



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY

C2023/4193

s.739 - Application to deal with a dispute

**Construction, Forestry, Maritime, Mining and Energy Union
and
BHP Coal Pty Ltd
(C2023/4193)**

BMA Enterprise Agreement 2022

Brisbane

11.00 AM, TUESDAY, 10 OCTOBER 2023

Continued from 03/08/2023

PN1

THE VICE PRESIDENT: Can I just start by taking the appearances?

PN2

MR C NEWMAN: Thanks, Vice President. If it pleases, this is Newman, initial C, senior legal officer for the Mining and Energy Union. (Indistinct) Mr West to join us, Vice President, of the Goonyella Riverside Lodge, and Mr Beilby, initial R, who is the (indistinct).

PN3

THE VICE PRESIDENT: Okay. So we're – sorry, Mr Coonan.

PN4

MR M COONAN: Yes, I appear on behalf of the respondent, (indistinct) and Ms Larsen and Ms Sabdia.

PN5

THE VICE PRESIDENT: Thank you. As I understand it, we've got a statement of facts and we're just dealing today with submissions.

PN6

MR NEWMAN: Yes, that's it, Vice President.

PN7

THE VICE PRESIDENT: Thanks.

PN8

MR NEWMAN: The submissions should also be in the reply submissions, Vice President.

PN9

THE VICE PRESIDENT: Yes.

PN10

MR NEWMAN: I'm not sure how you want to proceed with it. I'm happy to commence or - - -

PN11

THE VICE PRESIDENT: If you want to start, Mr Cooney, given it's your objection?

PN12

MR COONAN: I'm happy to start (indistinct).

PN13

THE VICE PRESIDENT: Yes, thanks.

PN14

MR COONAN: Thank you, Vice President. At the outset, we rely on our outline of submissions and our reply to the applicant's outline of submissions in this

matter. I suppose (indistinct) at this stage, at least our submissions, need to be marked as exhibits, if that pleases the Commission.

PN15

THE VICE PRESIDENT: I can. I'll mark the initial submissions as BHP1, and the reply submissions BHP2.

EXHIBIT #BHP1 INITIAL OUTLINE OF SUBMISSIONS OF THE RESPONDENT

EXHIBIT #BHP2 REPLY SUBMISSIONS OF THE RESPONDENT

PN16

MR COONAN: Thank you, Vice President. We do not intend to traverse those submissions in any detail, and we rely on them, as I say. We repeat that we – or we do want to add some additional oral submissions in these proceedings.

PN17

THE VICE PRESIDENT: Sure.

PN18

MR COONAN: We also, just for your (indistinct), a folder of cases. Again, I'm not going to refer (indistinct). You'll see from the submissions that that (indistinct) and provide the Commission with a copy of our cases, the cases that will be referred to in our submissions and one further case I'll refer to today.

PN19

THE VICE PRESIDENT: (Indistinct).

PN20

MR COONAN: In our oral submissions we just want to do three things, Vice President. I will summarise where we sit (indistinct) position and add some additional submissions, particularly but not just in light of the applicant's reply submissions.

PN21

One is respond to any specific questions that the Vice President might have, and then address the point that Mr Newman might raise in his oral submissions.

PN22

THE VICE PRESIDENT: Yes.

PN23

MR COONAN: In summarising where the position is in the submissions today, I want to deal with the synopsis of the evidence, the key submissions that have been made, and then add some additional further submissions.

PN24

As to the evidence, the Commission will note that both parties did not call any witness evidence, and we rely upon on the McVie(?) statement that's in the attached documentation to the original statement tabs.

PN25

We answer – although they're technically in our submissions, it might be best if the (indistinct) statement and the attachments were marked as an exhibit as well, Vice President.

PN26

THE VICE PRESIDENT: We'll mark those – I'll just mark those as exhibit A given they're a joint exhibit. Is that suitable for you, Mr Newman?

PN27

MR NEWMAN: That's fine, thanks.

EXHIBIT #A STATEMENT AND ATTACHMENTS

PN28

MR COONAN: We're not going to traverse in much detail the content of the agreed statement of facts - or sorry, the dispute (indistinct). For the record, you would have noted that we've objected to one assertion that's in the applicant's further submissions, and that's (indistinct) the employee representative (indistinct) to Mr Swanton on 5 May 2023, and that objection is set out in paragraph 34.

PN29

We're not making submissions either way. The same with the agreed statement of facts does not admit that Mr (indistinct).

PN30

What we do say is that there's one clear takeaway that the Commission can take from the agreed statement of facts, and that is that there is no contention that Mr Swanton did not reply to (indistinct) representative, (indistinct) – sorry - yes, 20 April or on 5 May. In fact there is agreement that he did in fact send an email (indistinct) on 27 April (indistinct). So the two responses, there's one in April 2023 and 27 April 2023. And as I say, there's (indistinct) agreement that we did in fact send the email on 27 April 2023 replying to the request for a dispute and offering to (indistinct).

PN31

As to the submissions on the (indistinct), we ask the Commission at this stage, first of all, to note that these are not contested. No submissions have been raised to contradict the respondent's submission that if the dispute settlement procedures have not been followed, then the Commission does not have jurisdiction.

PN32

Secondly, there's no contest or argument contradicting or taking issue with the respondent's submissions dealing with the policy context on the insertion of the (indistinct) periods (indistinct) 2012 (indistinct).

PN33

We make the submission that they are not guidelines, so they (indistinct). They're not guidelines. (Indistinct) aspirational (indistinct). There are no hardship provisions that are (indistinct). The timelines are binding, and as I said, certain things have been (indistinct).

