



DECISION

Fair Work (Registered Organisations) Act 2009
s.186(2)—Application to revoke an election exemption

Master Builders Association of Victoria
(E2020/93)

MR ENRIGHT

MELBOURNE, 20 APRIL 2020

Application to revoke an election exemption

Original exemption issued

[1] On 15 October 1990, the Master Builders Association of Victoria (MBAV) was granted an exemption from the provisions of subsection 210(1) of the *Industrial Relations Act 1988* which provided that:

‘Each election for an office in an organisation or branch of an organisation shall be conducted by the Australian Electoral Commission.’

[2] I am satisfied that the MBAV’s election exemption continued to apply by operation of relevant transitional provisions.¹ The relevant exemption provisions are now contained in section 186 of the *Fair Work (Registered Organisations) Act 2009* (RO Act).

[3] Section 186(2)(a) of the RO Act provides that the Registered Organisations Commissioner (the Commissioner) may revoke an exemption granted to an organisation or branch on application by the committee of management of the organisation or branch.

[4] Pursuant to s.186(2) of the RO Act, Regulation 137 of the *Fair Work (Registered Organisations) Regulations 2009* provides that an application by the committee of management of an organisation or branch under subsection 186(2) of the RO Act for revocation of an exemption must:

- (a) be in writing; and
- (b) contain a written statement signed by a member of the committee of management stating that the committee of management has resolved to make the application; and
- (c) be lodged with the Commissioner.

¹ The exemption was issued under s.211(1) of the *Industrial Relations Act 1988* (IR Act). Instruments issued under s.211(1) of the IR Act continue in force in accordance with s.2 of Schedule 1 of the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002* and s.622 of Schedule 22 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[5] On 3 April 2020, the MBAV lodged with the Registered Organisations Commission (ROC) a Declaration signed by the President of the MBAV indicating that a resolution had been unanimously passed by the MBAV committee of management at a meeting held on 29 October 2019, and subsequently affirmed on 3 April 2020, that an application be made to the ROC for the revocation of the MBAV's election exemption pursuant to section 186(2) of the RO Act.

[6] On 6 April 2020, the MBAV provided the Commission with the wording of the committee of management resolution seeking revocation.

[7] By instrument dated 5 May 2017, the Commissioner delegated to me pursuant to section 343B of the RO Act, all of his functions and powers under that Act other than those which are non-delegable. The power to determine matters under section 186 of the RO Act is among those powers and functions delegated to me.

Consideration

[8] The history of provisions relating to the conduct of elections for office in registered organisations is summarised in the decision in *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109.² As indicated in that decision at [24]:

[24] In 1989 it became mandatory for registered organisation elections to be conducted by Commonwealth officials unless an exemption had been granted. This was a result of the recommendations in the Report of the Committee of Review into Australian Industrial Relations Law and Systems (the Hancock Report) of 1985 as follows:

1.39 In 1985 the Hancock Report noted the increasing use made of the facility for officially conducted elections between 1949 and 1983. ... [the] Hancock Report considered that:

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 organisations in the conduct of ballots.

1.40 The Hancock Report recommended that the CA Act be amended to, amongst other things, require that all elections for office holders within registered organisations be officially conducted unless an exemption had been granted. This recommendation was adopted in the *Industrial Relations Act 1988* ('the IR Act') which replaced the CA Act and which commenced operation on 1 March 1989.

[9] The default position, now expressed in section 182 of the RO Act, is that elections for office in registered organisations and their branches *must* be conducted by the Australian Electoral Commission (AEC), unless an exemption granted by the Commissioner of the ROC is in force. Consequently, an application for revocation of such an exemption is, in effect, an application to return to the default scheme provided for in the Act.

[10] The power of the Commissioner to grant or revoke an exemption under section 186 of the RO Act is subject to particular requirements. In the case of an application by an organisation or branch under section 186(2)(a) to have its exemption revoked, the elements of Regulation 137 of the RO Regulations as to the nature of the application must be satisfied.³

² A matter involving revocation of a section 186 exemption at the instigation of the then regulator, the Fair Work Commission – a decision affirmed on appeal in [2016] FWCFB 197

³ *Motor Inn & Motel Accommodation Association* [2018] ROCD 72; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2017] FWCD 515; *United Voice* [2016] FWCD 1512

[11] While section 186(2) provides a discretion to the decision maker in relation to whether or not an exemption is revoked – as distinct from an *obligation* to revoke – the discretion must be exercised within the framework of the RO Act and its underpinning principles, as well as any mandatory elements of the section. Those mandatory elements are set out in Regulation 137 as indicated above.

