Trobe St,		
Suburb	Melbourne		
State or territory	VIC	Postcode	3000
Phone number	0407097808	Fax number	
Email address	Geoff.borenstein@slatergordon.com.au		

Is the Applicant's representative a lawyer or paid agent?

[X] Yes

[ ] No

The Respondent

These are the details of the person or business who will be responding to your application to the Commission.

Title	[ ] Mr [ ] Mrs [ ] Ms [ ] Other please specify:

First name(s)	Not applicable		
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

If the respondent is a company or organisation please also provide the following details

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	

1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

Sections 183 and 186 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) and regulation 133 of the *Fair Work (Registered Organisations) Regulations 2009* (**RO Regulations**).

2. Order or relief sought

2.1 Please set out the order or relief sought.

Using numbered paragraphs, set out what you are asking the Commission to do.

1. Pursuant to sections 183 and 186 of the RO Act, the Fair Work Commission exempt the Victorian District Branch from the requirements of s. 182(1) of the RO Act in relation to elections for offices in the Victorian District Branch.

2.2 Please set out grounds for the order or relief sought.

Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

1. This application is made by the Victorian District Board of Management (**the BOM**) of the Victorian District Branch of the Mining and Energy Union. The BOM is the committee of management of the Victorian District Branch within the meaning of sections 6 and 183 of the RO Act.

2. This application is filed with a supporting witness statement of Grahame Patrick Kelly dated 22 December 2023.

3. The BOM is entitled to make this application because, in accordance with s.183(2) and regulation 133(2):

   (a) on 6 December 2023 the BOM resolved to make this application; and

   (b) on 6 December 2023 the BOM notified the members of the Victorian District Branch of the making of the resolution by publishing a notice on its website.

4. The General Manager should be satisfied that the rules of the MEU comply with the requirements in sections 143, 144, 145 and 146 of the RO Act relating to the conduct of the elections for office. The rules were recently approved by the Fair Work Commission during the withdrawal of the Mining and Energy Division (**the ME Division**) from the Construction, Forestry, Maritime, Mining and Energy Union (**the CFMMEU**): see [2023] FWCFB 64.

5. The General Manager should be satisfied that if the Fair Work Commission grants the exemption the elections will be conducted in accordance with the rules of the MEU. The MEU relies on the following matters in support of this ground.

6. *First*, the demonstrated ability of its predecessor, the ME Division of the CFMMEU, to conduct its own elections in National Divisional offices and offices in its Northern Mining and NSW Energy District Branch, South Western District Branch, Tasmanian District Branch and Western Australian District Branch in accordance with its rules.

7. *Second*, the recent ballot successfully conducted by the ME Division in respect of the withdrawal of the ME Division from the CFMMEU in accordance with Fair Work Commission order PR760701. The ballot was conducted without any irregularities.

8. The General Manager should be satisfied that if the Fair Work Commission grants the exemption, the elections will be conducted in a manner that will afford members entitled to vote an adequate opportunity of voting without intimidation. The MEU relies on the following matters in support of this ground.

9. *First*, the demonstrated ability of the ME Division of the CFMMEU to conduct its own National Divisional elections and elections for offices in its Northern Mining and NSW Energy District Branch, South Western District Branch, Tasmanian District Branch and Western Australian District Branch in a manner that has afforded its members entitled to vote an adequate opportunity of voting without intimidation.

10. *Second*, the recent ballot successfully conducted by the ME Division in respect of the withdrawal of the ME Division from the CFMMEU in accordance with Fair Work Commission order PR760701 which afforded its members entitled to vote an adequate opportunity of voting without intimidation. The ballot was conducted without any irregularities.

11. The Applicant also submits that if the Fair Work Commission grants the exemption the elections conducted by the MEU in respect of the Victorian District Branch will encourage democratic participation by members. The MEU relies on the following matters in support of this ground.

12. *First*, the election model used by the ME Division in National Divisional elections and its elections for offices in its Northern Mining and NSW Energy District Branch, South Western District Branch, Tasmanian District Branch and Western Australian District Branch "…*has been very successful in encouraging member participation in elections, with attendance ballots conducted by the M&E Division routinely achieving double or triple the participation rates of union postal ballots conducted by the Australian Electoral Commission*" (see *Application by Grahame Patrick Kelly* [2023] FWCFB 64 at [50]).

13. *Second*, the ME Division conducted the ballot in respect of the withdrawal of the ME Division from the CFMMEU and it resulted in a participation rate of 53.11%.

14. *Third,* The Victorian Mining and Energy Division District Branch of the ME Division (**Victorian ME Branch**) was created in 2001, however the actual transfer of members into the ME Division did not occur until 2003, when *the* FEDFA Victorian Divisional Branch was dissolved and its members were apportioned between the Victorian Construction and General Divisional Branch and the new Victorian Mining and Energy Divisional Branch.

15. Accordingly, the 1996 ballot exemption did not apply to the Victorian ME Branch. The Quadrennial Elections for the election of offices in the Victorian ME Branch in 2004, 2008, 2012, 2016, and 2020 were conducted by the AEC.

3. The employer

3.1 What is the industry of the employer?

Not applicable.

4. Industrial instrument(s)

4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Not applicable.

5. Declaration

I, MARK RICHARDS of 5 Lignite Court, Morwell, Vic 3840, Union Secretary DECLARE that:

1) I currently hold the position of Secretary of the Victorian District Branch of the MEU.
2) I am also a member of the Board of Management of the Victorian District Branch of the MEU.
3) Pursuant to section 183(3) and regulation 133(1)(c) I verify the facts set out in this application and that the requirements in s 183(2) have been complied with.

Signature

If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	*Mark Richards*
Name	Mark Richards (for and on behalf of the Victorian District Board of Management of the Victorian District Branch of the Mining and Energy Union)
Date	22 December 2023

Fair Work (Registered Organisations) Act 2009

s.183 application for exemption by Victorian District Branch of MEU

STATEMENT OF GRAHAME PATRICK KELLY

On 22 December 2023, I Grahame Patrick Kelly, of 215-217 Clarence Street Sydney in the State of New South Wales, union official, state:

Introduction

1. I am the General Secretary of the Mining and Energy Union (**MEU**).

2. The MEU was registered on 1 December 2023 following the withdrawal of the Mining and Energy Division (**ME Division**) of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) under Part 3 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**).

3. Prior to 1 December 2023 I was a member of the CFMMEU and its predecessors since 1985. I have also held offices within the CFMMEU and its predecessors since 1996. I held the position of General Secretary of ME Division since 1 November 2017.

4. I make this statement in support of the application by the Board of Management of the Victorian District Branch of the Mining and Energy Union (VicBom) pursuant to Sections 183 and 186 of the RO Act and regulation 133 of the *Fair Work (Registered Organisations) Regulations 2009* (**RO Regulations**) for an order by the Fair Work Commission exempting the Victorian District Branch from the requirements of s. 182(1) of the RO Act in relation to elections for offices in the Victorian District Branch.

5. I make this statement based on my own knowledge, except as indicated to the contrary, having made enquiries of officers or employees of the MEU. Where I deal with matters based on information provided to me, I believe that information to be true and correct.

The Withdrawal Ballot

6. On 15 September 2022, I applied to the Fair Work Commission (**FWC**) under s 94 and s 94A of the RO Act for a ballot to be held to decide whether, the ME Division should withdraw from the CFMMEU (**the Ballot Application**).

7. On 21 February 2023, the FWC issued decision [2023] FWCFB 33. In that decision the FWC determined that the relevant requirements under the RO Act had been met and it was appropriate to accept the Ballot Application.

8. On 3 April 2023, the FWC issued decision [2023] FWCFB 64 and corresponding order PR7607001 (**the FWC Order**). The FWC granted the Ballot Application and ordered that the ballot commence on 17 May 2023 and close on 19 June 2023 (**the Ballot**).

9. Under the FWC Order:

   a. in lieu of the Australian Electoral Commission, Shane Russell Thompson (**Mr Thompson**) was appointed as the Designated Official to conduct the Ballot; and

   b. the Ballot was to be conducted in part as an attendance ballot and in part as a postal ballot.

10. In accordance with the FWC Order, between 17 May 2023 and 19 June 2023 the Ballot was conducted by Mr Thompson.

11. On 22 June 2023, Mr Thompson issued a signed certificate which declared the results of the Ballot (**the Certificate**) and a report on the conduct of the Ballot (**the Ballot Report**).

12. The Certificate states that in the Ballot:

   a. the total number of persons on the roll of voters was 21,655;

   b. 11,501 ballot papers were cast;

   c. 10,975 votes were cast in favour of the question set out in the ballot paper;

   d. 197 votes were cast not in favour of the question set out in the ballot paper; and

   e. there were 329 informal ballot papers.

