

BARRISTERS & SOLICITORS

REPLY TO:
OUR REF:
YOUR REF:
DATE:

PERTH

IU:JG:2519

20th August, 1991

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BY FACSIMILE TRANSMISSION

Dear Mr. Wilson,

re: Council Vacancy

We are instructed by you to provide advice regarding the filling of the vacancy in the position of Branch Organiser created by the resignation of Mr. J.B. Griffin.

As noted in our earlier advice, a postal ballot of the branch Executive seeking to appoint Mr. Raymond Jack Delbridge to the vacant position was not carried by the Branch Executive.

We are further instructed that in excess of one month has elapsed since Mr. J.B. Griffin resigned.

In our view, this matter is subject to sub-clause (1) of Rule 36 which reads, as follows:

"Should any Branch Office be vacant from any cause whatsoever; and

- (i) it appears in the opinion of the Executive Council either
- (A) that it is not practicable for the Branch Office to be filled in accordance with Rule 79; or
 - (B) that a Branch Executive is unable or unwilling to fill the Branch Office within the time prescribed by Rule 79;
 - (C) that a Branch Executive is unable or unwilling to lawfully fill the office in accordance with these Rules; or

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(D) that a Branch Executive requests the Executive Council to do so;

(ii) When the Executive Council has exercised its power under sub-rule (g) of this Rule;

The Executive Council may fill the vacancy or vacancies by exercising the powers of the Branch Executive prescribed by Rule 79 except that such power should be exercised within two (2) months of the vacancy occurring."

It is noted in our previous advice, pursuant to sub-clause (g) of Rule 89 the position of an elected organiser is defined as a "Branch Office".

In our view, the failure of the Branch Executive to fill the position of organiser within the time prescribed by Rule 7) falls squarely within sub-paragraph (B) quoted above and the Executive Council may now proceed to fill the vacancy provided that it does so within two months of the date that the vacancy occurred, namely the date that Mr. J.B. Griffin resigned.

We have been supplied with a copy of a letter dated the 2nd August 1991 from Mr. Cameron S. Gilmour to you and we have been asked to comment on its contents.

In that letter, Mr. Gilmour makes five assertions which we deal with in turn:

(i) Mr. Gilmour asserts that he has been appointed to fill the vacant organiser position on the basis that 6 Branch Executive Members indicated a preference for him in response to the postal ballot of the Branch Executive dealing with a proposed resolution to appoint Mr. Delbridge to the vacant position. As noted in our previous advice, it is not a proper response in a postal ballot on the proposition of appointing one person to a vacancy, to nominate a preference for a second person. As no proposition was ever distributed to the Branch Executive by way of postal ballot seeking the appointment of Mr. Gilmour to the vacancy, there is no possibility that Mr. Gilmour has been appointed. If Mr. Gilmour contests this assertion, then his remedy is to seek an order from the Federal Court pursuant to Section 209 of the Industrial Relations Act 1988. In our view, Mr. Gilmour would be unsuccessful in seeking any such order.

(ii) Mr. Gilmour asserts that he is eligible to hold office in the opinion of the Branch Executive. The question of eligibility is dealt with in the Rules and is not a matter about which the opinion of the Branch Executive is determinative. Specifically, sub-clause (a) of Rule 68 provides a number of criteria for eligibility

for election as an officer, which pursuant to sub-clause (h) of Rule 89 includes the position of elected organiser. We have no instructions regarding Mr. Gilmour's eligibility in accordance with the criteria specified in sub-clause (a) of Rule 68. The matter is only of relevance, if the Executive Council now seeks to appoint Mr. Gilmore to the vacant position of elected organiser and we would caution the Executive Council to satisfy itself, insofar as it is able, as to Mr. Gilmour's eligibility prior to making any such appointment.

- (iii) Mr. Gilmour asserts that any dispute about his appointment to the vacant organiser position or his eligibility to hold the position must be resolved by the courts. Ultimately, this is of course true. The Branch should, to the best of its ability, uphold the Rules in accordance with legal advice received and as noted above, our advice to you, is that Mr. Gilmour has not been appointed to the vacant organiser position. Once again, we note, that should Mr. Gilmour dispute this advice then he can make application under Section 209 of the Industrial Relations Act of the Federal Court.
- (iv) Mr. Gilmour makes assertions about the failure of an Executive meeting to be called and the timing of the postal ballot of the Executive. Mr. Gilmour does not point to any specific breach of the Rules and given his failure to make such specific allegations, we are in difficulties responding to these assertions. On our instructions, no breach of the Rules is apparent.
- (v)

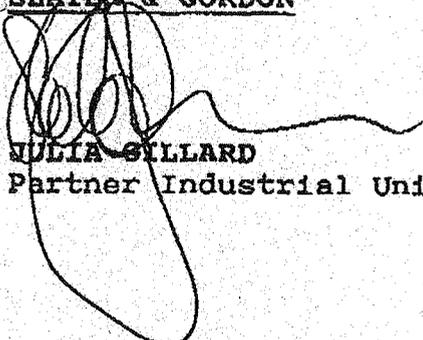
Mr. Gilmour makes reference to Sections 254, 255, 258 and 259 of the Industrial Relations Act 1988 in relation to this matter. In our view, these provisions are of no relevance to the matters asserted by Mr. Gilmour. These provisions broadly deal with the remedying of acts done in good faith by bodies such as branch executives which are later shown to have an invalidity problem. An example would be, a branch executive appointing a person, to a casual vacancy, and sometime later, it is discovered that there was a defect in the electoral process which resulted in the election of a number of the members of the branch executive. The Industrial Relations Act 1988 in these circumstances, enables members of unions to apply to the Federal Court to have such invalidities rectified and also provides that such invalidities are of no force or effect after the expiration of four years. These provisions do not in any way touch upon this situation. No one, has been appointed in a manner which includes an invalidity.

If Mr. Gilmour is suggesting that the Branch should recognise his appointment to the position of elected organiser, notwithstanding the advice provided by us that such an appointment has not been validly made under the Rules, on the basis that this "invalidity" can be cured by the provisions of the Act cited above, then, in our view that suggestion must be rejected. The provisions of the Act cited

above deal with the curing of invalidities that occur in good faith and without the recognition of the invalidity by the decision making body. These provisions do not cure invalidities which have come to the attention of the decision making body and then been ignored. Consequently, these provisions of the Act would not cure a situation where, the Branch having received legal advice that an appointment to a position such as a vacant elected organiser position is invalid, treats it as valid in any event.

We trust that this advice is of use to you. Should you require any further explanation or clarification please contact the writer at the Melbourne office of Slater & Gordon on (03) 602 4855.

Yours faithfully,
SLATER & GORDON



JULIA SILLARD
Partner Industrial Unit