PN34

THE VICE PRESIDENT: And your submission is also that the procedure doesn't provide any discretion for the Commission to say well this isn't fair and - - -?

PN35

MR COONAN: That's right.

PN36

THE VICE PRESIDENT: Someone (indistinct) or whatever and there's a reasonable basis for the email not to have been (indistinct) it's a hard and fast - - -?

PN37

MR COONAN: Yes, I'll make more submissions on that, particularly when - if that does happen, the (indistinct) submission that is made, our reply is that if that does happen, (indistinct) implications as to (indistinct). The agreement deals with that. If there is something missed, then there is a way in which the union can best (indistinct) the dispute and not (indistinct), but I'll make more submissions on that.

PN38

As to the point that the Vice President just raised, we say that that's clear (indistinct) decision, the 2008 MUA in *CFMMEU v BHP Coal Pty Ltd* [2020] FWC 311. There is a copy in the - I don't intend to take the Commission to it. We simply say that that decision makes clear that it is a hard and fast rule, in our submission.

PN39

Back to the issues which we say are not in contest, the applicant (indistinct) accepts our submissions that (indistinct) clause 37, and that this is in relation to 37 further: are we sure that the employee (indistinct) and the company focused the dispute in the relevant timeframes, or both mutually suffered the consequences and not did so. We say that admission's in paragraphs 5 to 7 of the applicant's submissions.

PN40

The other thing we ask the Commission to note about the submissions of the applicant is that, first, not one positive assertion in the applicant's submissions (indistinct). The gist of the applicant's submissions are fourfold. The applicant submits that the matter was not deemed to be withdrawn, and the failure to comply with the contents in clause 37.13.

PN41

We (indistinct) that to be 7, 10, 11, 12 for four reasons. The submissions are that given the (indistinct) for the dispute, the Commission should take a wide interpretation of the word, 'attempts.'

PN42

That means, in the second submission, that any attempt by the company must be genuine and reasonable, and any attempts by the manager to arrange a meeting were not genuine and reasonable, because the respondent didn't mention the time or a place for the meeting. They're the submissions (indistinct).

PN43

The third aspect of the applicant's submissions is that in (indistinct) word, 'attempts', of course 37.13 on its plain meaning means that multiple, or at least plural attempts, at each step, whereas the Commission notes I think there are at least four steps in this (indistinct) procedure. The submission is that at each level any attempt that is made must involve multiple, also plural. They concede it might not be multiple, that is, plural attempts (indistinct) instead.

PN44

In the alternate, there's an argument that a single inadvertent admission by the employer at (indistinct) should not cause an employee to lose their right to (indistinct) dispute. I want to deal with each of those four matters in that order, if the Vice President pleases.

PN45

Dealing firstly with the submission about (indistinct) in the dispute, firstly, the implications of (indistinct) should not come as any surprise to the applicant. I've only tendered just one example of the cases in which this Commission (indistinct) time periods. As we pointed out in that decision, the Commission has dealt with (indistinct) time limits.

PN46

Secondly, the applicant has not taken issue with our submissions about the obvious intention of (indistinct) time limits, and the natural agreed consequence of that. (Indistinct) made by the parties were that there were natural and (indistinct) consequences in a severe or not severe (indistinct), but more importantly, for both parties, the ability to have severe consequences for one party might.

PN47

Simply, if the contention is correct that there are severe implications for (indistinct) dispute, just (indistinct) the case in this matter: it is not a catastrophic failure or even significant failure for a dispute. The applicant is not left without a remedy under the agreement.

PN48

We pointed out in our reply submissions the email specifically deals with the circumstances where it appears that there has been no response, and that's not that there has to be no attempt. What the EA says, that if you haven't received a response, and believe you haven't received a response, then you have 14 days to respond. That wasn't done here.

PN49

THE VICE PRESIDENT: So 14 days from when you made a request?

PN50

MR COONAN: That's an interesting point. That would be the narrow interpretation. I can see another interpretation where it's 14 days after the 14 days, which would make it 28.

PN51

THE VICE PRESIDENT: At what - - -

PN52

MR COONAN: In this case it's 29 days anyway.

PN53

THE VICE PRESIDENT: Yes.

PN54

MR COONAN: 29 days before (indistinct) raised the failure to set up a meeting. So we would say that the failure to meet the time limit by the employer was not - or by the respondent - was not catastrophic. The agreement specifically deals with it in the provision for what the applicant to deal with, so that it would not lose the benefit of its dispute application.

PN55

What we say is the agreement - the agreed statement of fact shows this: that on 27 April – dealing with the critical dates – on 27 April the applicant did not believe the matter was (indistinct). He wrote to Mr Swanton - (indistinct) wrote to Mr Swanton, and that's (indistinct).

PN56

If the applicant believed that to be the case, that is, that the matter was not resolved, that if he gave (indistinct) to that, then the applicant gets 14 days to keep the dispute on foot. That's the 14 on one or two occasions, 28 on general (indistinct). But in either case, here, if the 29 days elapses from when the employee was (indistinct), and positively asserts that the matter was not resolved and there was no response to any request for it, then the agreement's unequivocal. If he has both those beliefs, then he has the right to (indistinct) the dispute.

PN57

THE VICE PRESIDENT: So essentially your argument is, it was 37.12 gave Mr West either the right to say I haven't had a response within 14 days of my inquiry, therefore I can send a further request to keep my dispute alive?

PN58

MR COONAN: Well, I can only - - -

PN59

THE VICE PRESIDENT: Or alternatively it might be 14 plus the 14 days to respond - - -

PN60

MR COONAN: Has elapsed, yes.

