[2018] FWC 6116

DECISION

Fair Work Act 2009
s.418—Industrial action

Queensland Rail Transit Authority T/A Queensland Rail
v
Australian Rail, Tram and Bus Industry Union
(C2018/5400)

DEPUTY PRESIDENT BULL SYDNEY, 5 OCTOBER 2018

Alleged industrial action by employees of Queensland Rail who are members of the RTBU and engaged in work which is covered by the Queensland Rail Train Crew Enterprise Agreement 2017. Whether Industrial action was agreed or authorised by employer. Role of union in organising industrial action.

[1] On Friday evening of 28 September 2018, the Fair Work Commission (the Commission) issued an Order pursuant to s.418(1) of the *Fair Work 2009* (the Act) [PR700937]. The Order required the Australian Rail, Tram and Bus Industry Union (the RTBU) including its office-holders and delegates who are employees of Queensland Rail Transit Authority T/A Queensland Rail (Queensland Rail) to stop organising, and not organise, any industrial action.

[2] The Order further required employees of Queensland Rail who are members of the RTBU and whose work and employment are regulated by the *Queensland Rail Traincrew Enterprise Agreement 2017* (the Agreement) and who may nominate to work or not to work on designated Bulk Leisure Periods in accordance with clause 81.5 of the Agreement during the period of operation of the Order to stop engaging in industrial action.

[3] The Order came into effect at 10:00pm on Friday 28 September 2018, and remained in force until 12:00pm on Sunday 30 September 2018.

[4] The reasons for the Order being issued are now provided below.

Background

[5] At 9:57am on Thursday 27 September 2018, an application under s.418 of the Act was made by Queensland Rail for an order to stop industrial action by employees. The application sought an order from the Commission that unprotected industrial action stop, not occur and not be organised. The proposed order also was directed at the RTBU including all its officers, employees and its delegates who are Queensland Rail employees who are members of the RTBU whose work is regulated by the Agreement.

[6] The Agreement also covers the Australian Federated Union of Locomotive Employees who has coverage of rail crew and was a bargaining representative for the Agreement negotiations. It is not suggested by Queensland Rail that this union is also organising unprotected industrial action.[1]

[7] The Agreement has not yet passed its nominal expiry date of 31 August 2020.

[8] Section 420(1) of the Act requires that as far as practicable, an application under s.418 must be determined within 2 days after it is made. An order for substituted service was sought by Queensland Rail as it was said to be impracticable given the urgency of the application to serve each employee in accordance with the *Fair Work Commission Rules 2013.* The application for substituted service was granted by the Commission.

[9] The matter was listed for hearing at 3:30pm the same day, also at 8:00am and 3:00pm the following day, all via video link to Brisbane. At the hearing both parties sought and were granted leave under s.596(2)(a) of the Act to be legally represented. Mr Murdoch QC appeared for Queensland Rail and Mr O'Brien of Counsel for the RTBU.

[10] At the conclusion of the first hearing on Thursday evening 27 September, following negotiations between the parties, the Commission was advised that the parties had reached an agreement on a form of words that the RTBU would send out that evening to its members which in short advised that there was no union sanctioned industrial action.

[11] At the request of Queensland Rail the matter was relisted for a report back before the Commission at 8:00am the following morning. At the report back Queensland Rail submitted that the RTBU had not honoured the agreement reached the previous evening by including additional wording not agreed to and that the alleged industrial action was continuing. On this basis Queensland Rail requested that the Commission issue an interim order as per s.420 of the Act. The Commission declined this requested course of action and listed the matter for a full hearing that afternoon.

Queensland Rail's Contentions

[12] Queensland Rail submitted that following a disciplinary process and the subsequent issuing of dismissal notices to a Rail Traffic Driver and a Tutor Driver on Friday 21 September, the RTBU issued a circular to members which included the following statement:

> "… we will be utilising whatever facilities available to us to advance our sacked members' best interests."