History of Ballots in the ME Division

13. Historically, it has been the practice of the ME Division to conduct and hold attendance ballots for the election of its officers.

14. This is consistent with the exemptions issued by the Australian Industrial Relations Commission on 2 May 1996, being:

    a. an exemption from the requirement that elections be conducted by secret postal ballot under s 198 of the *Industrial Relations Act 1988* (**IR Act**).

    b. an exemption under s 213 of the IR Act from the requirement that the AEC conduct the ME Division's elections.

15. By reason of the above exemptions, the ME Division and its District Branches have had their elections for officers conducted by a National Returning Officer and by attendance ballot in accordance with the then Divisional Rule 17

16. Such Elections occurred in the years 2000, 2004, 2008, 2012, 2016 and 2020 in respect of the ME Division and its District Branches (other than Victoria for the whole period and Queensland prior to 2012).

17. The election model used by the ME Division 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 Australian Electoral Commission. For example, the 2017 election for the General Secretary of the ME Division was conducted by the ME Division using the attendance ballot voting method. There was a participation rate of 46.5% in that ballot. In contrast, the recent 2023 postal ballot conducted by the AEC for the office of Queensland District Branch President of the ME Division recorded a participation rate of only 17%.

18. A submission to the Royal Commission details some of the research the ME Division staff have conducted into comparative participation rates between attendance ballots conducted by the ME Division and postal ballots conducted by the AEC in respect of a number of other federally registered organisations. That research revealed that the ME Division elections conducted between 1996 and 2012 as attendance ballots attracted an average membership participation rate of 69.4%. In contrast, the union

postal ballots surveyed in our submission revealed an average participation rate of just 23.2%.'

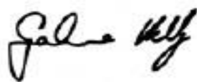
Annexed hereto and marked with the letters '**GK-1**' is a copy of the submission to the Royal Commission.

19. Given the historical importance of attendance ballots and participation rates of members of the MEU, I strongly believe that an attendance ballot for the Victoria District Branch will maximise the democratic participation of members and thereby impart significant legitimacy on the result of the election of Officers.

Victorian District Elections

20. The Victorian Mining and Energy Division District Branch of the ME Division (**Victorian ME Branch**) was created in 2001, however the actual transfer of members into the ME Division did not occur until 2003, when the FEDFA Victorian Divisional Branch was dissolved and its members were apportioned between the Victorian Construction and General Divisional Branch and the new Victorian Mining and Energy Divisional Branch.

21. Accordingly, the 1996 ballot exemption did not apply to the Victorian ME Branch. The Quadrennial Elections for the election of offices in the Victorian ME Branch in 2004, 2008, 2012, 2016, and 2020 were conducted by the AEC.



____________________________ Date: 22 December 2023

Grahame Kelly
General Secretary

Submission by the Construction, Forestry, Mining and Energy Union in response to Issues Paper No 3 "Funding of Trade Union Elections"

Introduction

This paper is concerned solely with question number 7 in Issue Paper No 3:

> Under section 186 of the RO Act, the General Manager of the Fair Work Commission may exempt a registered organisation, on specific grounds, from the requirement that the AEC must conduct the elections held by that organisation. The General Manager can revoke the exemption on application from an organisation's committee of management or on the grounds of dissatisfaction with the rules, but otherwise the exemption continues indefinitely. Is this provision appropriate and/or adequate?

This paper makes the case that the existing provisions allowing for an exemption from the general requirement that the Australian Electoral Commission ('AEC') conduct union elections, are both appropriate and adequate. The central focus of this submission is the conduct of union elections by the CFMEU Mining & Energy Division ('the Union') under the statutory exemption.[1]

However, a discussion of the conduct of elections by the Union is meaningless unless it is placed within a broader historical, legal and policy context. In establishing this contextual framework, it will be necessary to traverse the following areas:

1. The historical origins and democratic ethos that underpin the representative structures of the Union.

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[1] Currently, s186 of the *Fair Work (Registered Organisations) Act 2009* ('FW (RO) Act'); formerly ss211 of the *Workplace Relations Act 1996* and s211 of the *Industrial Relations Act 1998*.

2. The legislative history and policy approach guiding Australian Government regulation of internal union affairs, including elections.

3. The actual practice and results of elections conducted by the Union under the statutory exemption.

We aim to show that far from promoting a deficit of democratic control and transparency, the operation of the statutory exemption in respect of the Union is an exemplar of democratic control by the membership. Indeed, it is not unreasonable to contend that the level of democratic participation in elections and the degree of control exercised by rank and file members over key policy decisions of the Union is unsurpassed by any industrial organisation in Australia.

1. Direct democracy, local autonomy and federalism: a brief overview of the origins of coal mining unionism in Australia.

A submission of this length can only provide the barest sketch of the origins of coal mining industry unionism in Australia. However, this history – even in the truncated form that follows – is essential in understanding why the current statutory exemption and method of voting adopted by the Union is integral to its very identity.

Coal mining unionism in Australia can definitively be traced to the late 1850's in the coal fields in and about Newcastle in the colony of New South Wales. However, the origins of coal mining unionism are far more complex than can be encapsulated in the statement that the first official coal mining union was formed in Newcastle in 1860. Rather, the early history of coal mining unionism in Australia exhibits a number of powerful influences that has shaped the development of the Union and the outlook of its members to this day.

These influences may be roughly grouped as follows:

- First, the profound impact of immigrant coal miners who brought much of the language and culture of the longer established coal mining industry in Scotland, England and Wales to the new workings of the colony;

- Second, the examples of Friendly Societies and non-Conformist Churches as models of local and autonomous associations of working class people; and

- Third, the strong local community identity that emerged in the small, tightly-knit, mining towns that developed within walking distance of the collieries. Towns such as Cessnock, Greta, Mt Kembla, Bulli, Lithgow, Ipswich, Fingal, Collie and Wonthaggi.

Of the three principal mining regions in New South Wales, the coal fields around the city of Newcastle were the earliest to be mined in significant quantities[2]. In fact, the very earliest coal mining in Newcastle commenced around 1804 when Governor King used the discovery of coal near the Hunter River (known for a brief time as the 'Coal River') as an opportunity to punish recalcitrant convicts in the Sydney colony. Included amongst the first of these (decidedly involuntary) coal miners were some of the leaders of the Castle Hill Irish rebellion.[3]

The development of a private coal mining industry in New South Wales commenced in 1831 when the Australian Agricultural Company (later known simply as the A.A. Company) was granted a million acres of land within, and to

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[2] Comerford, Jim *Coal and Colonials: Founding of the Australian Coal Mining Industry* United Mineworkers' Federation of Australia, Northern District, April 1997.

[3] Gollan, R *The Coalminers of New South Wales: A History of the Union, 1860 – 1960* Melbourne University Press, Melbourne (1963) p 5. ("Gollan 1963")

the North of Newcastle. Within a short time, the most profitable part of the land grant became its coal holdings, making the A.A Company the owners of a very lucrative monopoly until public opinion forced the company to give up some of its holdings in 1847.[4] The coal mining industry developed rapidly thereafter, with three other major companies establishing themselves in the Hunter Valley by the early 1850's and commercial coal operations also commencing at Mt Keira in the Illawarra in 1849 and Bellambi in 1857.[5] However, the real boom period of the early coal mining industry occurred from the 1860's to the 1880's as English shipping companies realised that they could turn a profit by filling the empty hulls of ships delivering goods to the New South Wales colony with coal that could be exported onwards to California, South America, and China.

The development of the coal mining industry in what would become the States of Queensland, Western Australia, Victoria and Tasmania occurred slightly later than in New South Wales, with the first commercial workings generally commencing in the period from the late 1860's. Regardless of this later commencement, the economic and social characteristics of coal mining communities in all of the Australian coal fields would be remarkably similar – an important factor, no doubt, in the eventual decision of a number of the local coal mining unions to federate as one national body in the early 20th century.

The growth of the colonial coal mining industry led to demand for experienced and skilled underground coal miners as the supply of suitable convict labour dried up. The natural source of such skilled labour was the home country. The 1850's and 1860's saw an influx of experienced English, Welsh and Scottish coal miners settle in the coalfields of the Hunter Valley, the Illawarra, Lithgow and Ipswich. Two of these coal miners – Andrew Fisher, formerly of Ayreshire in Scotland and Joseph Cook, formerly of Staffordshire in England were to rise to

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[4] Gollan 1963 at pp 9-10.

[5] Ross, E *A History of the Miner's Federation of Australia* The Australasian Coal, and Shale Employee's Federation of New South Wales, Sydney (1970) p9.

the position of the 5th and 6th Prime Ministers respectively, of the newly formed Commonwealth of Australia – a remarkable achievement given their social origins.

