



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

D2022/10

s.94(1) RO Act - Application for ballots for withdrawal from amalgamated organisation

**Application by Grahame Patrick Kelly – withdrawal from amalgamated organization –
Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy
Union (D2022/10)**

Melbourne

9.30 AM, WEDNESDAY, 21 SEPTEMBER 2022

PN1

JUSTICE ROSS: Good morning. I've got Mr Borenstein and Mr Bakri for the applicant, Mr Dowling and Mr Massey for the CFMMEU and Mr Rawson for the Registered Organisations Commissioner. Have I missed anybody? No.

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Mr Rawson, I think you made an application for permission to appear.

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MR C RAWSON: Yes, your Honour, to the extent necessary, we would seek permission pursuant to paragraphs (a) and (c) of section 596(2) of the Fair Work Act to appear for the Commissioner.

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JUSTICE ROSS: Do I take it that, to the extent necessary, all the other parties are making the same application in the same terms, and those applications are not opposed by any party? No?

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MR H BORENSTEIN: No.

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MR C DOWLING: Correct.

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JUSTICE ROSS: All right, well, I grant those applications in each case. I've formed the view that it would enable the matter to be dealt with more efficiently taking into account its complexity.

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We have got two sets of draft directions. I just wanted to clarify something from your client, Mr Dowling. Look, the directions are framed that any person wishing to object, et cetera. Do I take it that your client will be objecting to the substantive application?

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MR C DOWLING: Yes, your Honour.

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JUSTICE ROSS: Does your client intend to object to the extension of time application?

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MR DOWLING: Your Honour, I'm still taking instructions on that, but you will see from the proposal that we have, what we are hoping to establish by the directions we propose, is that by the time of the matter being listed for a further mention, on 28 October, all of the issues will be on the table and your Honour will be best placed to know how the matter should be listed and, indeed, how to deal with that as an issue and also the provisional or threshold issues that your Honour has raised.

PN12

JUSTICE ROSS: I don't think I need to wait until 28 October to decide whether or not we're going to deal with the extension of time application by hearing or otherwise. Is there any reason why your client can't inform us by the end of next week, about whether it intends to object to the extension of time application?

PN13

I'm not talking about the submissions you might advance but you've formed a view you're going to object to the substantive objection, it shouldn't take long to decide whether or not you're going to object to the extension of time?

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MR DOWLING: There's no reason we can't do that. We sought to coordinate it so that all of the objections could come at the same time, but if your Honour's minded to separately identify the extension issue, we could do that within seven days.

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JUSTICE ROSS: The reason, Mr Dowling is this, and I'm not here expressing any sort of final view, but the language of 94A(1) suggests that the Commission may accept an application if it's satisfied, having regard to those matters, it's appropriate to accept the application. So I readily understand that could be done in one hearing, but in terms of the sequencing of any ultimate decision, we would have to determine the 94A point first, then accept the application and then et cetera. That's the reason for wanting to tease out that issue early.

PN16

If, for example, you form the view, perhaps without making any admissions or whatever, that you didn't intend to oppose the extension of time application, then that matter, and we would give any other party an opportunity to object, if they wish, by the end of next week. But if no party objected, that matter could be determined on the papers, essentially, on the basis of the material in the application that's already been filed.

PN17

That's the reason I raise it and that would be one less issue and perhaps then allow the parties to, if it wasn't opposed and an extension was granted, that could be done or dealt with fairly quickly, and then the parties would know where they stand, and focus on the other issues. That was the purpose in raising it, Mr Dowling.

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MR DOWLING: I understand, your Honour.

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JUSTICE ROSS: The other issue between the parties, and this might be - you're welcome to make any comments about that, Mr Borenstein, but I particularly wanted to take you to the CFMMEU's draft directions. They have a proposal, before the matter's listed for mention, that you file and serve a response to whatever material the Amalgamated Union wishes to file. That's not in your proposed directions and I was wondering what your view was about that.

