



DECISION

Fair Work (Registered Organisations) Act 2009
s.186(2)(b) Revocation of AEC Exemption

**Master Builders Association of the Northern Territory trading as Master Builders
Northern Territory**
(R2018/143)

MR ENRIGHT

MELBOURNE, 10 AUGUST 2018

Revocation of AEC Exemption.

[1] This decision concerns whether to revoke an exemption that enabled a registered organisation to conduct its own elections internally without the participation of the Australian Electoral Commission (AEC).

[2] The exemption was granted to the ‘Territory Construction Association’ on 11 May 1992 (the **AEC Exemption**). The name of the organisation has subsequently changed, and is now the ‘Master Builders Association of the Northern Territory trading as Master Builders Northern Territory’ (**MBANT**).

[3] The relevant revocation provisions are set out in section 186(2)(b) of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) and regulation 137(2) of the *Fair Work (Registered Organisations) Regulations 2009* (**RO Regulations**).

[4] The revocation proceedings were commenced due to concerns over the conduct of elections by the organisation and related matters as set out further below.

Background

[5] Organisations registered under the RO Act must have rules that provide for, among other things, the election of each officeholder (refer s 143).

[6] All elections for officeholders are to be conducted by the AEC unless an exemption has been issued to an organisation or branch to allow the organisation or branch to conduct its own elections (refer ss 182 and 186).

[7] The AEC Exemption was issued under s 213 of the *Industrial Relations Act 1988* (*Cth*) (**IR Act**) which exempted the organisation from the requirement that the AEC conduct

its elections (R219/1989). As a result, the organisation was entitled to conduct its own elections.

Overview of grounds for revocation

[8] Expressed in simple terms, the AEC Exemption in the present matter may be revoked if the decision maker is no longer satisfied (after giving the Committee of Management of the MBANT the prescribed notice and an opportunity to respond):

- a. that the rules of the MBANT comply with the requirements of the RO Act relating to the conduct of elections for office under s 186(1)(a); and/or
- b. that if the organisation is exempted from having its elections conducted by the AEC, that elections for the organisation will be conducted under the rules of the organisation and the RO Act under s 186(1)(b)(i).

Current legislation regarding revocation

[9] Section 186(2)(b) provides that the Commissioner (the **Commissioner**) of the Registered Organisations Commission (the **Commission**) is empowered to revoke an election exemption as follows:

- (2) The Commissioner may revoke an exemption granted to an organisation or branch under subsection (1):
...
 - (b) if the Commissioner:
 - (i) is no longer satisfied as mentioned in subsection (1); and
 - (ii) has given the committee of management of the organisation or branch an opportunity, as prescribed, to show cause why the exemption should not be revoked.

[10] The revocation provisions refer to the requirements of s 186(1), which states:

- (1) Where an application in relation to an organisation or branch has been lodged under subsection 183(1) and, after any objections duly made have been heard, the Commissioner is satisfied:
 - (a) that the rules of the organisation or branch comply with the requirements of this Act relating to the conduct of elections for office; and
 - (b) that, if the organisation or branch is exempted from subsection 182(1), the elections for the organisation or branch, or the election for the particular office, as the case may be, will be conducted:
 - (i) under the rules of the organisation or branch, as the case may be, and this Act; and
 - (ii) in a manner that will afford members entitled to vote at such elections or election an adequate opportunity of voting without intimidation;

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

[11] In addition, regulation 137(2) provides as follows:

For paragraph 186(2)(b) of the Act, the Commissioner, to give an organisation or branch an opportunity to show cause why an exemption granted to the organisation or branch should not be revoked, must:

- (a) fix a time and place at which the organisation or branch may show cause; and
- (b) give the organisation or branch a written notice containing particulars of the time and place so fixed by the Commissioner together with a statement of his or her reasons for the proposed revocation.

Delegation

[12] The Commissioner has delegated powers under s 186 to the Executive Director of the Commission, including the power to revoke exemptions (refer s 343B). I have held the position of the Executive Director of the Commission since 1 May 2017.

[13] References in this decision to the powers of the Commissioner with respect to s 186 and other provisions relating to election exemptions, will be references to the powers of the Commissioner as delegated to, and exercised by, me as the Executive Director of the Commission under s 343B.