Fisher and Cook were in many respects typical of the kind of person who assumed leadership positions in the early mining unions. Andrew Fisher commenced working in the coal mines of his native Scotland at the age of 10. He was largely self-educated, a result of his prodigious appetite for reading books he was able to borrow from the reading room of a local workingman's cooperative his father had formed in his native village of Crosshouse. Whilst working as a miner in Scotland, Andrew Fisher rose to become the Crosshouse District Secretary of the Ayreshire Miner's Union. Fisher was devoutly religious, a Superintendent of Presbyterian Sunday School and a member of the Royal True Friendship Lodge of the Manchester United Independent Order of Oddfellows. When he arrived in Queensland in 1885 Fisher commenced work in the coal mines of Burrum and later worked at the gold mines near Gympie, becoming President of the local Amalgamated Miner's Union and a shareholder in the Gympie Industrial Cooperative Society. [6]

Joseph Cook arrived in New South Wales in 1887 and settled near the Vale of Clywdd colliery at Lithgow. Cook grew up in poverty in England, and when his father died in a pit accident when Joseph was just 13 years of age, he was forced to become the main breadwinner. Like Fisher, Cook was devoutly religious – a Primitive Methodist - he eschewed gambling, sport and other frivolous entertainments.[7] During his time as a coal miner near Lithgow, Cook became an

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6 Murphy, D J, 'Fisher, Andrew (1862–1928)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, available at: http://adb.anu.edu.au/biography/fisher-andrew-378/text10613.

7 Crowley, F K, 'Cook, Sir Joseph (1860–1947)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, available at: http://adb.anu.edu.au/biography/cook-sir-joseph-5763/text9765. For a period, Cook even studied for the Methodist ministry.

active and prominent unionist, becoming in 1887 the General-Secretary of the newly registered Western Miner's Association. He was a founding member of the Labor Electoral League (the nascent Labor Party) and went on to become a senior Labor parliamentarian before spectacularly defecting to the conservative side of politics.[8]

These two[9] biographical sketches reveal some of the concepts, beliefs and outlook that British immigrant coal miners brought to the fledgling colonial mining unions. These notions included a strong sense of autonomy, self-reliance and mutual assistance; a democratic and anti-establishment (in the strict sense) outlook and a fundamental belief in the power and importance of the communal gathering - whether it be in the form of a congregation, a public lecture or a union meeting. British miners also brought with them some of the organisational principles that continue to abide in the Union today. The most of important of which is the concept of the Lodge – the local branch structure that is characteristic of British and Australian coal mining unions.

Whilst the origin of the term "Lodge" is not able to be definitively traced, it would appear to be a borrowing of the usual name of local branches of the Friendly Societies that were common in early industrial Britain.[10] Friendly Societies were in many cases simply mutual assistance and welfare associations with strong links to non-conformist churches; in other cases, they were crypto-trade unions attempting to operate beneath the gaze of the propertied classes and the

[8] Ibid.

[9] It should also be noted that the leader of the Federal Parliamentary Labor Party from 1922 until 1928 was Mathew Charlton, who was also formerly an official of the Colliery Employees' Federation, Northern District. Unlike Fisher and Cook however, Charlton was born in Australia but his father was formerly a coal miner from County Durham in England. Perks, M 'Charlton, Matthew (1866–1948)', Australian Dictionary of Biography, National Centre of Biography, Australian National University available at: http://adb.anu.edu.au/biography/charlton-matthew-5563/text9485.

[10] Gollan 1963 p28.

Combination Laws they employed to criminialise union activity. However, as the celebrated case of the 'Tolpuddle Martyrs'[11] demonstrated, the very existence of an organised workforce was not a matter likely to be tolerated in 1830's England, whatever they chose to call themselves.[12]

The role of Friendly Societies in pre-figuring the character of British and colonial unionism cannot be over-stated. As observed by the historian EP Thompson:

> The friendly societies, found in so many diverse communities, were a unifying cultural influence. Although for financial and legal reasons they were slow to federate themselves, they facilitated regional and national trade union federation. Their language of "social man" also made towards the growth in working-class consciousness…
>
> In the simple cellular structure of the friendly society, with its workaday ethos of mutual aid, we can see many features which were reproduced in more sophisticated and complex forms in trade unions, co-operatives, Hampden Clubs, Political Unions, and Chartist lodges. At the same time the societies can be seen as chrystallising an ethos of mutuality very much more widely diffused in the "dense" and "concrete" particulars of the personal relations of working people, at home and at work.[13]

The Lodge structure that derived from the Friendly Societies became the essential building block, or organisational unit, of the very earliest official colonial mining unions. There can be little doubt that familiarity with the existence and operation of coal miner's union Lodges in Britain transmitted to the colony of New South Wales along with the first of the experienced coal miners imported to Newcastle by the like of the A.A. Company and J and A Brown and Co. As Sidney and Beatrice Webb note in their seminal study of the origins of British

[11] The name of their union was the "The Friendly Society of Agricultural Labourers". See also Evatt, H.V *The Tolpuddle Martyrs –Injustice Within the Law* Sydney University Press 2009.

[12] Webb, S and Webb, B *The History of Trade Unionism* Longman Green and Co Ltd, London (1920), p 145. ("Webb and Webb 1920")

[13] Thompson, E.P. *The Making of the English Working Class* Vintage Books, New York (1980) at pp 422-423.

unionism it was certainly the case that there was a functioning (if somewhat loose) national federation of coal miner's lodges in Britain by the mid 1830's.[14]

As noted, the first "official" coal miner's union in New South Wales was established in May 1860 in Newcastle. Little by way of documentary evidence remains in relation to this union, including its exact official name. Nevertheless, the union was initially successful in uniting a number of separate Lodges in the Hunter River District and proceeded to attempt to negotiate with the four major coal producers with the aim of establishing uniform conditions of employment in the coal mines of the Hunter Valley. Inevitably perhaps, industrial disputes with the coal producers quickly erupted in 1860 and again in 1861, with defeat of the coal miners in the latter dispute effectively crippling the District organisation whilst leaving the Lodges largely intact.[15] After a hiatus of eight years, the union re-emerged, this time permanently, as the Coal Miners' Mutual Protective Association of the Hunter River District. This union would subsequently obtain official registration in 1882 under the *Trades Union Act 1881* (NSW).

The registration of the Hunter Valley miners' union was followed by the separate registration under New South Wales law of the Bulli Coal Miners' Mutual Protective Association (1883); the Illawarra Coal Miners' Mutual Protective Association (1885); the Coal Miners' Mutual Protective Association of the Western District (1886); the Hartley Vale Shale & Coal Miners Mutual Protective Lodge of the Western District (1890) and the Coal & Shale Miners Mutual Protective Association of Airley (1902).[16]

In Queensland, the process of obtaining official union recognition was somewhat slower - a fact recalled in the oral histories of a number of old retired coal miners

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[14] Webb and Webb 1920 p140.

[15] Gollan at pp 44-45.

[16] Australian Trade Union Archives – http://www.atua.org.au

to their union newspaper *Common Cause* in the 1950's. These workers recalled that by the year 1900 there was still not an effective union organisation in West Moreton field and that working conditions were generally appalling. [17] Nevertheless, in 1906 the West Moreton District Coal Miners Union was registered under the *Trades Unions Act 1886* (Qld) and in 1908 that union changed its name to the Queensland Colliery Employees Union. In the smaller coal mining States of Victoria, Tasmania[18] and Western Australia[19] the process of establishing formal union structures was smaller in scale, but in some cases no less dramatic.

The case of the Victorian Coal Miner's Association ('VCMA') from 1893 to 1907 is a particularly epic period in the history of coal mining unionism in Australia. The Victorian coal miners were located in the (then) remote district of South Gippsland, centered around the towns of Wonthaggi and Korumburra. The first federation of local union Lodges occurred in 1896 but it was not until 1907 that that the VMCA obtained registration under the *Conciliation and Arbitration Act 1904* (Cth) ('C&A Act'). The VMCA was eventually de-registered in 1914, but not before it had endured two massive industrial disputes – with one lasting over 70 weeks – and its existence as a registered organisation being the subject of challenge in one of the most significant early High Court cases in *Jumbunna Coal Mine v Victorian Coal Miners' Association (No 2)*.[20]

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[17] Thomas, P, *The Miners of Queensland, Volume 1: Creating the traditions* Queensland Colliery Employees Union, Brisbane (1986) p8.

[18] A Tasmanian Coal Miners' Association was formed in 1912. It is not clear whether this organisation obtained official registration prior to becoming a branch of the Australasian Coal and Shale Employees' Federation in 1916.

[19] The Collie District Miners' Association was registered in 1900 under the *Industrial Conciliation and Arbitration Act 1900* (WA). See, Ross p124.