PN61

THE VICE PRESIDENT: Elapsed. He had a further 14 days to comply. In either event he did not - - -

PN62

MR COONAN: Did not meet that, yes.

PN63

THE VICE PRESIDENT: I understand.

PN64

MR COONAN: And then finally I make the submission that with respect of the (indistinct) submission about severity, that argument cuts both ways, as I said. It applies equally to both parties. There are severe consequences for both parties if compliance or non-compliance was (indistinct). It should not be interpreted to one party over the other. There's nothing in the EA that even applies, let alone (indistinct) that there should be a less severe interpretation for the applicant than for BMA, or vice versa.

PN65

If I can move on then to the arguments that the attempt made by Mr Swanton for (indistinct) was not genuine or reasonable. The submission is that the response of Mr Swanton on 27 April after the meeting of 5 May was not genuine or reasonable, because he did not mention the time. Secondly, he did not mention the place. Thirdly, he did not follow up with any employer representative either before, during or (indistinct) the dispute on 5 May. And finally, it was up to Mr Swanton to provide all (indistinct) details (indistinct) 5 May.

PN66

Now, our submission is that there is no evidence, and in fact this submission is contrary to the evidence. First of all, that Mr Swanton on 20 April applied to the dispute settlement on 11 April. He did as he was required to do under the agreement. He provided the response. He went a step further. He provided a (indistinct) response on each of the points raised by the employer representative, and that was why he believed the dispute notification was (indistinct). So he starts (indistinct), not objecting, at least (indistinct) response, and even though he was under the (indistinct) to others (indistinct) on or (indistinct), he responded and he offered a meeting.

PN67

On receiving the email of 27 April where the employer representative did request a meeting, he replied within the hour in that instance (indistinct), and he replied to the exact same email the employer representative used in this correspondence, and in fact that's correspondence with the respondent in that the dispute (indistinct).

PN68

Mr Swanton offered to take for a conference of 5 May. He offered a date, 5 May. He offered a time. He said after the prestart. As to the place, I would concede that there is nothing express where it would be, but (indistinct) know where Mr Swanton's office would be or Mr Swanton would be at the end of each day.

PN69

But we also say that there is no evidence, in fact nor is there an assertion, that the employer representative did not received this response, as there was (indistinct) agreement that the response was sent, and sent within, as I said, 38 minutes of the request being received. The only assertion we have is that he didn't read it.

PN70

Secondly, the agreement considers the response by Mr Swanton, but we won't need to (indistinct). There is no evidence of that; no evidence or assertion that the response by Mr Swanton on 27 April was unreasonable, or not genuine, and there's no evidence that even if he had have read it, he would have considered it to be non-genuine or unreasonable.

PN71

The only assertions that are made as he listed and didn't read it. There's no evidence or assertion of how (indistinct) unreasonable or non-genuine by Mr Swanton in that regard, because (indistinct). Nor is there any suggestion that Mr Swanton was unreasonable – sorry, the assertion that Mr Swanton was unreasonable by not following up further to that correspondence.

PN72

The actual evidence is Mr Swanton did know, and he agreed, (indistinct) no evidence and no assertion that Mr Swanton ever knew until after 26 May (indistinct) that the employer representative had never reached that (indistinct). The email, which was, as I said, sent 27 April.

PN73

On that last point, we say these two things. How could Mr Swanton know he was supposed to follow up? He offered a date and the time and (indistinct) and a place, and he got (indistinct). Secondly, where does the EA say it's history to follow up and not be (indistinct)? Mr Swanton if you read that in that response clearly leaves that in the employer representative's hands. He says I'm not free on 5 May, after pre-start, if that suits, and nothing non-genuine, nothing unreasonable that day, and there's no evidence that it was unreasonable for Mr Swanton to believe and then say, as he does in this correspondence, that only this email response, he assumed the applicant did not want to continue the dispute. There's nothing non-genuine about that, there's nothing unreasonable about that.

PN74

The applicant submits that to be reasonable and genuine and to show that (indistinct). After receiving no reply, Mr Swanton (indistinct) that can assume one or three things. (Indistinct) – sorry, 5 May date, (indistinct) employer representative and the employee. Secondly, that he had to make all the arrangements, and in the absence of any stated reply, and thirdly, and more importantly, the applicant even wanted to continue the dispute. (Indistinct) before, there is nothing in the evidence (indistinct) on non-assertion that it was unreasonable or not genuine, and Mr Swanton could have assumed that, having received that reply, he assumed that the dispute was not pressed.

PN75

It's a complete (indistinct), once you receive no reply he should have understood the applicant wanted – first of all, wanted to continue the (indistinct). Secondly, he should have sought out Mr West, and then – and employee – and thirdly, he should have arranged all the details for that meeting to be held. As I said, it's a complete (indistinct).

PN76

I'll tell you one further point, and that's in relation to paragraph 23, where he even submits it was the lack of the follow-up by Mr Swanton which ensured that he cancelled the meeting and it did not occur. Well, equally, there was a (indistinct) failure by the employee representative, who asked for the meeting. He followed it up, or as we say, over the 29 days. This is the part when he actually (indistinct) same place.

PN77

There is nothing in his evidence that was in the agreement; no assertion that somehow Mr Swanton did speak of (indistinct) mind-reader. Assume that silence was, one, a decision to receive, but secondly, inadvertent error by the employer representative, both of which are entirely outside his (indistinct). The submission that there is an (indistinct) ungentuine or unreasonable (indistinct) Mr Swanton's behaviour, this is not supported by the evidence or by (indistinct).

PN78

THE VICE PRESIDENT: Can I just understand, Mr Coonan, this is a dispute where 37.9 doesn't apply to a disciplinary matter. So the first step was 37.10.