[12] Relevant authorities in relation to the regulation of registered organisations provide guidance as to the exercise of powers conferred on the regulator, including consideration of matters to be taken into account, and particularly the weight to be attached to them, when exercising a discretion. In *Re Supervising Technician's Assoc. PMG* (1971) 140 CAR 1121, it was held that:

On the other side of the discretion which the Registrar can exercise must be weighed the desire of the organisation itself ... The limited case law on the subject emphasises the weight to be attached to this consideration. It seems to me that the expressed wishes of the organisation override any considerations which might be in the Registrar's mind of clumsiness, ineptitude or even total inaccuracy provided the inappropriateness 'was not likely to cause confusion'.

... in the circumstances of this particular application, the decision to consent or not to consent must be taken solely in terms of whether the proposed title is prohibited

[13] In *Re Commonwealth Public Service Clerical Association* (1956) 86 CAR 566, concerning a proposed change of name, the court considered the issue of a decision-maker's view of expediency in the face of an organisation's application, finding that:

.....we have had to concern ourselves only with considerations of expediency advanced by Mr. Phillips in opposition to the proposed change of name. These considerations, strongly pressed by Mr. Phillips, cannot in our view prevail against the appellant's plain right to adopt a name which fairly and reasonably describes the functions of its members as public servants.

[14] The legislative scheme for the regulation of registered organisations has long emphasised that such organisations are free to organise their own affairs in the manner of their own choosing provided that they do so within the framework of the legislation. The Full Court of the Federal Court in *Doyle v Australian Workers' Union* (1986) 12 FCR 197 at 205 affirmed that:

[it] is the right of an organisation to choose its own rules and internal structures, within the framework of the Act. This right has been referred to so often in recent authorities that it is unnecessary to examine it in detail. ...

[15] This is consistent with the principles set out in *Wiseman v Professional Radio and Electronics Institute of Australasia* [1978] FCA 31,⁴ which held at [35], that:

The court is not at liberty to substitute its modes of thought for those of an organization. Subject to the provisions of the Act, an organization is free to determine its own internal structures; it is free to determine its own policies; it is free to pursue objects which it considers to be desirable; and it is free to decide what it considers to be in the best interests of its members or potential members. ... The court, in the exercise of the judicial powers conferred by s. 140 of the Act, is not permitted to substitute what it considers to be desirable internal structures of an organization; what it considers to be desirable policies; what it considers to be desirable objects; and what it considers to be in the best interests of the members of the organization;...

⁴ Cited with approval in a range of matters including the Full Court in *Re Municipal Officers' Association of Australia v Kenneth Lawrence Lancaster and Michael James Canny* [1981] FCA 151

Exemption is revoked

[16] I am satisfied that the requirements under section 186(2) have been met and that having regard to the express wishes of MBAV, the exemption granted on 15 October 1990, should be revoked. As a result, the exemption is revoked as of 20 April 2020.

[17] A consequence of this revocation is that the MBAV will be required to lodge prescribed information with the Commission, pursuant to section 189 of the RO Act, at least two months before an election commences to enable an election decision to be issued empowering the AEC to conduct the organisation's 2020 election in accordance with its rules.

[18] I note that on 23 March 2020 the AEC wrote to those registered organisations who do not hold an exemption under section 186, advising that as a consequence of the COVID-19 pandemic, any elections not already underway would be deferred for a period of three months pursuant to the AEC's power under section 193 of the RO Act.

[19] I further note that the MBAV's rules prescribe the timetable for each stage of its election of officers and that the timetable is such that the call for nominations by the AEC would not necessarily need to occur until 8 August 2020 (with prescribed information required to be lodged by 8 June 2020).

[20] Thus, the timeframe for the MBAV elections lies outside the period of the current 3 month 'pause' on elections announced in the AEC's 23 March 2020 correspondence.



DELEGATE OF THE COMMISSIONER

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