



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MASSON**

D2022/10

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

**Application/Notification by Kelly
(D2022/10)**

Melbourne

10.30 AM, TUESDAY, 20 DECEMBER 2022

Continued from 17/11/2022

PN1

ACTING PRESIDENT HATCHER: Mr Borenstein and Mr Bakri, you continue your appearance for the applicant?

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MR BORENSTEIN: Yes.

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ACTING PRESIDENT HATCHER: And Mr Dowling and Mr Matthew, you continue your appearance for the respondent?

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MR DOWLING: We do. Thank you, Acting President.

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ACTING PRESIDENT HATCHER: All right. So who'd like to report on the position?

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MR BORENSTEIN: Perhaps we could start by thanking the Commission for allowing us the time yesterday and this morning. The Commission will have received a document, this morning, I believe.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: Which sets out an agreed position that the parties were able to reach and in relation to which we seek some indicating from the Commission about whether the Commission is prepared to adopt the process suggested in that document. The parties, we would urge the Commission to do so, as a way of resolving the application in the most efficient way and the most timely way.

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You will have seen that if the Commission is prepared to deal with the issue of the rules which is referred to in paragraph four of the document, that will significantly reduce the area of disputation in the application, and hence the time necessary in the Commission to deal with it.

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ACTING PRESIDENT HATCHER: Mr Borenstein, can I just check with you our understanding of what the parties want us to do.

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MR BORENSTEIN: Yes.

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ACTING PRESIDENT HATCHER: In sequential order. So the first step is we allow you to amend your application in respect of the rules annexures.

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MR BORENSTEIN: Correct.

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ACTING PRESIDENT HATCHER: The second step is we rule on acceptance of the application under Section 94A?

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MR BORENSTEIN: Yes.

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ACTING PRESIDENT HATCHER: The third step is we make findings pursuant to section 100(1)(ba) in respect of the compliance with section 95A of the Rules. And then the final step is we conduct a further hearing in late February as to the balance of the matters about which we have to be satisfied in section 100(1). Is that correct?

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MR BORENSTEIN: I believe that's so.

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ACTING PRESIDENT HATCHER: Yes. Do you agree with that, Mr Dowling?

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MR DOWLING: Save one addition, I think, your Honour. And that is step three that your Honour described the findings in relation to 95A under section 100(1)(ba). We have anticipated as you might have seen from the document that that would involve giving the parties the opportunity soon rectify any concerns that the Bench might have and to return before you with the mechanism by which we endeavour to rectify those issues.

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ACTING PRESIDENT HATCHER: Yes. I was going to explore with you - - -

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MR DOWLING: Or address it.

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ACTING PRESIDENT HATCHER: Yes. I was going to explore with you, subsequently, the mechanism by which we might – you propose we reach that step.

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MR DOWLING: I understand.

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ACTING PRESIDENT HATCHER: I assume it's some sort of intuitive process where you're going to show us the Rules and then we'll examine them and raise any concerns with you. Is that - - -

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MR DOWLING: That's correct.

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ACTING PRESIDENT HATCHER: All right. Yes. Sorry, Mr Borenstein.

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MR BORENSTEIN: Yes. I also just wanted to clarify something that you said about section 94A. You will see that paragraph five of the document indicates that if the Commission is prepared to proceed in the manner proposed by the parties that CFMEU withdraws its objections and consents to an order being made to pursuant to section 94A. I just wanted to make that clear.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: In terms of documents that we would hand up, if the Commission agrees to the process? As a result of a lot of time spent yesterday between the parties, the parties have developed eligibility rules for each of the organisations after amalgamation which are proposed to be substituted for the rules that were attached to the application.

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ACTING PRESIDENT HATCHER: Well, I - - -

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MR BORENSTEIN: And it's proposed that those documents would be handed up to the Commission if the Commission agrees to proceed with this process and that within the next 24 to 48 hours there would be some supplementary rules dealing with the balance of the rules to accommodate those eligibility rules that have been changed from the ones that are in the annexures to the application.

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ACTING PRESIDENT HATCHER: So just to be clear the eligibility rules which you're going to propose to us, which need to comply with section 95A - - -

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MR BORENSTEIN: (4) to (6).

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ACTING PRESIDENT HATCHER: - - - (4) to (6) will they relate to your primary application, or your alternative application or will there be alternatives?

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MR BORENSTEIN: The primary application.

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ACTING PRESIDENT HATCHER: Right.

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DEPUTY PRESIDENT GOSTENCNIK: Mr Borenstein as a consequence of that that if we reject the primary application you proceed on the basis – you proceed with the case on the basis of the secondary application?

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MR BORENSTEIN: I'm sorry. I didn't hear the last part of that.

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DEPUTY PRESIDENT GOSTENCNIK: If we were to reject the primary manifestation of the constituent part does that mean that the applicant will proceed with – to final determination of its secondary position?

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MR BORENSTEIN: Are you asking me whether you proceed on the basis of the rules as they are annexed to the alternative application?

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DEPUTY PRESIDENT GOSTENCNIK: Well, if for some reason we're not persuaded that the primary constituent part falls within 95 – sorry, 94 – your current application has a secondary proposal.