PN79

MR COONAN: 37.10, that's my understanding, Vice President, yes.

PN80

THE VICE PRESIDENT: Yes. So the letter of 10 April, which I understand was sent on 11 April?

PN81

MR COONAN: Yes.

PN82

THE VICE PRESIDENT: The union's letter, which is Annexure A to the statement of facts, and the covering email is in the last page of attachment E, is that the case?

PN83

MR COONAN: I'll just check. Correct, yes.

PN84

THE VICE PRESIDENT: Okay. So Mr West sends the letter of 10 April with the covering email on 11 April at 8.07 am to Mr Swanton?

PN85

MR COONAN: Yes.

PN86

THE VICE PRESIDENT: So is that 37.10(a)?

PN87

MR COONAN: That's my understanding, yes.

PN88

THE VICE PRESIDENT: And 37.10(a) says the matter will then be referred for discussion between – so who's supposed to refer it? The party that raises the matter, do you say?

PN89

MR COONAN: I think that's more a nebulous concept (indistinct) that the raising the matter needs an (indistinct) to a discussion.

PN90

THE VICE PRESIDENT: Okay. So Mr Swanton responds and says I'm happy to discuss further in person if you wish?

PN91

MR COONAN: No. I think that's attachment B, the response between the (indistinct).

PN92

THE VICE PRESIDENT: Yes, which on the bottom - - -

PN93

MR COONAN: Yes, sure.

PN94

THE VICE PRESIDENT: I completed (indistinct) - - -

PN95

MR COONAN: (Indistinct) the Commission (indistinct) fact of the fulsome response.

PN96

THE VICE PRESIDENT: Yes, I understand he's responded to, and so I guess the things to note is attachment A doesn't ask for a meeting. It says we want these questions answered and then we're going to think about our position. Attachment B is the response that says I'm happy to discuss, if you want to. And then Mr West responds and says I hope to be back at work on the 5th, would very much like to discuss. And Mr Swanton, on the bottom, it says I'll be able to meet with you next Friday. So is that then 37.10(b)?

PN97

MR COONAN: No, I think we're still in 37.10(a).

PN98

THE VICE PRESIDENT: We're still in 37.10(a) and we never got out of 37.10(a)?

PN99

MR COONAN: That's right, Vice President, yes.

PN100

THE VICE PRESIDENT: All right.

PN101

MR COONAN: Yes, as I say, when you read 37.11 and 12, you must read 37.10 that refers (indistinct) 37.12, or (indistinct) specifically state that the respondent in this matter can either have a discussion or can provide a response. We say we did both, and that's the letter that you referred to on 20 April by Mr Swanton, both provided – there's another (indistinct), though Mr Swanton did both. He provided a response, and then he upped and - - -

PN102

THE VICE PRESIDENT: So 37.11 applies at each stage, so applied at 37.10(a), and it says that the employee – so the company has 14 calendar days from the date of the last discussion to respond or make contact, to arrange a meeting to attempt to resolve?

PN103

MR COONAN: Two things, to respond.

PN104

THE VICE PRESIDENT: Yes.

PN105

MR COONAN: Or to contact to arrange a meeting. We say that they're the two separate options that it has.

PN106

THE VICE PRESIDENT: All?

PN107

MR COONAN: Yes.

PN108

THE VICE PRESIDENT: So if no meeting's asked for, it doesn't have to offer a meeting, it can respond?

PN109

MR COONAN: Give their response.

PN110

THE VICE PRESIDENT: Yes.

PN111

MR COONAN: Yes.

PN112

THE VICE PRESIDENT: And then so it's for a contact to arrange a meeting if the meeting is – and that you would say (indistinct) engage with the meeting is posted in the first correspondence?

PN113

MR COONAN: Well, only that it needs to be (indistinct). That's in the situation where you both either provided a detailed response and the offer to meet in person, if the employer representative (indistinct).

PN114

THE VICE PRESIDENT: Yes. Well, that's not arranging a meeting. I think the second email - - -

PN115

MR COONAN: It's not for the meeting.

PN116

THE VICE PRESIDENT: It is arranging it. That's your argument?

PN117

MR COONAN: That's correct.

PN118

THE VICE PRESIDENT: There's been no offer for the second one, if it's sufficient to arrange a meeting?

PN119

MR COONAN: Yes. Or the one complication, firstly, (indistinct) no, it's both a response, and an offer to have a meeting if you wanted it.

PN120

THE VICE PRESIDENT: Yes.

PN121

MR COONAN: And the second email was (indistinct).

PN122

THE VICE PRESIDENT: Yes, and that was the attempt to arrange the meeting?

PN123

MR COONAN: Correct.

PN124

THE VICE PRESIDENT: Yes, I understand. Thanks.

PN125

MR COONAN: Moving on with the claim, or the submission that there must be multiple attempts to arrange a meeting, we've dealt that in our written submissions in some detail, going to both the context of the agreement, the context of the clause in question, and we did put the clause in question and provided it in (indistinct) submissions. But (indistinct).

PN126

The aspect in the submission fails to deal with two things. All that's required, the applicant states that, in response to our submission, that misinterpretation (indistinct) multiple responses. It says that at least – sorry, it states the two attempts are sufficient. There doesn't need to be more. Our submission is that that's (indistinct). What if there's an inadvertent (indistinct) or both? Then we have to make multiple attempts. On the (indistinct) submissions, if there's an inadvertence, and it has severe implications, you've got to keep trying until either

we resign or somehow divine that the (indistinct) was to proceed with the dispute - or doesn't want to proceed with the dispute.