Recent elections in the organisation

[14] Prior to the establishment of the Commission on 1 May 2017, the General Manager of the Fair Work Commission (**FWC**) and her delegates administered many of the provisions in the RO Act pertaining to the rules of organisations and arrangements for the conduct of elections (but not the actual conduct of elections).

[15] Under the current rules of the organisation, which have been in operation since 6 September 2010 (**MBANT Rules**), elections are to be conducted annually, as all offices have one year terms.

[16] In the recent past, a number of concerns have arisen regarding the conduct of elections in the MBANT. These include:

- a. whether elections have been conducted by a correctly appointed returning officer who was not an officer or employee of the organisation as required by Rule 13(c) of the MBANT Rules (noting that it is mandatory for the rules of an organisation to include such a provision under s 143(1)(b) of the RO Act);
- b. whether elections have been conducted for the correct number of Sector Councillors and General Councillors under the MBANT Rules;
- c. whether the results of elections have been declared correctly.

[17] Prior to 1 May 2017 the Regulatory Compliance Branch of the FWC corresponded with the organisation regarding these concerns. After 1 May 2017 staff of the Registered Organisations Commission corresponded with the organisation regarding these concerns.

[18] After reviewing that correspondence I formed the preliminary view that the organisation appeared not to have been conducting its elections in accordance with its rules and the RO Act. I also became aware that one of the provisions of the MBANT Rules regarding absent voting (Rule 13(e), which relies on the use of proxy votes) may not be consistent with the mandatory requirement that all ballots for officeholders conducted under the RO Act be conducted by a secret ballot (as discussed further below).

Show Cause Notice

[19] In light of the above, on 14 June 2018, I issued a Notice to Show Cause (**Show Cause Notice**) to the Committee of Management of the organisation seeking its response as to whether the AEC Exemption should be revoked.

[20] The Show Cause Notice invited the Committee of Management to show cause as to why the AEC Exemption should not be revoked and listed the matter for hearing on 25 July 2018 in Darwin.

Statement of Reasons

[21] Attached to the Show Cause Notice was a Statement of Reasons (**Statement of Reasons**). This outlined four reasons and their associated particulars which supported my preliminary view that I could no longer be satisfied of the matters in s 186(1)(a) and 186(1)(b)(i).

[22] The notice and statement contained detailed references to a range of documents. Copies of those documents were sent to the organisation with the Notice. The Statement of Reasons also included some preliminary background information regarding the structure of the organisation and its rules.

[23] The four reasons in the Statement of Reasons are quoted below, in an abbreviated form, with the original paragraph numbering (and the original footnotes are also included where relevant).

1. Possible failure to appoint Returning Officer in accordance with Rules (2012 to 2017)

Contrary to MBANT Rule 13(c), my preliminary conclusion is that the MBANT Council did not appoint a Returning Officer (to conduct elections for offices) from 2012 to 2017 who was not the holder of another office in, or an employee of, the organisation.

Particulars – 2012

- (a) The Minutes of the 2012 AGM refer to Mr Jeff Colver as the ‘Returning Officer’. Mr Colver also issued a ‘Declaration for the Election of President’ dated 19 July 2012. Mr Colver was an employee of the MBANT engaged as the ‘General Manager Operations’ at the time. Accordingly, any purported appointment of Mr Colver as Returning Officer was contrary to Rule 13(c) as he was an employee of the MBANT.

Particulars – 2013

- (b) The Minutes of the 2013 AGM refer to Mr Colver as the ‘Returning Officer’. Mr Colver also issued a ‘Declaration of the Election of President’ dated 13 September 2013. Mr Colver was an employee of the MBANT engaged as the General Manager Operations at the time. Accordingly, any purported appointment of Mr Colver as Returning Officer was contrary to Rule 13(c) as he was an employee of the MBANT.

Particulars – 2014

- (c) The Minutes of the 2014 AGM do not expressly refer to a Returning Officer but they do state that the MBANT’s ‘Executive Director’, Mr David Malone, declared Mr Dick Guit ‘elected unopposed’ as President and declared the names of elected Councillors. This suggests Mr Malone was the Returning Officer in 2014. Any purported appointment of Mr Malone as Returning Officer was contrary to Rule 13(c) as he was an employee of the MBANT.