[20] [1908] HCA 95 (6 October 1908). The Jumbunna case concerned the application for registration under the C&A Act of the VMCA. An objection to the application was lodged by two employers including the operator of the Jumbunna Colliery. The Registrar of the newly created Court of Conciliation and Arbitration granted registration to the VMCA despite the objections of the employers. The employers then appealed to the Arbitration Court which subsequently upheld the application for registration. Jumbunna then took the matter on appeal to the High Court where it argued, inter alia, that a local union organisation could not have the necessary "interstate"

By the end of the first decade of the 20th century, there existed the essential elements of what would become a national federation of coal miner's unions. The first manifestation of this organisation under the C&A Act emerged in 1913 with the registration of the Australasian Coal Miners Association.[21] However, the first truly national union embracing of all the main coal districts in Australia (and for a period, New Zealand)[22] occurred with the registration in 1916 of the Australasian Coal and Employees Federation – known commonly from that date forward as the Miners' Federation.

From the outset, the Miners' Federation adopted the manner of organisation that had developed amongst the local coal mining unions from the second half of the 19th century. As the inaugural constitution of the Miners' Federation made clear – the union was truly federal in concept, with fundamental autonomy in decision making residing in the District Branches, and within that unit of organisation, the individual mine Lodges. The Miners' Federation also explicitly adopted principles of direct representation for all levels of leadership in the union. That is, all positions in the Miners' Federation – local, District and National - were to be directly elected by the membership, voting in Lodges.

This concept of direct voting and democratic control extended through to the decisions of the supreme governing body of the Miners' Federation, the Central Council. The rules of the Miners' Federation provided that all decisions of Central Council were subject to ratification by direct vote of the membership, voting in

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character required under s51(xxxv) of the Constitution to attract the jurisdiction of the C&A Act. In dismissing this appeal, Justice O'Connor of the High Court developed some of the most important principles guiding the interpretation of the Australian Constitution – particularly in respect to the necessity for a broad reading of the Constitution over a narrow construction, wherever possible. He also introduced the notion that the Court should strive for general comity with international law norms in interpreting the Constitution. See Kirby, M AC CMG 'A Century Of Jumbunna – Interpretive Principles And International Law' (2010) 31 *Adelaide Law Review* 1.

[21] Ibid ATUA

[22] See, Ross, at pp298-299.

Lodges, before they could become the policy of the union.[23] As to the likely influence of British coal miner traditions on this aspect of the democratic practice of the Miners' Federation, Beatrice and Sidney Webb writing in 1902, made the following observation:

> Among the well-organised Coalminers of the North of England the theory of "direct legislation by the people" is still in full force. Thus, the 19,000 members of the Northumberland Miners' Mutual Confident Association (established 1863) decide every question of policy, and even many merely administrative details, by the votes taken in the several lodge meetings…

In each respect, voting in Lodges has meant an attendance vote by members of the Federation in the workplace conducted by a union Returning Officer.

These essential characteristics of democratic control, namely:

- Direct voting by the membership for all leadership positions in the union;[24]
- Direct voting by the membership to endorse or reject, the decisions of the supreme governing body of the union;[25] and
- The conduct of elections at the workplace by elected union Returning Officers.[26]

remains the fundamental democratic apparatus of the Union to this day.

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[23] Webb, S and Webb, B, *Industrial Democracy* Longmans, Green and Co., London (1902) p 32.

[24] CFMEU Mining and Energy Division Rules – Rule 17– Ballot.

[25] CFMEU Mining and Energy Division Rules – Rule 8(iv) – Endorsement of Decisions.

[26] CFMEU Mining and Energy Division Rules – Rule 17– Ballot.

With the emphasis on direct democratic control in the Constitution of the Miners' Federation it is possible to see the lasting imprint of the principles and ethos of working class organisation going back to the earliest days of unionism in Britain. The organisational character of the Miners' Federation has always been strongly local, participatory, autonomous and self-reliant. At its core was the Lodge, which remained the focal point of membership control over the actions of its elected representatives. Fundamental to the operation of the Lodge were elections conducted at the workplace by Local Returning Officers elected by and from members of the Federation.

In the third section of this paper, we describe the manner and process of elections conducted by the Miner's Federation and the Union, subject to the exemption existing in respect of elections by the AEC.

However, any discussion of the organisational principles and ethos that has shaped the Miners' Federation and the Union cannot escape the impact that workplace safety and the sadly frequent occurrence of mine disasters has had on the outlook of the members that comprise the union. The impact of workplace safety issues has been to strengthen the notions of self-reliance, mutual support and solidarity that are deeply ingrained in the workforce. From the earliest days coal miners – particularly underground miners – have learnt from bitter experience that the only persons that they could rely upon to ensure their personal safety and welfare, were their workmates. This has led over the decades to the coal mining industry in Australia being subject to unique forms of safety regulation that include the ceding to representatives of the workforce, powers to enforce safety standards that are unheard of in other industries.[27]

[27] Refer to the *Coal Mining Safety and Health Act 1999* (Qld) and the *Coal Mine Health and Safety Act 2002* (NSW). In particular, note the statutory powers and responsibilities given to Industry Health and Safety Representatives (Queensland) and Industry Check Inspectors (NSW). These statutory positions are conferred with powers similar to Mines Inspectors, but are elected by and from the membership of the Union. They are elected under the ballot rules of the Union in elections conducted by the National Returning Officer.

Underground coal miners have been subject to some of the worst industrial disasters in Australian history. Whilst safety standards have now improved to the point at which the Australian coal mining industry leads the world, the impact of these disasters have left an indelible imprint on the Union. The mineworkers' memorial wall at the Union offices in Cessnock, contains the names of over 1,800 adults and children who have died in the Northern District coal fields alone in industrial accidents. This figure can be extrapolated and multiplied many times over through the other coal mining districts in Australia. It is worth recalling some of the most terrible of these coal mine tragedies, some of which occurred in relatively recent history:

- The 1887 Bulli mine disaster which killed 81 men and boys.
- The 1902 Mt Kembla coal disaster which killed 96 men and boys.
- The 1921 Mt Mulligan mine disaster that killed 75 mine workers.
- The 1972 Box Flat mine disaster that killed 17 mine workers.
- The 1975 Kianga No 1 mine disaster that killed 13 mine workers.
- The 1979 Appin mine disaster that killed 14 mine workers.
- The 1986 Moura No 4 mine disaster that killed 12 mine workers.
- The 1994 Moura No 2 mine disaster that killed 11 mine workers.

Regrettably, the last 12 months have also seen one of the worst years for fatalities in the coal mining industry over the last decade, with four fatalities in mines in Queensland and New South Wales.

The history and experiences of coal mine workers arising from both their industrial and safety concerns has reinforced the importance of an effective workplace organisation and direct participation in decision making by rank and file workers. The model of democratic control adopted by mine workers, as reflected in the rules of the Miners' Federation, and then the Union, is derived from generations of practical experience.

The rules of the Union provide that this democratic control resides in the membership of the Union, organised in Lodges. This is as it should be. The election of office bearers of the Union occurs via elections conducted at the workplace level, overseen by National and Local Returning Officers, in accordance with the rules of the Union. This is also as it should be.

The system of democratic control that that has been adopted by the Union has worked exceptionally well for over a century. The longevity of the model is a testament to the fact that the system of democratic control adopted by the Union is based on sound democratic principles that allow as free an expression of the will of rank and file workers as any industrial organisation in Australia.

2. The regulation and oversight of union elections in Australia – a means to an end, or end in itself?

It might be thought that the present statutory regime that nominates the AEC as the mandated body for the conducting of union elections in Australia is both long-standing and in conformity with international norms. However, such a conclusion would be demonstrably wrong. The statutory requirement that the AEC conduct union elections unless an exemption is obtained from the Industrial Registrar/General Manager of the Commission only appeared in the statute books with the making of the *Industrial Relations Act 1988* (Cth) ('IR Act').

Similarly, the practice in those countries that have the most similar legal and cultural inheritance to Australia – Britain, New Zealand and Canada – shows varying approaches to supervision and regulation of union elections, with New Zealand[28] and Canada[29] having little in the way of prescribed controls over internal union affairs, whilst Australian and British law occupies the opposite end of the legislative spectrum. However, it should be noted that even the highly prescriptive British provisions do not require the conduct of union elections by a nominated Government agency as is the case in Australia.[30]

In this section of the paper, we will consider the legislative history and policy rationale behind the Australian approach to the regulation and supervision of union elections. It will be argued that the approach adopted by Australia – which is to impose a degree of Government supervision rare amongst developed democracies – is the result of specific historical and political events, the most influential of these being the cold war politics of the 1950's and the dramatic industrial struggle between the "industrial groups" and communist elements of the trade union movement. We shall argue that the cold war mind-set that gave rise to much of the legal apparatus governing union elections is of little relevance today and that the only legitimate concern of Government is to promote the democratic participation and control of organisations by their members.