PN20

MR BORENSTEIN: Your Honour, I will perhaps do what I always do and address our thing first and then answer your question. Our proposed directions seek to focus the mind on the issue that you raised in the statement, which is the determination of any preliminary matters up front. So the purpose of our direction was to flush out, from any objectors, whether there are any other objections that they take, which might be categorised and classified similarly as a preliminary or jurisdictional point.

PN21

So, central to that, was to have any objectors identify what the grounds are that they propose to raise. Now, we didn't want to create a mini trial over the grounds, at this stage, but simply to understand the parameters of the objections that would be taken so that the Commission could then say, 'Okay, objection 1 is a jurisdictional objection. Section 94A is a preliminary point, why can't we hear all those together in one hearing', that was the intent of our direction.

PN22

So, that being the case, we didn't see that there was any utility, once the objectors filed the grounds of objection, so that we see the scope of the argument, to have a separate step for us to file our response to the objection. What we had in mind was, once the objections were identified then there would be the usual sort of programming orders, where we would file a written submission and any material that would be responded to and so on, and that would expose what our attitude is to the various objections.

PN23

JUSTICE ROSS: All right. The provisional view, though, talks about the threshold issues are all about 94A.

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MR BORENSTEIN: Well, that's so, but we envisage, and based on the experience we've had in the earlier Kelly application, that there may be other objections that will be raised, which similar - well not similar, but jurisdictional objections which may impact on whether or they may seek to say that there is no application, in any event, or no valid application, in any event. I don't want to make Mr Dowling's objections for him, but that's what we're concerned about. We don't want to be in a position where if there's a contest about 94A, we have that separately and then whatever flows, after the Commission's decision, might then occur, then the whole thing gets fragmented until we have the next hearing, and so on.

PN25

JUSTICE ROSS: Well, I don't think the thing gets fragmented. The 94A thing, it seems to me, is a discrete point. We don't know, at this stage, whether the applicant, the Amalgamated Union, is even going to object to that point. The arguments about that issue are quite separate from the substantive issue. It needn't delay any of the substantive matters, on your proposed directions. You could deal with - bear with me, just one moment.

PN26

MR BORENSTEIN: Can I just correct something that your Honour might have taken out of what I said? I wasn't suggesting that the Commission would cause delay but your Honour will be conscious of the fact that even a decision on 94A is amenable to judicial review. That's all we're worried about.

PN27

JUSTICE ROSS: That might be so. But I understand this is likely to be hard fought, based on the experience but, ultimately, if there's an application for judicial review, you need to seek interlocutory relief that the substantive application be stayed. I think we're quite a way down the path, whereas at the moment we don't know whether the Amalgamated Union even intends to object to that application and until we know that and determine it, I understand your concern, but you know.

PN28

MR BORENSTEIN: All we're saying your Honour is let's hold our hand on what we do next until we know what objections are going to be taken, including whether the 94A is going to be objected to. If 94A is not objected to then the course your Honour's proposed obviously is a good course to follow. But if there are numerous objections, including the 94A, then it might call for a different approach to the programming of the various parts.

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JUSTICE ROSS: All right. In the event - yes.

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MR DOWLING: Can I just say, your Honour, what we had intended to do, by the response, including that in the list of directions, was to make sure that the full extent of the controversy was before your Honour before it returned, so that we knew what issues were taken with objections that had been raised by my client. That way, as I say, your Honour knows the full extent and knows what other jurisdictional hearings there might be and what the response to them is. It seemed to us to be a much more efficient way of dealing with the matter.

PN31

JUSTICE ROSS: No, I follow the issues that you both raised. I want to give that matter some more thought and I'll talk to the other members of the Full Bench about it.