PN127

Secondly, two was the magic number. (Indistinct) in view of the evidence that there were two offers to discuss the dispute, and that's what we just traversed with the Vice President. Mr Swanton offered in his email of 20 April to discuss the matter, and he offered specifically a further meeting in his email of 27 April.

PN128

When you look at the evidence, again, with respect of all of those matters, the correspondence between the parties is from the same emails, and to the same emails. As I said, (indistinct) of the (indistinct) – it's in the evidence - after receiving the request for (indistinct) response.

PN129

But I did want to deal with the submissions in reply that the claim that the respondent hasn't dealt with (indistinct) submissions about the explanation for the use of the word, 'attempts', or the use of the word, 'plural attempts', in of course 37.13.

PN130

We say there is an explanation for that. That (indistinct) came from our previous submissions. We say that the explanation for the use of the plural in clause 37.13 doesn't require multiple attempts to arrange a meeting at each level of the dispute settlement procedure.

PN131

Clause 37.13 deals with all (indistinct) which are required under clause 37.11, which deals with all (indistinct) that are required under clause 37.10. In this matter there are three stages of the process under clause 37.10 at which we must duly respond, or make an attempt to set up the meeting.

PN132

There's the meeting with the superintendent under 37.10(a). There's a meeting with (indistinct), that level, at 37.10(b), and there's the SLC under 37.10(c). That's the reference to why the word 'attempts' in plural that's used in 37.14; not that we have to make multiple attempts, but (indistinct), but if there's an attempt at (f), and there's an attempt at (g), and there's an attempt at (h), that's the reference to the word 'attempts' in plural.

PN133

Finally, I'd like to deal with the submission about the (indistinct) that perhaps should not be in dispute. We simply restate our submissions earlier. There's no contest or argument contrary (indistinct) our submissions that (indistinct) contest of the insertion of covenants(?) in the agreement. There's no (indistinct). There was nothing inadvertent in this provision. There's no (indistinct) or exception. (Indistinct) in the full knowledge of the consequences of (indistinct) invite, inviting of (indistinct) parties, and as I say, that's consistent with the decision in the matter in 2020.

PN134

Again, we state in earlier submissions, (indistinct) the applicant was left without remedy. As I said, the EA deals with it. If they believed there was no response, which the employer representative (indistinct), the applicant itself could have saved the application from the (indistinct) – there's a word, useless – could have escalated it to the next level in the 14 days of the request, 14 days of a response to his request, which the applicant simply didn't do.

PN135

I then want to go to, finally, just repeat why the Commission says that (indistinct) the proceedings, and I rely on our submissions, because (indistinct) submissions, as to why the (indistinct) of the agreement - of the respondent should be favoured over that of the applicant, and submit that there was a disposal of these proceedings was that for the Commission to find that there's no jurisdiction and that the application be dismissed. Unless the Commission has any questions, those are my submissions.

PN136

THE VICE PRESIDENT: Thanks, Mr Coonan. I don't have any questions. Mr Newman?

PN137

MR NEWMAN: First of all, we wanted to start our open again, just probably seek to tender our submissions as well, similar to Mr Coonan.

PN138

THE VICE PRESIDENT: Yes. We'll mark the initial submission, MEU1, and the reply submission MEU2.

EXHIBIT #MEU1 INITIAL SUBMISSIONS OF THE APPLICANT

EXHIBIT #MEU2 REPLY SUBMISSIONS OF THE APPLICANT

PN139

MR NEWMAN: Thank you very much. Mr Coonan's outline (indistinct) in his submissions, this is a dispute around 37.13, but not in isolation, in respect to the disputes procedure around 37.13, and as is correctly outlined, that the union's position around the way that subsection 37.13 operates in conjunction with 11, 12 and 13, and what we say about the way that that should be interpreted is that there are strict guidelines in place under the disputes procedure, the 14 days. That's not in dispute between the parties. That's the (indistinct) these matters. The union doesn't argue that they (indistinct) the guidelines and the reasons for them, but I mean we've made those admissions.

PN140

What our argument is is that – and I'll respond to Mr Coonan's response as well and put our position forward – is that it is quite clear that the ramifications for non-compliance in subclauses 11, 12 and 13 are vastly different for the respondent, for currently, than they are for the employee.

PN141

Subsection 11 is, as correctly has been pointed out, 37.11, gives no obligations on both parties 14 days to attempt to meet and resolve the matters at each step of 37.10, as we've gone through.

PN142

Now, in 37.11, if the company doesn't meet their attempts to resolve the matter within 14 days, there's an ability for the employee to make an assumption that the matter couldn't be resolved at that stage, and then 37.12, I should say there's an assumption for the employee to say that the matter couldn't be resolved and they have the option to progress the matter to the next stage. It's not non-discretionary like Mr Coonan submitted. It says the employee may progress the matter to the next stage of the process.

PN143

Now, the consequences for the employer in terms of non-compliance of 14 days is that the matter escalates to the next level. They don't lose their fundamental rights. There is no fundamental loss of rights that – all that happens is the matter escalates to the next level, and the matter commences all over again, and the dispute gets (indistinct) all over again. They've essentially lost nothing.

PN144

However, in 37.13, if the employee doesn't progress the matter within the time limits, which it was held before, or – and this is what's in dispute at this time – respond within 14 calendar days to the company's attempts to arrange a meeting, the matter in dispute will be treated as withdrawn. Once this occurs, an employee cannot seek to reinvoke this procedure in relation to (indistinct). The employee loses all rights to their dispute (indistinct) if they do not comply with this.

PN145

THE VICE PRESIDENT: Yes, and that was the - - -

PN146

MR NEWMAN: And that's what was agreed to.