The history of Commonwealth regulation of trade union elections is comprised of four distinct stages. The first stage is associated with the introduction of the C&A Act in 1904 and represents a largely non-interventionist approach to the regulation of industrial organisations. The second stage occurs in the 1920's as

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28 See, Part 4 of the *Employment Relations Act 2000* (NZ) (Recognition and operation of unions). See also, guidance material entitled '*Running a Society'* prepared by New Zealand Government's, Companies Office which is available at www.societies.govt.nz/cms/incorporated-societies/running-a-society

29 Lynk, M, "Union Democracy and the Law in Canada" (2002) *Just Labour* (1) *16*.

30 See Chapter IV of the *Trade Union and Labour Relations (Consolidation) Act* 1992 (Elections for certain positions). See also, Department of Business Innovation and Skills *Trade Union Executive Elections: A guide for Trade Unions, their members and others* (2010).

the Bruce-Page conservative governments sought to increase the degree of regulatory scrutiny of trade unions as a means of curbing industrial militancy, particularly amongst seafarers and waterside workers. The third and arguably most significant period concerns the years from 1949 to 1951 as first, the Chifley Labor Government and then the Menzies Liberal-Country Party Government responded to allegations of vote rigging in the union election battles between communists and industrial groupers, particularly in the Federated Ironworkers' Association ('FIA'). The fourth period surrounds the introduction of the IR Act in 1988 and in particular, the findings and recommendations of what is commonly known as the Hancock Report into Australian industrial relations.[31]

The enactment of the C&A Act was one of the most significant steps towards the development of an Australian national character in the years following federation. This is because the C&A Act embodied a uniquely antipodean[32] approach to the resolution of industrial disputes between workers and business that provided fairness in outcome, not just the suppression of industrial disputation;[33] but it is also because of the huge influence of early industrial cases that derived from the provisions of the C&A Act in influencing the High Court's approach to the interpretation of the Australian Constitution. [34]

Central to the operation of the C&A Act was the notion of representative bodies of employees and employers. That is, the intended operation of a system of

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31 *Australian Industrial Relations Law and Systems: Report of the Committee of Review* Australian Government Publishing Service, Canberra 1985.

32 By the time of the introduction of the C&A Act in 1904, there were already functioning arbitration and conciliation systems in New Zealand and New South Wales.

33 The signal achievement in this regard being the introduction of the concept of an arbitrated "living wage" by Justice Henry Bourne Higgins in the 'Harvester Case' *Ex parte H.V. McKay* (1907) 2 CAR 1. See also Kirby, Michael AC CMG, "Industrial Relations Law – Call Off The Funeral", speech commemorating 100 years since the making of the *Conciliation and Arbitration Act 1904* - http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_industrial.htm.

34 Ibid *Jumbunna*; "Kirby 2010"; *Waterside Workers' Federation of Australia v Alexander* (1918) 23 CLR 434; (1920); *Clyde Engineering Co Ltd v Cowburn* (1926); and later *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956).

conciliation and arbitration was predicated on the existence of registered bodies that would speak on behalf a defined class of employee or employer. The promotion of registered organisations was embodied in the principal Objects of the C&A Act at section 2(vi) as follows:

> To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act;

The 1904 enactment of the C&A Act had little to say, explicitly, as to how registered organisations were to run their internal affairs, including the conduct of elections for office bearers of the new registered organisations. Section 55(2) of the C&A Act provided that applicants for registration had to comply with a number of conditions set out in Schedule B to the Act before registration could be granted. However, the only parts of Schedule B relevant to elections or democratic control of registered organisations were as follows:

> The affairs of the association must be regulated by rules specifying the purposes for which it is formed, and providing for the following matters:-
>
> (a) The appointment and continuance of a Committee of Management, a Chairman or President, and a Secretary;
>
> (b) The powers, duties, and removal of the Committee and of the Chairman or President and the Secretary;
>
> (b) The control of the Committee by General or Special Meetings;
>
> ….

If one accepts that the term “appointment and continuance of Committee of Management” appearing above, connotes a democratic process of appointment involving members of the registered organisation, then the only discernible restraints on the internal processes of unions under the first C&A Act is the requirement that the rules provide for elections of key personnel and the

governing body, and that the governing body is in turn subject to the control of general or special meetings of members. As observed by McCallum, the lack of detailed prescription as to the internal workings of industrial organisations may be partly attributable to the fact that the registration of organisations under the C&A Act was an ancillary aspect to the main purpose of the Act, which was to encourage and strengthen compulsory arbitration.[35]

The emergence of serious disputation in the post World War One period in Australia was a particular concern to the conservative Governments that were led by Stanley Melbourne Bruce from 1923 until 1929. The Bruce Governments (which entered into formal coalition with the Country Party from 1922) exhibited a contradictory approach to the legal regulation of industrial relations and organisations. On the one hand, Bruce was a vocal proponent of a non-interventionist approach to industrial disputation, preferring that the industrial protagonists be left to their own devices, except in situations where the public interest was threatened. On the other hand, his Governments, particularly after the maritime strike of 1926, sought to centralise legislative power over economic matters in the Commonwealth and enacted the most intrusive legislation relating to the internal workings of unions seen since Federation.

The 1928 amendments to the C&A Act introduced by the Bruce Government, allowed for, amongst other things, the power for the Arbitration Court to order a secret ballot of employees of unions prior to taking industrial action[36] and penalties for unions who incited their members to refuse or not accept employment.[37] More immediately relevant, the 1928 legislation also introduced, for the first time, the notion that the rules of a registered organisation could be

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[35] McCallum, R 'The Mystique of Secret Ballots: Labour Relations Progress v Industrial Anarchy"' [1976] 2 *Monash University Law Review* at page 168.[cite the page that the article commences plus the page you are referring the reader to – convention is e.g 168, 169 ("McCullum 1976")

[36] C&A Act s56A.

[37] C&A Act s8(2).

disallowed by the Arbitration Court on grounds that they were "tyrannical or oppressive"[38] and that individual members could apply to the Court for orders that the performance of rules be observed[39].

The Bruce Government amendments were intensely political interventions into what were previously seen as the prerogatives of registered organisations. Significantly, the interventions occurred following the infamous "red scare" election of 1925 in which Bruce defined his principal task if re-elected as being "…*to defeat the nefarious designs of the extremists in our midst, and armed with the mandate of the people will take all necessary steps to accomplish this end*".[40] This approach of first vilifying sections of the union movement for political purposes and then seeking to extend Government regulation and control over the activities of trade unions in order to weaken their power would become a depressingly familiar modus operandi of Australian conservative governments up until the present day.

The incoming Scullin Government amended some of the more onerous intrusions into the internal working of trade unions in the 1930 amendments to the C&A Act. The Scullin amendments removed the capacity for a quorum of ten members of a union to require a secret ballot on any decision of the governing body of the union, but in its place the ability of the Court to order to order such a ballot on application was retained.[41] Similarly, the provisions relating to the ability of members to seek Court orders that the rules of the union be observed were retained and remained a permanent fixture of Commonwealth labour law thereafter.

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[38] C&A Act s58D.

[39] C&A Act s58E.

[40] See, Bruce, Stanley Melbourne *Election Speech, 5 October 1925 avaliable at* http://electionspeeches.moadoph.gov.au/speeches/1925-stanley-bruce

[41] McCullum 1976 p169.

It is notable that the Bruce and Scullin amendments did not disturb the existing arrangements in respect of union elections being conducted by unions themselves rather than an external body. The first legislative reforms in this direction occurred in the dying days of the Chifley Government.

By 1949, the Chifley Government was in serious electoral trouble with multiple crises buffeting it. The extreme measures taken by the Labor Government in the national coal miners' strike had caused significant disquiet and division within labour movement ranks; the Government had failed in its attempts to nationalise the Australian banking system; and more generally, Australian politics was becoming increasingly infected by a cold war mind-set that was typified by the vicious industrial competition between "grouper" and communist elements in the trade union movement in the immediate aftermath of world war two.[42] In addition, amongst the general public there was increasing weariness with the continuation of post-war austerity measures, such as continuing petrol rationing.

The measures introduced by the Chifley Government in its 1949 amendments to the C&A Act appear to have been a direct response to the recommendations of an ACTU inquiry into allegations of electoral irregularities, as well as a sensational expose in the Melbourne *Age* newspaper of a former communist union official detailing specific allegations of electoral fraud that he had participated in.[43] Merrifield has described the Chifley amendments as an attempt to *"..meet the public demand, while still preserving the maximum of union independence and initiative*" for trade unions.[44] The main changes brought in by the Chifley Government included:

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[42] For an excellent discussion of these issues, see generally: Day, D, *Chifley: A Life,* Harper Collins Sydney (2001).