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MR BORENSTEIN: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: Does it mean that the secondary proposal will proceed? Or is part of the arrangement for the secondary proposals falls away altogether?

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MR BORENSTEIN: Can you just give me a moment?

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DEPUTY PRESIDENT GOSTENCNIK: Yes.

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MR BORENSTEIN: Deputy President the intention is that if the primary application fails that we would ask the Commission to rule on the alternative application and I am told that the changes to the eligibility rule that we are handing up would be proposed in relation to the new union that would be registered on that alternative application as well.

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DEPUTY PRESIDENT GOSTENCNIK: All right. So we'll have two alternative sets of rules? One for the - - -

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MR BORENSTEIN: The rules will be the same in respect of both which is the way in which the applications have been made presently.

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DEPUTY PRESIDENT GOSTENCNIK: All right. So if, for example, having received the rules we identified – I am speaking theoretically now – that we identify that the proposed eligibility rule would not comply with the requirements of section 95A in respect of the alternative proposal we would inform the parties of that view and some corrective step might be taken?

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MR BORENSTEIN: Yes. And we would endeavour to meet the problems that the Commission enforces off.

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ACTING PRESIDENT HATCHER: So we should address the rules from the perspective of both alternatives?

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MR BORENSTEIN: That would be helpful, yes.

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ACTING PRESIDENT HATCHER: Yes. All right. I understand.

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MR BORENSTEIN: I'm not sure that there's anything else I can add to the written submission.

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ACTING PRESIDENT HATCHER: Right. So in terms of the process of the assessing the rules what do you have in mind as to how we might go about that task?

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MR BORENSTEIN: What we have in mind is to provide you with the substitute rules. As I said, we will be providing you in the next little while, in the next few minutes, with the substitute eligibility rules. Within the next day or two we will provide you with the balance of the rules to substitute for those that are in the application, including the industry rules and other rules. And then we would – we had envisaged that the Commission would review those rules against the criteria in section 95A(4) to (6).

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DEPUTY PRESIDENT GOSTENCNIK: Is it envisaged, Mr Borenstein, that there would be a joint submission as to how the rule was complied?

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MR BORENSTEIN: I'm sorry?

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DEPUTY PRESIDENT GOSTENCNIK: Is it envisaged that there would be a joint submission – written submission – to indicate how the rules that you're going to hand up comply? Mr Dowling says 'yes'.

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MR BORENSTEIN: That hadn't been envisaged, Deputy President, but if that would be of assistance then that could certainly be attended to.

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DEPUTY PRESIDENT GOSTENCNIK: Well, speaking for myself I can give it to you.

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ACTING PRESIDENT HATCHER: I think that would be of assistance. I'm not sure that we undertake an undirected examination of the rules. If the parties can direct us to what we need to look at to satisfy the statutory requirements that would make our task easier.

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MR BORENSTEIN: We're here to assist the Commission. If that would be of assistance then we would do that. And then we would, as Mr Dowling has indicated, I think, we would hope that the Commission would give an indication of its thinking about the rules. Whether the Commission was of the view that they did comply or if they didn't comply would give some indication of the areas of non-compliance of the requirements, and then the parties have agreed on the process to try and address that.

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So, Mr Bakri was suggesting to me a method by which the Commission might indicate its position he was suggesting something like the background paper that was issued in the 94A application. But I'm not suggesting that the Commission should necessarily go to that much effort for that.

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But once we get some indication about where the Commission is concerned we would then address that jointly and hopefully satisfy the Commission about that and then the matter can proceed effectively without objection after that.

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As to the timing of when we can provide you with a document – a written submission – we might endeavour to do that before the end of the week but given the time of year it might be a little bit later than that.

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ACTING PRESIDENT HATCHER: All right. Thank you. Mr Dowling?

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MR DOWLING: Thank you. Not very much I need to add to that. As my learned friend said the parties contemplated that the eligibility rules will be provided today and the balance of the rules within 48 hours.

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The parties had not contemplated what the Bench has said today but we agree it's a useful exercise, a joint set of submissions as to why they meet the requirements. We also share some concern about the ability to do that before the end of the week but we will discuss it and we will do it as soon as we possibly can.

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As to the process by which the Bench might communicate any concerns it has we don't want to be prescriptive. We had for ourselves contemplated something like an agreement approval process where, for example, on the BOOT question the Commission might convey to the parties some of the concerns they have about

whether it meets the relevant test and the parties are given an opportunity to address it something similar to that process. But, as I say, we don't want to be prescriptive. We think the exercise can be done with the good will of everyone involved.

PN71

ACTING PRESIDENT HATCHER: Is it envisaged that the acceptance of the application under section 94A would involve us issuing some sort of interlocutory decision. Is that the correct course?

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MR DOWLING: We think perhaps that the step that's contemplated by the parties could be achieved by the making of an order. And that's an order that we'd, under the process, described in the agreement that we would consent to. The parties, I think it's right to say, hadn't contemplated the reasons as a result of it or reasons in support of it.

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ACTING PRESIDENT HATCHER: I mean the consent's important but at the end of the day we have to make the findings in relation to our satisfaction about the matters in subsection (2).