[13] On Monday 24 September, Queensland Rail became aware of Facebook message to rail train crew which stated:

> "Could you please pass it on that nobody (sic) to relieve at our depots from next Friday. Got a call from Kelvin. River fire is on and they need 26 extra job cards. It's to do with the heavy handiness of QR. So nobody to relieve at Out Depots. Sign on at Own depot only. Thanks"

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[1] See Agreement approval decision [2017] FWCA 1765 at [4]

[14] Queensland Rail submitted that the Facebook message reference to 'Kelvin' was its employee and RTBU delegate Kelvin Steer.

[15] Following email interaction on 25 September between Queensland Rail and the RTBU, the RTBU issued a newsletter stating that it strongly discourages members from engaging in the conduct referred to in the Facebook message. The newsletter was titled '*Heavy Handed Traincrew Management Unlawful Industrial Action'.* The newsletter also made reference to the ACTU's 'Change the Rules' campaign and stated that there were fundamental flaws in the current Federal industrial relations legislation.

[16] Despite the RTBU newsletter, on the morning of 27 September, 45 rail train crew had advised that they would not be available to relieve at out depots.[2]

[17] Employees not making themselves available for relief at alternative locations were said to limit the pool of available back fill employees. This proved a problem for staffing levels in the event a particular depot has increased absenteeism.

[18] The Brisbane River Fire Festival was scheduled for the weekend of Saturday 29 September and is Queensland Rail's busiest day of the year apart from New Year's Eve, creating a need to transport approximately 50,000 patrons requiring 32 additional services.

[19] Queensland Rail produced telephone transcripts of conversations between employees and rostering staff which they submitted, supported the conclusion that the RTBU was organising unprotected industrial action.

[20] On the morning of 25 September, an employee identified as Employee A stated to a rostering officer they would not be available to work on Saturday 29 September, otherwise they would be 'in strife'.[3]

[21] On the morning of 26 September, an employee referred to as Employee B stated to a rostering officer that 'there's supposed to be a ban or something on' as a reason why they could not make themselves available on Saturday, stating they did not want to get into trouble.[4]

[22] On the morning of 28 September, Employee C requested that they be taken out of a depot until "all this shit is over and done with … there is some talk … you know, not relieving out depots… you know everyone is talking about it.'[5]

[23] Employee D on the morning of 28 September retracted their previous availability to relieve at out depots stating that they would like to do it, but not until everything was sorted. [6]

[24] Queensland Rail stated that it had not experienced any difficulties with rail crew not making themselves available in accordance with the customary practice for the 2017 River Fire event. Under the Agreement a train driver working 8 hours on a Saturday as an additional

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[2] Affidavit of Mr Broad Ex A1 at [24]

[3] RB6

[4] RB6

[5] RB2-3

[6] RB2-4

shift would receive $778 and a guard $731. In addition to asking train crew to accept an overtime shift, the Rostering Office may require train crew to commence their shift from a depot which is not their home depot, referred to as relieving at out depots.

[25] Evidence on behalf of Queensland Rail was given by Mr Broad the *Train Service Delivery Roster Allocation Manager*, who also provided two affidavits.[7] Mr Broad's evidence was that with current train crew numbers there is always a deficit between the number of train crew required and the number who are available to be rostered ordinary hours. This requires train crew being available to work overtime. Clause 81.5 provides for employees to indicate their willingness to work overtime commonly referred to as accepting a 'Block Leisure Period (BLP) working'.

[26] In addition to the 45 train crew who had indicated their unavailability to relieve at a depot other than their home depot, 63 guards and 40 drivers had called in sick on Friday 28 September. Mr Broad stated that this was an unusual increase from the previous year. In his second affidavit he stated that he had become aware of a text message received by a train crew employee on 24 September, which he attached to his affidavit that stated:

> 'To tighten the screws on the sacking offenders could you tell all crew you come into contact with to remove names from other depot reliefs.'