[43] Merrifield, L. 'Regulation of Union Elections in Australia' (1957) *Industrial and Labor Relations Review* 10(2) 258.

[44] Ibid p259.

- A provision that allowed any union member to file an application for an inquiry by a single judge into alleged union election irregularities;

- A specific power that enabled the Court to order that a union open up its membership records to inspection by the Industrial Registrar;

- The conferral on the Court of the power to declare and election void and as a remedy to either call a new election, or declare certain persons to have been elected;

- The introduction of a provision that allowed for the Commonwealth Attorney General to authorise the payments of applicant employees' legal costs in certain circumstances; and

- Most relevantly from the perspective of the current discussion, the ability for a union to seek by application, to have the union elections conducted by the Industrial Registrar.[45]

In 1951, the Menzies Liberal Government introduced further significant amendments relating to union elections. The purpose of these changes was described by a contemporary American legal academic as part of Menzies' "…*program to destroy the influence of communism in Australia*".[46] The amendments would change the C&A Act in the three main ways:

> (1) to require that union rules must provide for election of officers by secret ballot; (2) to permit union elections of officers to be conducted under Arbitration Court auspices, not only when the union requests it (as was provided under the Labor party's 1949 legislation), but where a group of union members ask for it to prevent irregularities; and (3) to strengthen the power of the Court

45 Merrifield 1957 at pp 259-260.

46 Ibid p260

> to ascertain the views of union members by secret ballot when the Court considers that it might prevent or lead to a settlement of a labor dispute.[47]

Therefore, by the early 1950's the C&A Act exhibited most of the features that continues to exist in Commonwealth law today related to the protection of union members' rights in the context of union election processes. As noted however, the political context in which the measures were introduced weighed heavily on the form and effect of the proposed changes. The changes were aimed squarely at empowering dissident, mostly anti-communist factions to effectively challenge the existing power elites in trade unions. The legislative changes operated on the assumption that fraudulent electoral practices was endemic amongst communist controlled unions, and that given an opportunity for a free expression of will, rank and file employees would in turn throw out these anti-democratic forces.

However, as McCallum has observed, the industrial reality following these reforms has been far more complex. Corrupt union leaders could continue to be returned to office, sometimes overwhelmingly, as long as they were effective industrial representatives.[48] Similarly, it appears to be a generally erroneous assumption that given the ability to exercise free will in a secret ballot, that rank and file members would prove to be more moderate in their instincts than their supposedly unrepresentative and more radical leadership.[49] As observed by Canadian academics England and Rees, it might be a case of "be careful of what you wish for":

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[47] Ibid.

[48] McCallum 1976 p177. In respect of the United States experience in purging of the Teamsters' Union of organized crime elements, but not of control by the Hoffa group, see Jacobs, James B. & Portnoi, D. 'Combating Organized Crime With Union Democracy: A Case Study Of The Election Reform In United States V. International Brotherhood Of Teamsters" (2009) Loyola of Los Angeles Law Review, (42) 335

[49] McCallum 1976, at pp 178-179.

> It is… ironic that business-oriented governments usually make the most fuss about handing unions back to their members in the name of democracy when their business clients stand to lose the most from it. The real purpose of such measures, of course, is to reduce strikes; the premise being that the militant top commonly forces the passive majority into unwanted strikes. However, that premise is generally false: the top typically acts as a manager of discontent, dissipating rank and file militancy rather than inflaming it. Proponents of responsible yet democratic trade unionism must walk a fine line between enhancing grass roots influence without at the same time undermining responsible decision-making by the leadership. If democratization ultimately fuels greater militancy, its proponents can hardly complain of being unable to have their cake and eat it too.[50]

It should be noted that the experience of the Union in the conduct of protected action ballots under Part 3-3 of the FW Act bears out the skeptical approach to the moderating effect of secret ballots amongst members. That is, the average participation level and "yes" vote in protected action ballots conducted by the Union under the FW Act are routinely in the high 80 percent region.[51]

The last major stage of legislative reforms to the way in which union elections conduct their elections, occurred with the making of the IR Act in 1988. However, before considering these changes it is worth noting two other significant amendments to the C&A Act that were made in 1973. First, the existing requirement for a secret ballot of employees was extended to the election of a wide range of representative structures within registered organisations. Second, the C&A Act was amended to provide that where a registered organisation opted

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[50] England, G and Rees, B 'Reforming the Law of Internal Trade Union Affairs: Some Transatlantic Pointers' (1990) 15 *Queen's Law Journal* 97, 103. ("England and Rees 1990")

[51] See, the ballot results published on the Fair Work Commission website at: https://www.fwc.gov.au/resolving-issues-disputes-anddismissals/industrialaction/protected-action-ballots/ballot-results. The protected action ballots conducted by the Union are not conducted by the AEC, but by authorised ballot agents engaged by the Union.

to have its elections conducted by the Industrial Registrar, the cost of these elections would be borne by the Commonwealth.[52]

The making of the IR Act in 1988 involved a substantial reworking of many of the provisions of the C&A Act and a formal repeal of that Act. In substance as well as form, the IR Act represented the first definitive break from centralised wage fixing and the arbitration model since 1904. The IR Act introduced the first legislative encouragement of a decentralised, enterprise bargaining system that is now the norm of Australian industrial relations. The IR Act was introduced by the Hawke Labor Government and was seen as part of that Government's broader economic modernisation program that included deregulation of the finance sector, the lowering of tariffs and protection of Australian industry and the privatisation of certain Government assets.

The introduction of the IR Act was preceded by a wide-ranging and comprehensive examination of industrial relations arrangements and labour laws that became known as the Hancock Report, after the name of the chairperson of the committee established to produce the report, Professor Keith Hancock. The Hancock Report deals with issues of union governance at Chapter 9 of the Report, and with the question of union elections at Part VIII of the Chapter.

It appears that the Hancock committee was cognisant of the importance of preserving a proper balance between international norms relating to freedom of association and the degree of interference in the working of registered organisations by the State in considering its recommendations concerning internal union governance:

> Again, the question is: what is reasonable by way of superimposing statutory obligations upon accepted principles of free association?[53]

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52 McCallum 1976 p170.

This is a significant consideration, because as mentioned, Australia is unusual amongst developed democracies in the extent to which there is statutory interference in the internal operations of trade unions. Indeed, it is strongly arguable that aspects of the current framework concerned with the regulation of trade union elections in Australia are inconsistent with our international labour standard obligations. At a general level, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)[54] of the International Labour Organsiation (ILO) adopts at Article 3 as one of its fundamental principles the following:

> ***Article 3***
>
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Whilst the ILO has recognised certain State prescription (such as a requirement for secret postal ballots under Australia law) as not being inconsistent with the Convention 87 if it has the intended effect of increasing democratic accountability, measures that do not have this fundamental purpose are in a different category. Specifically, *"…(l)egislation regulating "in detail" the internal election procedures of unions is impermissible as "apriori supervision" by the state… State*

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53 Hancock, K.J., Fitzgibbon, C.H and Polites, G *Australian Industrial Relations Law and Systems: Report of the Committee of Review Volume Two* ("Hancock et al 1985") April 1985 Australian Government Printing Services at p 486.

54 *Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950) Adoption: San Francisco, 31st ILC session (09 Jul 1948) - Status: Up-to-date instrument (Fundamental Convention).*

supervision of union elections and disqualification of candidates on political grounds are impermissible."[55]

In addressing the question of the external supervision or regulation of trade union elections, the Hancock Report comments on the effect of the 1949 amendments to the C&A Act discussed earlier, in the following terms:

> Provisions permitting an organization or a number of its members to have elections for office conducted in accordance with arrangements made by the Registrar were first introduced into the Act in 1949. The enabling legislation was part of a legislative package, the thrust of which was to ensure, as far as possible, that elections were, in fact, conducted, that they expressed the will of those entitled to vote under the rules, and that the incidence of irregularities occurring in connection with the conduct of such elections was kept to a minimum.[56]

The Hancock Report then considered the take up of the option provided in the C&A Act for elections conducted by the Industrial Registrar. The report notes a relatively low take up of the facility until 1973, when the C&A Act was amended to provide that the Commonwealth would carry the entirety of the financial burden of conducting union elections under s170 of the Act. From that point on, the Report notes a dramatic increase in the number of unions applying for externally conducted elections – the obvious implication being that the option was being taken up for primarily economic reasons.

However, in coming to its recommendations on the conduct of union elections the Hancock Report comes to the conclusion – rather surprisingly, given the paucity of discussion on the topic - that externally conducted union elections should be the <u>default</u> position under Commonwealth law:

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[55] England and Rees 1990 p104

[56] Hancock et al 1985 at p 492.