PN147

THE VICE PRESIDENT: That's the (indistinct) both ways - - -

PN148

MR NEWMAN: We're not arguing that that's the consequence - - -

PN149

THE VICE PRESIDENT: Because the company's accepted altercation rule and dispute around - - -

PN150

MR NEWMAN: And we accept that position. What we say though is that because that threshold is different, the company has to have some real and cogent efforts of a failure to either progress within the 14-day time limit, or they've got to show genuine and real attempts to arrange a meeting in order to make that assumption. That's where this dispute – this is where the jurisdictional objection falls down in our view, and this is the crux of the matter in our view.

PN151

Does the factual matrix of this matter, and the Commission has to decide on the factual matrix of this matter - does the company's action constitute attempts to arrange a meeting under 37.11? Did they make attempts to arrange that meeting in order to satisfy that the employee considered the matters, or the employee wanted to have the matter withdrawn, and the employer could make that assumption? Then, does that action constitute that? That's the crux of the matter.

PN152

Our submission, as pointed out (indistinct), is twofold. Firstly, we say that there was no genuine attempt to arrange a meeting under 37.11 at all by Mr Swanton. But a point of Mr Coonan's submission, there are several times he coats that Mr Swanton's email hasn't offered a meeting. An offer is not an attempt. It's two different things. An offer is not an attempt. So we say at first instance there was no attempt to arrange a meeting.

PN153

THE VICE PRESIDENT: Isn't an attempt less than an offer?

PN154

MR NEWMAN: No. We say no. An attempt is more than an offer. An offer is we have availability on this day. An attempt is there will be a meeting on this time at this date at this place (indistinct).

PN155

It would be simply if we were to have a sort of - much the same as this matter, where the associate may say there's availability on this date. That's not an (indistinct) to occur.

PN156

THE VICE PRESIDENT: Okay. (Indistinct) happen.

PN157

MR NEWMAN: You know, if there was - yes, exactly, who knows what could happen between now and then, but if there is a - if there is a - if the duration (indistinct) are saying there will be held a hearing but not on this day at this time, (indistinct), or on this (indistinct), then that's an arrangement; that's an attempt to arrange a meeting. I mean it would go further obviously, but you get the point. The arrangement has to be more than just a: I'm available this day. It has to be this time, this date, this place, with these people.

PN158

Let's look at what occurred. The key seems to be the email of 27 April at attachment C. Now, our submission is that that's not a - again, that is not an attempt to arrange a meeting. That is an offer to make a meeting. Mr Coonan has made submissions in relation to this being a genuine offer. Well, it might have been a genuine offer, but who knows what could happen between now and then. He's also made submissions in relation to, well, Mr West could have done this and Mr West could have done that, well Mr West didn't have a responsibility to arrange a meeting. 37.11 and 37.13, it is incumbent on the employer to arrange a meeting.

PN159

THE VICE PRESIDENT: It makes it incumbent on the employer to attempt - - -

PN160

MR NEWMAN: To arrange a meeting.

PN161

THE VICE PRESIDENT: - - - doesn't it?

PN162

MR NEWMAN: Yes. No attempt was made. If he had said that's great, Simon, we'll invite Mr – come to office after prestart, I'll talk to your supervisor and make sure that it's okay, and we'll get the civility involved, and nail the response. Okay, maybe that's an attempt, but none of that has occurred. All it was was I've got availability some time after prestart in a week's time. That's not an attempt to arrange a meeting.

PN163

You've got to remember Mr West is an employee. He has no control over where he goes or what he does. He has no control of booking connected rooms. He has no control of getting Mr Beilby off – because the employee has to be involved as well. There's been no attempt by Mr Swanton to involve Mr Beilby in this at all. It says, 'the employee and their representative.' Mr Beilby has not been involved in any of this.

PN164

So how can the respondent get up and say now that there was an attempt to arrange a meeting, when there was no time for the meeting, there was no place for the meeting, there is no – the employee wasn't invited, and it was just left at that.

PN165

Now, Mr Coonan's said that he's made a fulsome response and made this genuine attempt, but I mean – and what more could he have done. Well, professional courtesy dictates that if you thought the meeting was going on and it didn't occur, you'd go and ask the person. Professional courtesy dictates that if you didn't get a response you'd follow it up. Professional courtesy says that if you believe that something was go on and it didn't occur, you would go – especially if it's an employee under your control, that you had absolutely every right and ability to call up on the two-way and say hey, we're going to have this meeting today, you'd do it. I mean, essentially BHP's response is once the email's sent it's all care and no responsibility from their behalf.

PN166

THE VICE PRESIDENT: Well, that assumes that your argument about what 'attempt' means is correct, and that it's not sufficient to just say over to you – I'm available then, over to you, that, you know, if it suits you, and then I can state whatever arrangement necessary - - -

PN167

MR NEWMAN: Well - - -

PN168

THE VICE PRESIDENT: - - - (indistinct) - - -

PN169

MR NEWMAN: Mr West's email said that he'll be back on that date, that he'll be at work and therefore available. Mr Swanton's response is in effect that that'll be fine after prestart. It's then up to the employer to make the attempt to arrange the meeting.

PN170

THE VICE PRESIDENT: Except Mr West hasn't said yes that's - - -

PN171

MR NEWMAN: Well, he doesn't, but again, if there was a genuine thought that the meeting was going on, where's the professional courtesy? Where's the respect to ring him up and find out what's going on? If that was a genuine attempt. If that was a genuine attempt to arrange a meeting that didn't occur, where's the professional courtesy to follow up or to realise that the emails didn't stress a time and says hey, further to my email I'm available on the 20th, 10.12, I'll get you off by 10, let's see where Mr Beilby is? None of that occurred.