PN32

I think you can take it that whether we adopt a course where all the matters are flushed at one time at a hearing or we separate the 94(a) - leave that aside for the moment - Mr Dowling, the directions will include a requirement that any person wishing to object to the grant of an extension of time under 94(a) will be obliged to notify the Commission and the applicant by 4 pm next Friday. So, if you could bear that in mind, whatever else happens, because if there's no objection, well, then, away we go. If there is, you know, then we will need to think through the other issues.

PN33

If there's no objection, we will need to consider that application on the material filed and then issue a timely decision about that. If it's granted, then directions will follow; if it's not granted, well, that will be that.

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MR DOWLING: Yes.

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JUSTICE ROSS: Let me just think through the rest of it and talk to my colleagues. We will come to a view about it today and advise you, but I want to put you on notice about letting us know about the 94(a) matter, Mr Dowling. In the event that there is an objection to that, you wouldn't have thought it would have been difficult to come up with an agreed list of relevant contraventions of workplace or safety laws by the amalgamated unions and, for that matter, any contribution of the constituent part to that record.

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All right. Mr Rawson, is your interest in the substantive application or the 94(a) or both?

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MR RAWSON: Your Honour, the Commissioner doesn't wish to support or oppose either the substantive application under section 94 or the application for an extension of time pursuant to section 94(a). As I think your Honour may have observed in your statement last week, section 94(a) does provide a particular role or right for the Commissioner to speak on certain matters. For its part in this matter, the Commissioner is content to provide assistance as your Honour considers appropriate.

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Beyond that, it's possible that the Commissioner might form his own view that it's appropriate to make limited submissions confined to particular discrete matters, but the Commissioner would only propose to do that if he considered that there is a material omission from the material provided by the parties.

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If, as appears to be contemplated today, the directions made today are confined merely to flushing out any grounds of any objection to the application, then it seems to us that, in those circumstances, given that the Commissioner does not object, there is perhaps no need to make provision for the Commissioner in this round of directions. If the matter was to be timetabled beyond the point of flushing out objections or grounds of objections to the application, then it might be appropriate for provision to be made for a short period of time for the Commissioner to file any material (indistinct) - - -

PN40

JUSTICE ROSS: All right. When you say what assistance the Commission might seek in it, just going back to my earlier reference to the amalgamated organisation's record of not complying with workplace or safety laws, is that a matter the Commissioner has turned his mind to and is that a matter that you would be in a position to compile a document setting out those contraventions?

PN41

MR RAWSON: Your Honour, the position of the Commissioner is that the definition in section 94 of workplace or safety laws includes but extends well beyond the realm of laws that the Commissioner is concerned with himself, and whilst the Commissioner might, and could have, something to say about such of those laws as it regulates, at least without some form of indication from the Fair Work Commission that a broader role than that was expected of it, the Commissioner wouldn't propose to be saying anything about the effect of the chronological contraventions that anyone else can - - -

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JUSTICE ROSS: What assistance were you referring to?

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MR RAWSON: Well, we don't suggest that there's any assistance that the Commission should seek from the Commissioner, but, equally - - -

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JUSTICE ROSS: Okay.

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MR RAWSON: - - - having read the terms of your decision, we wanted to be present and to inform the Commission that we are happy to provide any assistance should it be required.

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JUSTICE ROSS: All right. Look, one course may be - and this is - Mr Dowling, if you were able to - well, we may confine the direction to the short point about any person wishing to object to the 94(a) extension of time application should do so in writing by - we said 4 pm next Thursday, the 29th, and then we see what that brings out and then relist the matter for mention at 9.30 the following day on the 30th, and that then, rather than trying to sort of sequence and craft a set of directions premised either on there's no objection or there is an objection, it might be better to find out. It won't affect the dates that we ultimately fix for the filing of materials or anything like that, but that might give us a bit more clarity on the path forward.

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MR DOWLING: Yes, your Honour, I don't have anything to say against that. That would isolate that issue and allow further directions and further clarification of the matters in dispute or the extent of the controversy thereafter.

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JUSTICE ROSS: Yes. Mr Borenstein?