> "We consider that the grounds which gave rise to the legislative package of 1949 are still relevant. Indeed, we support a general presumption that elections should be conducted by official returning officers unless the organization successfully applies to the Registrar for an exemption. The Registrar should not grant an application for exemption unless he is satisfied that the election will be conducted by an organization in accordance with its rules and the requirements of the Act. An exemption should remain in force until revoked by the Registrar on his own initiative or in response to a request by the organization.
>
> The conduct of elections by Commonwealth officials facilitates a consistency of approach, leading to fewer invalidities and disputed elections. It should enhance the confidence of the community and the members of organizations in the conduct of ballots.
>
> Present provisions as to the cost of elections should not be changed. That is, the cost of an officially conducted election should be borne by the Commonwealth; but if an organization conducts its own election, it should bear the costs.
>
> As a general principle, we believe that elections for office should be conducted by secret postal ballot unless an alternative method of secret voting can be shown to produce a fuller participation of members of the organization and a freedom from intimidation."[57]

The recommendations of the Hancock Report largely came to fruition with the passage of the IR Act in 1988. Sections 211, 212 and 213 of the IR Act provided that the default position for all registered organisations would be externally conducted ballots run by the AEC. Only by successfully obtaining an exemption would organisations be authorised to conduct their own elections. The legislative criteria to the considered by the Registrar under s213 of the IR Act in granting an exemption closely followed the recommendations of the Hancock Report. They were:

- the rules of the organisation or branch governing the conduct of elections comply with the Act;

[57] Ibid at pages 493-494.

- elections will be conducted in accordance with the rules and the Act; and

- members entitled to vote in elections will be able to do so without intimidation.

Sections 211 to 213 of the IR Act were carried over unchanged in the making of the first iteration of the *Workplace Relations Act 1996* ('WR Act') retaining the same numbering as the IR Act. In turn, the substance of these provisions was also transmitted, unchanged into the *Fair Work (Registered Organisations) Act 2009* ('FW (RO) Act'), however the numbering is now ss183-186 of that Act.

There does not appear to have been any substantial consideration of the exemption provisions since the discussion contained in the Hancock Report in 1985. Similarly, there does not appear to be any Full Bench authority going to the grounds and reasons for granting a statutory exemption under the provisions,[58] though there are a number of individual decisions on applications issued by the Industrial Registrar/General Manager of the Fair Work Commission or its predecessors.[59]

Whilst the FW (RO) Act does not have specified objects, s5(3) explains Parliament's intention in making the Act relevantly in the following terms:

> (3) The standards set out in this Act:

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58 Email from Chris Enright to the CFMEU Mining & Energy Division, 24 July 2014 - Information request concerning registered organisations who currently have s186 exemption certificates ("Chris Enright email").

59 For example, *Re Metal Trades Industry Association of Australia*, Registrar J.P O'Shea, 28 November 1990, Print J5763; *Re The Pastoralists' Association of West Darling* Registrar J.P O'Shea, 4 March 1991, Print J6929; *Re Australian Teachers' Union* Registrar B. Deegan, 16 June 1993, Print K8037.

> (a) ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and
>
> (b) encourage members to participate in the affairs of organisations to which they belong; and
>
> (c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and
>
> (d) provide for the democratic functioning and control of organisations; and
>
> (e) facilitate the registration of a diverse range of employer and employee organisations.

In summary, we are left with a view of the operation of the existing provisions of the FW (RO) Act in which the purpose can be described as primarily concerned with ensuring democratic accountability to the membership of registered organisations of their elected leadership. The guidelines for approval of an exemption by the Industrial Registrar/General Manager support this interpretation of the purpose of the provisions.

Accordingly, it can be seen that the FW (RO) Act election provisions are properly construed as a means to an end, and are not an end in themselves. In conformity with international labour norms, the Australian approach to regulation should be interpreted in a manner that countenances interference in the internal workings of unions only to the extent necessary to achieve the objectives relating to democratic control and accountability. It would be a mistake therefore to propose amendments to the current provisions that interfere with the ability of registered organisations to achieve these ends by means that are both familiar and culturally suited to the membership they represent. This is particularly the case where it can be demonstrated that the alternative approach adopted by the

registered organisation has delivered a greater level of democratic control and accountability than the default provisions of the FW (RO) Act.

3. The experience of elections conducted by the Union under its exemption certificate - transparency, efficiency and high voter turnout

General elections of the Mining and Energy Division of the CFMEU are conducted every four years, in respect to all District Branches and for National leadership positions. Each elected position within the Union is therefore up for re-election at the same time (except for casual vacancies). As mentioned in the first part of this paper, each level of full time leadership position in the Union, as well as the representatives on the governing bodies of the Union are directly elected by members of the Union. There is no collegiate aspect within the decision making structure of the Union.[60]

The Union is subject to an exemption originally obtained from the Australian Industrial Relations Commission on 2 May 1996. The Union is one of 11 registered trade unions and 30 registered employer organisations that currently have an exemption from the default requirement in the FW (RO) Act.[61] There have been five general elections conducted during the period of the exemption certificate, and one special ballot to elect the General-Secretary.

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[60] The only possible exception relates to the composition of the Central Council of the Union. Rule 8(b) and (c) mandates that the principal National and District Officers are automatically members of Central Council. However, each District is then entitled to further representation on Central Council of members directly elected by the rank and file based on a membership threshold of 2000 for each Central Council representative. This means that in the larger District Branches the majority of representatives on Central Council are rank and file workers elected directly from their Lodges in a general ballot of members.

[61] Chris Enright email.

The election of officers of the Union pursuant to the exemption occurs by means of a secret ballot of members overseen by a National Returning Officer and largely conducted by Local Returning Officers elected by and from members in local Lodges. The National Returning Officer is also responsible for ensuring a postal vote component for the union elections for those members who are not organised into Lodges. The postal vote component of the General elections conducted by the Union and represent a small minority of the votes cast.

The National Returning Officer is appointed by the Central Council of the Union in accordance with Ballot Rule 17 of the Union.[62] The recent practice of the Union has been to appoint a retired union official as the National Returning Officer. The National Returning Officer from 2000 to 2013 was Kenneth Hawkins, a former General Secretary of the Mine Mechanics Union. Mr Hawkins passed away in 2013. Since Mr Hawkins' passing, the Union has appointed Mr Greg Betts, the former President of the Queensland District Branch of the Union as National Returning Officer.

The Union has produced a "Returning Officers Manual" that explains in detail the responsibilities and obligations of National and Local Returning Officers in the conduct of the elections of the Union. A copy of the Returning Officers Manual is attached to this paper as **Attachment 1.**

The Returning Officers Manual urges all involved in the election process to uphold the highest traditions and standards of conduct of the Union. It is worth reproducing in full, the introduction to the publication by General Secretary Andrew Vickers:

> The role of Local Returning Officer is an extremely important position of responsibility in our Union. Indeed, it has been so since the formation of the Miners Federation in 1915.

[62] Mining and Energy Division Rule Book, rule 17 – Ballot.

> Unlike many other unions today, our Union has largely maintained the ability to conduct our own elections. That we have been able to do so in the face of many challenges over the years is the result of the integrity with which we have conducted all elections in the past the respect with which our Local Returning Officers have been held. This is evidenced in the high return of votes from our members in all previous elections. The Union's ability to conduct our own elections will be jeopardised if we become complacent about the importance of elections in our Union.
>
> Our Union demands the highest standards of our officer bearers, from the grass roots Lodge and Branch level, to District Officers and up to the National leadership. We pride ourselves on the quality and character of our officials and we have always set a high benchmark for the processes we engage in, especially the election of our office-bearers.
>
> The conduct of our ballots is integral to the reputation and credibility of our Union. The quality of our Local Returning Officers is essential to maintaining the proud democratic reputation we have established.
>
> Our Union has produced this publication to ensure that we maintain the high standards and traditions of our Returning Officers. It outlines what we require of you and how we can assist you to carry out your important work with diligence and confidence.

As we will show shortly, the standards professed in the extract above are no hollow boast. The conduct of union elections by the Union has resulted in a very high return rate relative to postal vote union elections conducted by the AEC. Moreover, there has been absence in living memory of legal challenges to the validity of election results.

The Returning Officers Manual goes into specific detail as to how an election should be conducted under the ballot rule of the Union. What follows is a summary of the process.

The timing of the four yearly elections is at the discretion of the National Returning Officer.[63] The National Returning Officer will formally appoint Local Returning Officers, who will normally be the Local Returning Officer elected by the Lodges to conduct local Lodge elections.[64] In the event that a Local Returning Officer is not appointed by the nominated date, the members of the relevant site will receive a postal vote.[65] All postal votes are conducted by the National Returning Officer.