...

Particulars – 2015

- (e) The minutes of the 2015 AGM state that the ‘returning officer’ declared the results of the election for Councillors but it does not name the Returning Officer. The minutes also state that Mr Malone (but not Mr Colver) attended. This suggests (together with the information at paragraph (d) immediately above) that Mr Malone was the Returning Officer in 2015. Any purported appointment of Mr Malone as Returning Officer was contrary to Rule 13(c) as he was an employee of the MBANT.

Particulars – 2016

- (f) The declarations of results issued by [the Returning Officer] ... for the 2016 elections dated 29 August 2017 state that [the Returning Officer] ... was ‘appointed ... by the Executive Committee of Master Builders NT’. That appointment was contrary to Rule 13(c) which requires the Returning Officer to be appointed by the Council not the Executive Committee.

Particulars – 2017

- (g) The (undated) declaration of results issued by [the Returning Officer] ... for the 2017 elections state that [the Returning Officer] ... was ‘appointed ... by the Executive Committee of Master Builders NT’. That appointment was contrary to Rule 13(c) which requires the Returning Officer to be appointed by the Council not the Executive Committee.

...

2. Possible failure to conduct elections in accordance with Rules (2012 to 2017)

Contrary to MBANT Rules 12, 13, 15 and 24 my preliminary conclusion is that an election for each office in the organisation was not conducted in accordance with the Rules from 2012 to 2017...

[The Statement of Reasons then set out a range of apparent electoral deficiencies that appeared to have occurred in one or more elections between 2012 and 2017. These apparent deficiencies included the following:

- that Sector Councillors had not been elected in accordance with Rules 12(b) and 24(c) which require 10 Sector Councillors to be elected each year on the basis of two Sector Councillors elected by and from each of the five sectors set out in Rule 12(b);
- that the purported MBANT Rules that were used for the purposes of the organisation's elections in some years were not the certified rules of the MBANT registered organisation;
- that the organisation did not know (or disregarded) that the correct total number of General Councillors and Sector Councillors to be elected under Rule 12(b) was 18 (consisting of 10 Sector Councillors and 8 General Councillors);
- that the Returning Officer did not declare the results of the elections for all offices in each year in accordance with the MBANT Rules;
- that where persons were included in a list of elected MBANT Councillors with the description of 'Observer' it was unclear whether they were *elected* members of Council.]

3. MBANT Rule 13(e) may not provide for secret ballot or absent voting

I have formed the preliminary conclusion that Rule 13(e) of the Rules does not comply with the requirements of the RO Act relating to the conduct of elections for office regarding section 143(1)(e) (that a ballot for an office 'must be a secret ballot') and section 143(1)(e)(ii) (that a secret ballot for office 'must make provision for ... absent voting').

Particulars

- (a) Rule 13(b)(iii) provides that if a ballot is required in any election for the office bearers (President, Vice President and Treasurer) or other members of the Executive Committee it shall be by a 'secret ballot of all Councillors ... present [at a meeting of the Council] and shall be conducted as provided in sub-rule [13](e)'.¹
- (b) Rule 13(e) then provides for a ballot at a Council meeting.¹ Rule 13(e) also:
 - i. refers to persons voting 'in person or by proxy'; and
 - ii. states that 'no person' is to return 'more than one ballot paper' to the Returning Officer 'subject to rule 14'.
- (c) Rule 14 then provides that '[a]ny member who is absent from any meeting of the Council ... may appoint any other member present at such meeting his proxy to vote

¹ This election process at a Council meeting can also be utilised in some circumstances for elections of Sector Councillors and General Councillors - refer rules 13(a), 15 and 24(c).

on his behalf at any such meeting ... [and the proxy form shall be given to the Chairman] prior to the holding of any poll or ballot...'

- (d) The use of proxy voting in Rule 13(e) (where a person votes on behalf of another person) is not consistent with a secret ballot.²
- (e) In addition, Rule 13(e) does not 'make provision for ... absent voting' and thus is contrary to section 143(1)(e)(ii) for the following reasons:
 - i. section 143(1)(e) states that a ballot for an office 'must be a secret ballot';
 - ii. Rule 13(e) provides for absent voting by proxy, but that is not consistent with a secret ballot;
 - iii. Rule 13(e) does not provide for absent voting by any other means;³
 - iv. therefore Rule 13(e) does not provide for absent voting in a secret ballot.