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MR BORENSTEIN: Your Honour, we can understand the reasoning behind that. We heard Mr Dowling say at the outset that he had turned his mind to other objections already and we would say, respectfully, that if that's the case, it would be helpful to know whether there are any other jurisdictional points or points of that kind which could conveniently have been dealt with together. Of course, I

understand the point your Honour makes that if there's no objection to the 94(a), that could simply go off and be dealt with on the papers.

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JUSTICE ROSS: Yes.

PN51

MR BORENSTEIN: But that could be seen from a statement of all of the objections if that was made and the Commission would see, 'Well, that's all right, that's out of the way, we can do that on the papers, but we've got these other objections that we need to program.'

PN52

JUSTICE ROSS: Yes. Mr Dowling, you have heard what Mr Borenstein said. I don't propose to issue any directions for you to do anything by 29 September other than an indication about whether your client objects to the extension of time application. Obviously, as soon as you are able to form a view at least about any points of jurisdictional objection that you think might conveniently be dealt with in a threshold sense, then you can identify those.

PN53

Mr Borenstein, I'm not quite following your argument. You don't want the 94(a) issue determined discretely if it's contested because you think it might lead to a judicial review application. Well, doesn't the same apply to any preliminary jurisdictional issues?

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MR BORENSTEIN: It does, your Honour, but it means that - - -

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JUSTICE ROSS: You're only up there once.

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MR BORENSTEIN: That's right.

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JUSTICE ROSS: Yes.

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MR BORENSTEIN: That's exactly the point, and the last time we went up on judicial review, it took 10 months to resolve and we don't want to be in the position - - -

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JUSTICE ROSS: Yes, which we don't - - -

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MR BORENSTEIN: Yes, we don't want to be in that position again.

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JUSTICE ROSS: No. Well, I suppose it depends on whether the Court stays the proceedings in the Commission.

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MR BORENSTEIN: Well, that's so.

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JUSTICE ROSS: Of course, it might be you up on judicial review as well.

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MR BORENSTEIN: Well, there won't be any question of a stay then, but your Honour is, of course, right. It will turn on a question on whether the court stays the proceedings or not and, of course, we can't predict what the court would say about that. We can predict what Mr Dowling would say about that, on behalf of his client, which is why should he incur all these costs and effort in something which shouldn't be going ahead. That has some force, of course.

PN65

JUSTICE ROSS: Well, Mr Dowling has been making notes, as you've been speaking, Mr Borenstein, so - - -

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MR BORENSTEIN: Well, I'm winning him his arguments.

PN67

JUSTICE ROSS: All right. I've heard what you've said. I think we will adopt that course. Can I just check your availability on the 30th for a short - a further short mention? Is there any issue with a 9.30 on that day?

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MR BORENSTEIN: As long as the internet works at Phillip Island, your Honour, I can do it.

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JUSTICE ROSS: All right.

PN70

MR DOWLING: I may have some difficulty, your Honour, but I will ensure that someone will, of course, be present on behalf of my client, it it's not me.

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JUSTICE ROSS: Is it more convenient to do it at 1 pm? Does it make any difference?

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MR BORENSTEIN: It's the date, your Honour, not the time.

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JUSTICE ROSS: All right. I'm sorry about that, Mr Borenstein. Does the following Monday give you any comfort, or are you locked on Phillip Island for some time?

PN74

MR BORENSTEIN: No, no, the following Monday is 3 October and 9.30 on 3 October suits me.

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JUSTICE ROSS: What about you, Mr Dowling?

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MR DOWLING: It suits me too, your Honour, thank you.

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JUSTICE ROSS: Why don't we do Monday, 3 October.

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MR BORENSTEIN: Thank you.

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JUSTICE ROSS: All right. Thank you and I'll see you on Monday, 3 October at 9.30. I'll adjourn.

ADJOURNED UNTIL MONDAY, 03 OCTOBER 2022

[9.53 AM]