The National Returning Officer will establish a timetable for the conduct of the election. The normal timetable for the conduct of an election from the time advertisements are placed in the local and union publications until a ballot is concluded is about 6 to 8 weeks.[66]

One of the first tasks of the National Returning Officer is to confirm the roll of voters seven days before the nomination period commences. It is the responsibility of District Branches to supply the relevant information to the National Returning Officer in order to compile the roll.[67] The roll of members is open to the inspection of any candidate for a period of 14 days leading up to the ballot opening and until the ballot is declared. A candidate cannot make a copy of the roll and District Offices and National Offices are not permitted to supply membership records to candidates.[68]

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63 Construction, Forestry, Mining and Energy Union *Returning Officers Manual: A Guide to District and National Election Processes* , p5.

64 Ibid p9.

65 Ibid.

66 Ibid, p7.

67 Ibid, p11.

68 Ibid at pp 11 and 32.

Candidates for office are required to campaign and communicate to members in a manner which is "..*fair, respectful and non-offensive to other candidates*".[69] Non compliance with this requirement can lead to a ballot being invalidated by the National Returning Officer. Candidates are not permitted to use any Union resources in seeking election and the District and National Offices and Local Returning Officers[70] are not permitted to assist any candidate. All costs of electioneering are to be borne by the candidates themselves. The only exception is that the National Returning Officer may authorise each candidate to have posted at the Union's expense, one A4 size, single sided notice to all members.[71]

The form of the secret ballot used in the vast majority of cases is an attendance ballot at the mine site. The attendance ballot is conducted and supervised by the Local Returning Officer.[72] The attendance ballot is normally conducted on company property in a convenient area on the surface of the mine, such as a training room, bath house area, or administration area. The ballot is conducted in the much same manner as a vote in local, State or Federal elections, with an employee receiving ballot papers from a Local Returning officer after having his or her identity confirmed and marked off the roll of voters. The member is then given a ballot paper initialed by the Local Returning Officer. Only ballot papers that are issued to members are initialed.[73]

The member then attends a private area of the room to fill in the ballot paper and to place the ballot paper in a secure box retained by the Local Returning Officer. It is the Local Returning Officers' responsibility to provide a secure and lockable

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[69] Ibid,p19.

[70] Ibid, p 21.

[71] Ibid.

[72] Ibid, p 21.

[73] Ibid.

ballot box. The Local Returning Officer also has a responsibility to ensure that members are free from intimidation and attempts to influence their votes.

The Local Returning Officer then has the responsibility of returning all ballot papers (including unused papers) and a summary sheet to the National Returning Officer. The National Returning Officer will then conduct a count of the ballot papers in the National Office of the Union in Sydney. Scrutineers appointed by the candidates will be permitted to view the count. Progressive tallies will be issued by the National Returning Officer, at his or her discretion. [74]

Once the count is completed (including postal votes) the National Returning Officer will declare the results of the ballot. All candidates will be contacted to advise them of the results of the ballot. The results of the ballot will be published in the next edition of the Union journal *Common Cause*. The National Returning Officer will prepare a report for Central Council in respect of the result of the election and its conduct.

One of the matters reported to the Central Council of the Union in respect of the conduct of elections is the participation rate of employees, including voting rates. The National Returning Officer Report on the 2004 general elections of the Union contains statistics on returns going back to 1996. These are average return figures. Since 2008 however, the Union has developed a database that provides a more accurate median result for election returns. The table below summarises the returns for the last five general elections and the special ballot in 2009:

[74] Ibid, p23.

Year	Return rate including postal votes
1996	71.5%
2000	73.4%
2004	65.1%
2008	71.68%
2009[75]	69.5%
2012	65.3%

The experience of the Union is that part of the gradual decrease in voting returns indicated above is due to the increased proportion of postal votes as part of the total number of votes over the corresponding period. The increase in postal votes in turn, is related to the increase in the number of members who are not members of a Lodge, but are most likely to be the employees of contractors on short term contracts of employment, or not permanently located at a single mine site.

Regardless of this fact, the voting returns of the Union are exceptional when compared to the average returns in AEC conducted postal ballots. Whilst there is (to the best of our knowledge and enquiries) no readily available statistical database concerning the level of returns in respect of postal ballots conducted by the AEC of Australian union members, the available evidence seems to suggest that the membership participation level in ballots conducted by the AEC is substantially less than half of that achieved in elections conducted by the Union, as the following examples demonstrate.

The website of the Finance Sector Union of Australia[76] ('FSU') reports that in the most recent elections for the position of National Secretary of that union in 2014,

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[75] Special ballot to elect a new General-Secretary following resignation of the incumbent.

a total of 5,748 votes were returned, plus 34 informal votes. If one then examines the 2013 Annual Report lodged with the Fair Work Commission by the FSU,[77] the return reveals a total national membership as at 31 December 2013 of 36,739 members. Accepting the possibility of some slight variation, this equates to a voting return of approximately 15.6% of the national membership in the most recent election.

The Australian Education Union Victorian Branch ('AEU') website[78] records that the 2012 election for Victorian Branch President returned a total of 14,520 votes cast. Fair Work Commission records,[79] which include the 2011 returns of the AEU, show that the Victorian Branch membership as at 31 December 2011 as being 46,668. Again accepting the possibility of slight variation in the precise figure, the rate of voter return in this election was approximately 31.2%.

In the 2009 elections by members of the Australian Nursing Federation for the position of Federal Vice President, 162,871 ballot papers were issued and 33,330 were returned to scrutiny, equating to 20.9% of eligible voters. This information is derived from a return lodged with the Australian Electoral Commission by the AEC.[80]

In the 2012 election for Federal Secretary of the Community and Public Sector Union (SPSF Group), there were 89,458 ballot papers issued with a return of 17,562 votes, equating to 20% of eligible voters. This information is derived from

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76 http://www.fsunion.org.au/News-Views/FSU-Election-Results.aspx

77 See, http://www.e-airc.gov.au/files/036n/AR2014161FSU.pdf

78 www.aeuvic.asn.au/160182_11_80147032.html

79 www.e-airc.gov.au/files/284wic/AR2012372.pdf

80 Return completed by Shane T Lanning of the Australian Electoral Commission, 17 February 2009.

a Declaration of Results for Contested Offices lodged with the General Manager of the Fair Work Commission by the AEC.[81]

Similarly, it has been reported that in the 2013 elections for the newly constituted HSU New South Wales Branch, there was a total of 8,500 votes cast.[82] An examination of the 2013 Annual Return lodged with the Fair Work Commission for the HSU NSW Branch shows a total membership of 29,855,[83] therefore the voting returns in the 2012 election represented approximately 28.4% of the membership of that branch.

In summary, the average rate of return of the five examples of AEC conducted union postal ballots mentioned above is 23.2%.

This Australian sample seems to be generally consistent with the evidence deriving from Great Britain,[84] which has the closest model to Australia of a system of externally conducted postal voting for union elections. For example, in the 2010 and 2013 elections for the position of General Secretary of Unite, Great Britain's largest union (an amalgamation of the former Transport and General Workers' Union and Amicus) the voter turnout was 15.8% and 15.2% respectively.[85] Also, the actors' and entertainers' union Equity reports that in its recent 2014 election for President and Council, the total return of votes was 13% "slightly up on the same elections two years ago".[86] Finally, the Universities and Colleges Union return for its 2009 election for the National Executive Committee

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81 Declaration by Rhys Richards of the AEC, 28 November 2012.

82 'Hayes wins HSU NSW election' *Workplace Express,* 29 November 2012.

83 See, http://www.e-airc.gov.au/files/051vnsw/AR2013248HSUnsw.pdf

84 See, generally, the discussion in McIllroy, J *Trade Unions in Britain Today,* Manchester University Press, Manchester (1995).

85 See, http://en.wikipedia.org/wiki/Unite_the_Union

86 http://www.equity.org.uk/news-and-events/equity-news/malcolm-sinclair-re-elected-for-third-term/

and National Officers, shows a particularly poor voter turnout of just 9.3% of the 117,638 ballots issued.[87]

In contrast, the experience of the Union in conducting elections under the exemption granted to it has been overwhelmingly positive. There has been an exceptionally high voter participation rate precisely because it is an electoral model that is deeply understood and valued by the membership of the Union. As we have seen, the model of voting adopted by the Union has a long history that is profoundly influenced by the social characteristics of coal miners and their local communities and their forebears. The voting model used by the Union is one that maximizes the control of rank and file workers over the leadership of the Union. It is based on the notion that there should be the highest level of direct democracy possible in the Union. Its focal point is the workplace and the Lodge where the overwhelming majority of members are located. There is no valid reason from the perspective of the Union and the members it represents, to alter a system that is working effectively.

Construction, Forestry, Mining and Energy Union
1 August 2014

[87] http://www.ucu.org.uk/media/pdf/r/d/elect09_natscrutineersreport.pdf