[27] Mr Broad was subject to cross examination. No further evidence was adduced on behalf of Queensland Rail.

[28] Queensland Rail contend that employees are making themselves unavailable to work overtime and at out depots in a coordinated RTBU campaign is a limitation or restriction on the performance of work or the offering for work by an employee and a ban and is unprotected industrial action. On this basis the Commission must make an order that the unprotected action stop, not occur and not be organised.

[29] Queensland Rail submitted that the only available inference was that the unprotected action was being directed or coordinated by the RTBU through its employees and officials and any order should operate to include its officials, employees and its delegates.

[30] It was submitted that the Agreement does not authorise employees to engage in industrial action by making themselves unavailable for overtime where it is on the basis of a coordinated industrial campaign.

RTBUs Contentions

[31] The RTBU called no evidence and relied on its oral submissions and the cross examination of Mr Broad.

[32] Without conceding that industrial action was occurring, the RTBU submitted that there was no evidence that it was organising industrial action. The RTBU submitted that the Facebook and text messages annexed to Mr Broad's affidavits were not evidence that the RTBU was involved in organising industrial action.

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[7] Exhibits A1 and A2

[33] The RTBU contended that the increase in rail crew unavailability was not significant and the increase in unavailability for Saturday 29 September could be attributed to a multiplicity of reasons including employees wishing to attend the River Fire Festival with their family or to enjoy the AFL Grand Final on Saturday afternoon.

[34] The RTBU further put that it had sent out a newsletter which contained the wording agreed with Queensland Rail, on Thursday evening 27 September 2018.

Findings

[35] Section 418(1) of the Act provides as follows:

> 'If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
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> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.'

[36] As can be seen from the words of s.418(1) the Commission is required to make an order of the specified type 'if it appears' to the Commission that industrial action that is not, or would not be, protected industrial action is happening, or is threatened, impending or probable, or is being organised. The Commission's perception of the relevant matters requires the formation of an opinion or the reaching of a state of satisfaction.[8] This also involves 'to a significant degree an evaluative assessment with a degree of subjectivity.'[9]

[37] The Commission is required to act with some haste in dealing with s.418 applications.[10] It will often be the case that parties to a s.418 application will be expected to provide their evidence and/or response to the application within a short timeframe with limited opportunity to consider their position and to obtain legal or other advice.[11]

[38] This can result in the Commission being faced with evidence of a lesser standard than might otherwise be expected from parties to a matter where considerable notice of a listing is given, as the best evidence is not always available at short notice. This applies to all parties.

[39] No party in this application sought an adjournment of proceedings.

Is there industrial action?

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[8] See Full Bench decision in *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2013] FWCFB 7736 at [7]

[9] Ibid at [11]

[10] *CEPU and CFMEU v Abigroup Contractors Pty Ltd* [2013] FWCFB 453 at [30]

[11] *Mr Ian McKewin; and others v Lend Lease Project Management & Construction (Australia) Pty Ltd* [2013] FWCFB 2568 at [32]

[40] The Commission has before it evidence that there has been an increase from the previous year of employees making themselves unavailable to relieve at an out depot and an increase in the number of employees reporting sick and not making themselves available to work overtime on Saturday 29 September 2018. Although the evidence did not demonstrate a significant increase in these notifications, the increase is to be viewed against the factual matrix that exists. This includes the Facebook message, text message and recorded telephone conversations to rostering officers which leads the Commission to draw the inference that the spike in overtime unavailability and sick leave are part of a coordinated and collective industrial campaign relating to the earlier dismissal dispute with the RTBU.

[41] The ongoing action by rail crew employees is coordinated and collective action which restricts and limits the performance of work and hence is industrial action that is happening, threatened and probable.

Is the action authorised or agreed to by the employer?