4. Abolition of MBANT sectors may not remedy election difficulties

I have formed the preliminary conclusion that even if the organisation takes steps to amend its Rules to abolish the sectors (as the organisation has, on more than one occasion, suggested may occur but has not yet occurred) this may not ensure that future elections in the organisation will be conducted in accordance with the Rules and the RO Act.

Particulars

- (a) The organisation has indicated in a range of correspondence to the ROC that it may seek to abolish the sectors (and thus have fewer elected offices) as a means of remedying its ongoing election difficulties. For example:
 - i. the letter from the Executive Director, Mr Malone, to the ROC dated 27 April 2018 stated that 'if members are not prepared to participate in sector based activities, then it is not possible to conduct traditional sector based elections ... [the] solution ... is to revise the constitution ... Our goal is to have a revised Constitution in place before the 2018 election process is due to commence'.
 - ii. the letter from the Executive Director, Mr Malone, to the ROC dated 25 May 2018 stated that the MBANT is 'working towards a new Constitution, with a single Board of 8 people ...'.

² French J of the Federal Court (as he then was) in *Re William Joseph Yarran v Michael Blurton and Ors* [1992] FCA 199 dated 11 May 1992 stated at [42]: 'Having regard to the purpose of the secret ballot, the mechanism adopted must enable the elector to cast a vote in private, that is to say without disclosing it to any other person, and must enable the anonymity of that vote to be protected ... The provisions under which blind, illiterate or incapacitated electors cast their votes with the assistance of an electoral official is a compromise adapted to the particular class of case. It would not be understood as a secret ballot if applied to the wider population of electors'. Given that this judgment is dated the same date as the exemption decision the judgment of French J would not have been available for consideration by the registrar when the exemption decision was issued.

³ By contrast, Rule 13(d) regarding secret postal ballots does provide for absent voting in a secret postal ballot.

- (b) Notwithstanding the above, the materials suggest that the election difficulties in the organisation (involving multiple failures to comply with the Rules and/or the RO Act over a significant period of time):
- i. may not be remedied by the abolition of the sectors;
 - ii. because many of those election difficulties (as set out in this Notice) are not limited to the sectors.

Show cause hearing

[24] On 25 July 2018 I formally opened the hearing in Darwin to provide the Committee of Management of the MBANT with an opportunity to show cause why the AEC Exemption should not be revoked (in accordance with regulation 137(2)). Also in attendance for the Commission were Mr Bill Steenson and Mr Patrick Coyle, Principal Lawyers for the Commission.

[25] At the hearing I formally noted that I had received, on the afternoon of 24 July 2018, a letter from the MBANT's Executive Director, Mr David Malone, dated 24 July 2018 (the **letter of 24 July 2018**) which relevantly stated:

I wish to confirm ... that Master Builders NT does not seek to contest your decision, and ... is prepared to accept the revocation... [and the] Master Builders NT will not be taking up your offer to attend the hearing ...

[26] Consistent with the above, no appearances were made by, or on behalf of, the MBANT at the hearing.

[27] In light of this, I formally noted at the hearing that a decision would be made and published in due course regarding this matter based on the available materials.

[28] I then formally closed the hearing.

Letter of 24 July 2018 from MBANT

[29] The letter of 24 July 2018 also included some additional information regarding the circumstances of the organisation and its future intentions.

[30] Most significantly, the letter stated:

Following advice and consultation with the Fair Work Commission, Master Builders NT has commenced a process to de-register from the RO Act, so as to simplify the transfer to ... [a] new entity [under the *Corporations Act 2001 (Cth)* (CA Act)].

[31] In confirmation of this, I am aware that a notice was published in the Commonwealth Government Notices Gazette on 4 July 2018 by the General Manager of the FWC advising that the MBANT has applied to the FWC for its registration to be cancelled (D2018/4). That application is subject to a 35 day period for any interested person to lodge an objection to the cancellation. After that time, as far as I am aware, the matter would be referred to the FWC Tribunal for determination under the relevant provisions of the RO Act.

[32] The letter of 24 July 2018 also included some additional comments regarding the conduct of recent MBANT elections as discussed further below.