PN172

So, again, for the employer to then stand back and say well we considered the matter withdrawn, we don't say that meets the threshold of an attempt to arrange a meeting to a level that they could say genuinely that they considered the matter withdrawn, because it was clear that the matter was in dispute. It was clear that they were keen for a meeting.

PN173

Now, we have made the submission that the reason for it is inadvertence, that Mr West missed the email. Mr Coonan's made a submission that there is no evidence of that. Well, that's not true. In the statement of agreed facts, attachments G and F, he makes it clear in his emails to the company that they have missed the email.

PN174

Now, we can take that as far as we can, because it's a statement of agreed facts, but there is evidence there of the reasons for it. We're not saying that there should be allowances for that. We're just saying as part of the matrix there is evidence of why that was missed. What we say though is that there was not an attempt to arrange a meeting by Mr Swanton on 27 April.

PN175

Now, even if that is incorrect, and then you formed a view that that is an attempt, the clause at 37.13 clearly says that you've got to have attempts to arrange a meeting under 37.11. If that email of 27 April is an attempt – we say it's not - but even if it is, they've got to make attempts to arrange a meeting.

PN176

I don't accept Mr Coonan's submissions just before in relation to 'attempts' meaning attempts in the entirety of this biz process. That's clearly just not the

correct interpretation. If that was the case, then it would say, 'attempts to arrange meetings', not – it'd be multiple meetings. It is, 'attempts to arrange a meeting', single meeting. There can only be one meeting at each dispute process, unless the parties agree otherwise.

PN177

So it's clearly talking about making multiple attempts, more than one, plural, to arrange a meeting under 37.11. If you're not with us on that, don't accept that the email is an attempt, it's incumbent on the company to make more than one attempt.

PN178

We say the reason for that is quite clear. Again, the consequences for the employee of not responding to the attempts to arrange a meeting, or to (indistinct) 14 days, is quite severe. It's a total loss of rights to their dispute, and in this instance, this isn't attributable to – we're talking of our business - Mr Beilby. Mr Beilby has been suffering - according to the dispute - is suffering the loss of \$100 per week as a result of having his train certification taken off him, we say incorrectly. So Mr Beilby is (indistinct) consequence of the dispute. Mr Beilby is losing \$100 a week as a – and that is disputed.

PN179

So it's incumbent, we say, on the employer to make attempts – more than one, plural – to arrange a meeting. Mr Swanton, again all care no responsibility on Mr Swanton, there's no harm in that. He's just merely sat back while this nebulous email of 27 April, and where Mr West has come in with a genuine attempt to try and get those addressing, saying I feel sorry (indistinct), here it is; it's all care no responsibility, it's up to you.

PN180

Well, it's not up to Mr West. It's up to Mr Swanton to arrange the meeting and then make attempts to arrange that meeting. He did not do that, and now the company is sitting here and saying Mr Beilby should lose all rights and perpetuity because Mr Swanton has all care and no responsibility.

PN181

I quickly also want to touch on one of Mr Coonan's arguments in relation to that there were alternatives to Mr West in the disputes process. If I read it correctly, I'm not sure where that would take you, first of all, if he was to dispute the fact that it wasn't being disputed, or the fact that it wasn't – because the company would end up saying well you've seen my opposition and you'll be given jurisdictional objection anyway.

PN182

But in any event, I just want to point the Commission to attachments E, F and G, and I think even H as well, of the statements where it's quite clear that Mr West didn't do that, exactly what Mr Coonan said. He sought to dispute – (indistinct) – he's progressed the matter to Shirley(?), or Taint(?), as it's called, who's the next up in the chain, as of 37.10, saying:

PN183

Could not be resolved. It's an incorrect (indistinct) view that the matter's been withdrawn. I'm seeking to escalate this matter.

PN184

And the response he got was:

PN185

No, the matter's been withdrawn.

PN186

Attachment G, it goes to the next level, which is the HR representative, saying this matter should not have been withdrawn, we need to progress this matter, here's all the facts around it. Again, gets nowhere with it, and then the matter was progressed to the Commission. So one can't say that Mr West didn't avail himself of the disputes procedure at any time. He tried, and each time he was rebuffed by what we say is an incorrect interpretation in clause 37.13.

PN187

THE VICE PRESIDENT: But if Mr West was going to progress it, didn't he have to, within 14 days or 28 days, depending on what interpretation you adopt, didn't he have to say well I've sent an email and it was 28 days ago and I haven't had a response? So within that time he had to follow up and say where's my response?

PN188

MR NEWMAN: Well, he did that. He did that on 26 May.

PN189

THE VICE PRESIDENT: Well, did he do it within 28 days though?

PN190

MR NEWMAN: Well, he's done it outside of the 14 days. If the matter wasn't – he's got an option to address the matter if not - - -

PN191

THE VICE PRESIDENT: Yes.

PN192

MR NEWMAN: No, he's not availed himself of that option, because he sought to do something reasonable, something Mr Swanton never did, which was to see if he could get this done reasonably on 26 May, and was rebuffed. Now, after - - -

PN193

THE VICE PRESIDENT: Be that as it may - - -

PN194

MR NEWMAN: Yes.

PN195

THE VICE PRESIDENT: Whether it was reasonable or not, that replies to what was to have a reasonableness requirement in - - -

PN196

MR NEWMAN: No - - -

PN197

THE VICE PRESIDENT: - - - (indistinct).

PN198

MR NEWMAN: No, not in any sense. I understand there's no reasonable requirement in there. I'm just saying that one can be reasonable if one chooses, and one chose not to. There are options.