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MR DOWLING: You do. What has changed, Acting President, is that we don't object that those – we don't maintain the objection, subject to the course that's described in the agreement. We don't maintain the objection in respect of those matters or the constructional argument that we put, of course, that there might be other matters.

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ACTING PRESIDENT HATCHER: Yes. All right.

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MR DOWLING: Thank you, your Honour.

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DEPUTY PRESIDENT GOSTENCNIK: And to be clear the constituent part in subsection (2)(b) is the primary proposal or both.

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MR DOWLING: Both.

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DEPUTY PRESIDENT GOSTENCNIK: Both. So there are, in fact, two findings made under that subsection in relation to each once one (indistinct).

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MR DOWLING: That's correct.

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ACTING PRESIDENT HATCHER: All right. We might just adjourn for a short period and consider what's been put.

SHORT ADJOURNMENT

[10.50 AM]

RESUMED

[11.05 AM]

PN82

ACTING PRESIDENT HATCHER: All right. I can indicate that the Full Bench is prepared to accede to the procedural path jointly proposed by the parties. We anticipate – and any party can just interrupt me if this is inconvenient or not consistent with the arrangement but for our part we understand it would involve the following steps.

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Firstly, we would grant leave to the applicant to file an amended application, that is an application containing the amended rules by the end of the week, that is by 23 December 2022.

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The second step is that – and the parties can fill in the date for us or identify a convenient date – but we would direct the parties to jointly file a submission addressing the requirements of section 100(1)(ba) vis-à-vis the amended rules and the amended application.

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What might be a convenient date for that to be done by?

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MR BORENSTEIN: Just excuse me. We would get that to the Commission on or before the 30 January.

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ACTING PRESIDENT HATCHER: All right. And the third step would be that we would then anticipate issuing an interlocutory decision addressing acceptance of the application as amended under section 94A.

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The fourth step would be that we would then engage in a consideration of whether the amended rules satisfy the requirement of section 100(1)(ba) and to the extent that we have any concerns in that respect we will engage in some appropriate process of communication with the parties which might involve further amendments.

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And as a final step we propose to reserve two dates for final hearing. The best we can do, I'm afraid, is the 1 and 2 March.

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MR BORENSTEIN: 1 and 2 March is all right at this end.

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MR DOWLING: And with us also. Thank you.

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ACTING PRESIDENT HATCHER: All right. So does that deal with all the matters?

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MR BORENSTEIN: That deals with the process that we provided in the submissions.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: There are a couple of matters that we wanted to deal with in addition to that.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: One of them is to provide the Commission with the revised eligibility rule.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: And so we're handing up the revised eligibility rule for the new organisation and also a revised eligibility rule for the existing organisation following withdrawal.

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ACTING PRESIDENT HATCHER: And this will be incorporated in the amended application to be filed?

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MR BORENSTEIN: No, to substitute for – they were in partial substitution for what are annexures 5 and 6 to the present application.

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ACTING PRESIDENT HATCHER: And Mr Dowling your client will still be the CFMMEU. That's very convenient.

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MR DOWLING: It will.

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ACTING PRESIDENT HATCHER: Yes.

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MR BORENSTEIN: Excuse me. The second thing that we wanted to deal with is a question of confidentiality of some of the information in the answering materials that we filed on the directions. And we have got a draft order that we ask the Commission to make.

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And if I can just indicate to the Commission what the items are in the draft order. Item (a) is annexure 2 to the application which is the bundle of authorisations which identified various members and where they work. Item (b) is the third witness statement of Mr Kelly which, again, identifies the membership at various workplaces.

PN107

Items (c), (d), (e), (f), (g), (h), (i) are statements from district secretaries dealing with membership in their particular districts and the reporting of those to Mr Kelly. Item (j) is the statement of Melanie Mitchell who, again, she is an employee of the division and was involved in the vetting of the membership numbers and the authorisations and makes a statement about that.

PN108

And then, the final one, Mr Pasfield – in that statement he annexes the combined role of all of the various districts and membership role which shows all the membership and location et cetera.

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And so on the same basis that we ask the Commission and the Commission agreed to make orders about the confidentiality of the membership role is we've asked the Commission to make confidentiality orders under section 594 in respect of all of these statements that have been filed with the Commission.

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ACTING PRESIDENT HATCHER: Right. Is there any issue with that Mr Dowling?

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MR DOWLING: No, your Honour.

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ACTING PRESIDENT HATCHER: Right. Mr Borenstein can your client forward an electronic copy of this document to my Chambers please?

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MR BORENSTEIN: Absolutely.

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ACTING PRESIDENT HATCHER: Anything further?

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MR BORENSTEIN: No. That's all I have. Thank you.

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ACTING PRESIDENT HATCHER: Right. Anything further, Mr Dowling?

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MR DOWLING: No, your Honour, thank you.

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ACTING PRESIDENT HATCHER: All right. Well, we congratulate the parties on the progress they've made to date. We will take steps to formalise the matters which we have adverted to as to the further procedural progress of the matter and we will now adjourn.

ADJOURNED INDEFINITELY

[11.14 AM]