Consideration

[33] Given that:

- a. there were no appearances at the hearing;
- b. there were no formal submissions lodged in relation to the hearing;
- c. the organisation does not contest the revocation of the AEC Exemption (as per the comments in the letter of 24 July 2018); and
- d. the organisation has applied to the FWC for cancellation of its registration

it may appear that the MBANT's AEC Exemption can be revoked without further consideration.

[34] However, notwithstanding those matters, s 186(2)(b) makes clear that an exemption may only be revoked if the decision maker has given the prescribed notice *and* 'is no longer satisfied as mentioned in subsection [186](1)'. Therefore, in order to determine this matter, I am required to reach a conclusion on that issue.

[35] But in doing so, I note that it is not necessary for the decision maker to be 'no longer satisfied' of every element in s 186(1). Rather it is only necessary for the decision maker to be no longer satisfied of one of the elements in s 186(1). This is because:

- a. an election exemption may be granted if the decision maker is satisfied of every element in s 186(1);
- b. an exemption may be revoked if the decision maker is 'no longer satisfied as mentioned in subsection [186](1)' and has given the prescribed notice;
- c. being no longer satisfied under s 186(1) would mean no longer being satisfied in relation to every element in s 186(1); therefore
- d. if the decision maker was no longer satisfied of only one element under s 186(1) then he/she would 'no longer [be] satisfied as mentioned in subsection [186](1)' and would have jurisdiction to revoke the exemption.

[36] In order to reach a conclusion under s 186(2)(b) I will consider the four reasons in the Statement of Reasons in light of any material that was provided by the organisation as part of the show cause process – noting that the only such material is the letter of 24 July 2018 (given that there were no appearances or formal submissions in relation to the hearing).

The four reasons

[37] In relation to the first reason (the possible failure of the MBANT to appoint a Returning Officer under Rule 13(c) to conduct its elections from 2012 to 2017) I note the following points:

- a. Regarding the elections from 2012 to 2015 - based on the available materials it appears that the returning officer who conducted those elections for the MBANT (in each of those years) was an employee of the MBANT. This was contrary to Rule 13(c) which states that a returning officer must not be an officer or employee of the relevant organisation.⁴
- b. Regarding the elections in 2016 and 2017 - based on the available materials it appears, on balance, that the Returning Officer was not appointed in accordance with the MBANT Rules for the following reasons:
 - i. Rule 13(c) states that the Council shall appoint the Returning Officer however the materials indicate that the Executive Committee appointed the Returning Officer in those years.
 - ii. While I note that:
 - A. the letter of 24 July 2018 states that ‘[h]istorically, the administration of elections for the Association has been delegated by Council to the Executive Committee, as provided for in the Constitution’; and
 - B. MBANT Rule 11(f)(ii) states that the ‘Executive Council shall carry out such duties as may be delegated to them by the Council’;

I have not seen any express documentation from the Council that indicates that the Council delegated that power at that time to the Executive Committee. Therefore while I cannot discount the possibility that such a delegation may have occurred as stated in the letter of 24 July 2018, based on the materials available to me as a result of the show cause process, I cannot be positively satisfied that the Returning Officer who conducted the elections in 2016 and 2017 was appointed in accordance with the MBANT Rules.

[38] In relation to the second reason (that identified a range of deficiencies in the conduct of annual elections from 2012 to 2017) the letter of 24 July 2018 stated that the MBANT ‘accepts that it has made errors in the conduct of its elections’. The letter also relevantly advised:

- a. in relation to the election of Sector Councillors:
 - .. [the show cause documents pointed to] question marks over the election of the Council, since traditional Sector Elections have not been conducted ...

⁴ It is mandatory for the rules of an organisation to include such a provision under s 143(1)(b).

We acknowledge that the Constitution provided for a process whereby 5 sectors would elect 2 members to the Council of the Association each year.

The challenge has been that, over time, members have voted with their feet by no longer participating in sector based activities...

- b. some uncertainties had arisen within the MBANT regarding the correct version of the MBANT Rules (that should be used for the conduct of MBANT elections) because other versions of the constitution pertaining to the underlying association were registered under the *Associations Act (NT)*; and
- c. where persons were included in a list of elected Councillors with the description of ‘Observer’ they were not elected members of the Council.