PN199

THE VICE PRESIDENT: It's really saying one should just ignore and say, oh well, I admit poor Mr West had tried, and I'm not unsympathetic to Mr West, but Mr West had tried it and therefore I should allow a bit of a lapse in not responding - - -

PN200

MR NEWMAN: There are often (indistinct) where that could've been done, and they've taken the hard option. We say it wasn't open to them to do that.

PN201

THE VICE PRESIDENT: Where's the option to let it slide if the time limit isn't met?

PN202

MR NEWMAN: It says – well, first of all, 37.12 – 37.12, 'The employee may address the matters' – and at that stage it doesn't have to.

PN203

THE VICE PRESIDENT: So where the company fails to make contact.

PN204

MR NEWMAN: Yes.

PN205

THE VICE PRESIDENT: But where does it refer to the company exercising any discretion at all to do something differently to what's in the procedure?

PN206

MR NEWMAN: Sorry, if I can just have a look at the procedure, if they choose to accept it making the dispute offer. There's no procedural (indistinct).

PN207

THE VICE PRESIDENT: Well, can they, Mr Newman? Because it's very clearly been established that the Commission has only power as given to it under the disciplinary - - -

PN208

MR NEWMAN: I appreciate that, because the party would under agreement, unless otherwise agreed. And it's not what's agreed that the parties could agree. I'm not saying that the employer did not have – our argument is that the employer could have agreed, but they chose not to, to overlook that, because

unless the parties agree. The parties clearly don't agree. The employer is seeking their rights under 37.13. We're saying it's not open to them.

PN209

THE VICE PRESIDENT: I don't know that a superintendent can agree to something that effectively gives the Fair Work Commission jurisdiction where it doesn't have it under the dispute settlement term of the agreement. I (indistinct) - -

PN210

MR NEWMAN: 37.15 says that the company (indistinct) employers can bypass any of the steps, it could just bypass the (indistinct).

PN211

THE VICE PRESIDENT: Let's - - -

PN212

MR NEWMAN: Parties can come to the Commission - - -

PN213

THE VICE PRESIDENT: (Indistinct) - - -

PN214

MR NEWMAN: - - - under 738 (indistinct) for a dispute if they agree. But the point I'm making is, in this instance - - -

PN215

THE VICE PRESIDENT: I don't know that's right, Mr Newman, that if the dispute settlement procedure says the Commission can only arbitrate with respect to the National Employment Standards, and there's a dispute about something that's not within the terms of the agreement, I don't know that the parties can hold hands and come to the Commission and say we're going to grant you power that the approved agreement does not grant you; we're going to agree to submit ourselves under the dispute settlement procedure for a binding outcome. I don't know if it does allow that.

PN216

MR NEWMAN: (Indistinct), but irrespective of that, the point we're making is that there is a threshold level for the matter to be dismissed, to say the matter was withdrawn can not be made in this instance.

PN217

THE VICE PRESIDENT: I understand.

PN218

MR NEWMAN: Because a) they have not made an attempt to arrange a meeting, and b) they've got to make more than one, and they've not done either.

PN219

THE VICE PRESIDENT: I understand.

PN220

MR NEWMAN: (Indistinct) there would be further questions, that's all I have.

PN221

THE VICE PRESIDENT: No. Thank you. Mr Coonan, do you have anything in response?

PN222

MR COONAN: Just very briefly, Vice President. I want to first of all deal with the submission that there was no (indistinct) the dispute had not been progressed. We take issue with that. We say that there is. We have an agreement that says that there must be that response within 14 days, where we have an (indistinct) here. We have, as I say, in the EA where it says an employee has 14 days to reply, and we have evidence that he didn't. There might be a reason. It might be harsh, an outcome, but the simple fact is that there is evidence that there wasn't (indistinct) of a dispute within 14 days.

PN223

I also want to deal with the submission that an offer is not an attempt, and that at least (indistinct). That submission is contrary to the (indistinct) submissions. If you look at paragraph 9 of the submissions, it relies on the definition of 'attempts' in the Macquarie Dictionary, and it says that looking at 'attempts' it is (indistinct), firstly, within its ordinary meaning, namely (indistinct) try.

PN224

There can't be any submission that Mr Swanton didn't make an effort, or didn't try to set up a meeting. The definition in the Macquarie Dictionary doesn't say actually set up the meeting and give the dates, the time, a place, the people, et cetera. In its own submissions, we have made an effort and we have tried to set up a meeting.

PN225

The second thing is that it feels like an issue with the submission that the (indistinct). That's not true, in our submission. There are four steps under the agreement that accept that it can do in the (indistinct), which speaks in there largely about the reference to the rules in clause 37.13.

PN226

In relation to the submission about attachment E (indistinct), can I just say that Mr West had never availed himself of escalating the dispute. Our submission was that he could have, and there is a time limit which he can do that, and he didn't do it. So the submission in relation to attachment E that support our submission, not (indistinct). That's all I have, Vice President.

PN227

THE VICE PRESIDENT: Thank you. Thank you for those submissions. I will indicate that I will reserve my decision and I will issue it in due course, and on that basis I'll adjourn. Good morning.

ADJOURNED INDEFINITELY

[12.07 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #BHP1 INITIAL OUTLINE OF SUBMISSIONS OF THE RESPONDENT PN15

EXHIBIT #BHP2 REPLY SUBMISSIONS OF THE RESPONDENT..... PN15

EXHIBIT #A STATEMENT AND ATTACHMENTS PN27

EXHIBIT #MEU1 INITIAL SUBMISSIONS OF THE APPLICANT..... PN138

EXHIBIT #MEU2 REPLY SUBMISSIONS OF THE APPLICANT..... PN138