[39] In relation to the third reason (that the MBANT Rules do not provide for absent voting by a *secret* ballot – for election ballots that are conducted at a meeting) the letter of 24 July 2018 stated ‘[w]e appreciate that advice, but believe that the concern is rectified by reform steps mentioned at the start of this letter’.

[40] The relevant reform steps mentioned in the letter were that the MBANT has applied to the FWC to cancel its registration under the RO Act so that the underlying association of members can pursue its activities, in future, under another corporate entity. Therefore the letter of 24 July 2018 did not refute the information in the third reason that the use of proxy voting for the purposes of absent voting in Rule 13(e) is not consistent with a secret ballot.⁵

[41] In relation to the fourth reason (that the abolition of the MBANT sectors may not remedy all of the MBANT’s electoral problems) I again note that the organisation has applied to the FWC to cancel its registration. In light of this, it appears unlikely that the MBANT will abolish its sectors (for the purposes of remedying its electoral problems) in the near future and/or prior to its deregistration. Therefore it has not been necessary to further consider the hypothetical situation set out in reason four.

Conclusion

[42] After carefully considering the relevant materials, including the information in the MBANT’s letter of 24 July 2018 I have reached the following conclusions:

[43] I am ‘no longer satisfied as mentioned in subsection [186](1)’ that the ‘rules of the organisation ... comply with the requirements of ... [the RO] Act relating to the conduct of elections for office’ under s 186(1)(a) as:

- a. Rule 13(e) does not comply with the requirements of s 143(1)(e) (that a ballot for an office ‘must be a secret ballot’) because:
 - i. the provision for proxy voting (whereby a person votes on behalf of another person) for the purposes of an absent vote at an election ballot conducted at a meeting in Rule 13(e) of the MBANT Rules;

⁵ Ibid, note 2.

- ii. is not consistent with a secret ballot – having regard to the comments of French J of the Federal Court (as he then was) in paragraph 42 of *Re William Joseph Yarran v Michael Blurton and Ors* [1992] FCA 199.⁶

[44] I am ‘no longer satisfied as mentioned in subsection [186](1)’ that if the organisations is exempted from having its elections conducted by the AEC, that elections for the organisation will be conducted under the rules of the organisation under s 186(1)(b)(i) as:

- a. Rules 12(b) and 24(c) require elections to be conducted for 10 Sector Councillors each year (with two Sector Councillors elected by and from members of each of the five sectors in Rule 12(b)) as:
 - i. the available materials indicate that the sectors, and the elections in the sectors, no longer operate as:
 - A. the organisation’s letter of 27 April 2018 (referred to in the Statement of Reasons) stated that the ‘sectors no longer function within [the] MBNT’;
 - B. the letter of 24 July 2018 stated that ‘members have voted with their feet by no longer participating in sector based activities’ and the letter also indicated that in the recent past that ‘traditional Sector Elections have not been conducted’;
 - C. the elections from 2012 to 2017 did not fill the 10 Sector Councillor offices with two candidates nominated by and from (and where necessary elected, in a contested ballot, by and from) members of each of the five sectors; and
 - ii. given that the organisation has applied to the FWC to cancel its registration then (without in any way commenting on the exercise of that jurisdiction by the FWC Tribunal) it appears unlikely that in the near future and/or prior to the deregistration of the MBANT that elections for Sector Councillors will be conducted in the manner set out in Rules 12(b) and 24(c).

[45] In light of the above I am no longer satisfied under s 186(2)(b) (after giving the committee of management of the MBANT the prescribed notice and an opportunity to show cause why the AEC Exemption should not be revoked):

- a. that the rules of the MBANT comply with the requirements of the RO Act relating to the conduct of elections for office under s 186(1)(a);
- b. that if the organisation is exempted from having its elections conducted by the AEC, that elections for the organisation will be conducted under the rules of the organisation under s 186(1)(b)(i).

⁶ Ibid, note 2.

[46] I therefore hereby revoke the AEC Exemption issued in R219/1989 with effect from the date of this decision.



DELEGATE OF THE COMMISSIONER

Hearing details:

25 July 2018 - Darwin

Printed by authority of the Commonwealth Government Printer

<PR351130>