[42] The Commission referred the parties to cl 81.5 of the Agreement titled *Process for nominating work preferences for leisure periods* which reads as follows:

> "Employees may nominate to work or not to work on designated SLP's or BLP's as reflected in the Master Roster and will not be penalised either way."

[43] This reference was made as the definition of 'industrial action' at s.19(2) of the Act does not include action by employees that is authorised or agreed to by the employer.

[44] In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union,*[12] Reeves J dealt with a situation where employees were holding twice daily, two hour union meetings at the Carrara Sports and Recreation Project on the Gold Coast (the Project). A number of enterprise agreements applied to construction workers on the Project, the agreements all contained provisions relating to the right of employees to attend paid union meetings of up to 2 hours at a time. In particular, 4 agreements provided that employees could attend union meetings or participate in union activities during working hours with up to 2 meetings/union activities being held/conducted either consecutively or separately per shift.

[45] The Australian Building and Construction Commissioner (ABCC) contended that the union meetings were unlawful because they constituted industrial action within the meaning of s.19 of the Act. The exclusion in s.19(2)(a) did not apply as the CFMEU was not making a bona fide use of the union meeting clauses.

[46] Reeves J rejected the ABCC's contention that the union meeting clauses should not be construed to permit union meetings for the purpose of delaying and disrupting the orderly progress of work at a workplace.[13] The clauses were expressed in reasonably clear terms including the nature of the activities that could be undertaken, the meetings were authorised and agreed under the provisions of the various union meeting clauses of the agreements.

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[12] [2017] FCA 157

[13] Ibid at [107]

[47] In, *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No3),*[14] Collier J dealt with a similar set of circumstances concerning union meeting clauses in enterprise agreements. In that case the ABCC argued that the decision of Reeves J should not be followed as it was clearly wrong.

[48] Collier J held that s.19(2)(a) of the Act contemplates authorisation or agreement by the employer of action by employees, without restriction on the nature of the action of the employees (including potential unlawfulness)[15] further stating:

> "[39] There is nothing in ss 19(1) or 19(2)(a) of the FW Act which confines conduct that may be authorised to only lawful activities. Unlawful conduct may contravene the FW Act – this does not mean, however, that such conduct is not "industrial action" which is incapable of being authorised or agreed to by an employer and, therefore, excluded from being subject to the regulatory scheme.
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> [40] Section 194(e) deems "unlawful" a term of an enterprise agreement which is inconsistent with a provision of Part 3-3 of the FW Act. On its face, cl 32.9 does not undermine the policy and scheme of the FW Act, and is certainly not inconsistent with Pt 3-3. It may be that the objective of the union in conducting certain union meetings or promoting certain union activities is contrary to provisions of the FW Act, however that is secondary to the operation of the clause, rather than required by the clause itself. The union meeting clause in this case sets out the agreement of the employer, where certain conditions are met, to employees attending union meetings or participating in union activities during working hours. It is an unwarranted strain on the language of cl 32.9 to construe it by reading in purpose or objectives not specifically contemplated, as contended by the ABCC. In my view, such an interpretation would be untenable.
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> [41] Further, s 19(2)(a) of the FW Act is clearly intended to allow an employer to ***authorise or agree*** to certain conduct of employees, identified in s 19(1), which would otherwise be subject to the regulatory framework of the FW Act, ***including*** Pt 3-3. Performance of work in a manner different from that in which it is customarily performed (s 19(1)(a)), bans, limitations or restrictions on the performance of work by employees (s 19(1)(b)) and failure or refusal by employees to attend for work or perform work when there (s 19(1)(c)) are obviously the types of industrial action which are contemplated by Pt 3-3 of the FW Act, including s 417. Indeed, the Stoppages in this case clearly fell into one or more of the categories of industrial action set out in s 19(1).
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> [42] If, in the terms of a clause such as that currently before the Court, the employer sought to qualify the conduct of employees to which the employer agreed by reference to the consequences of the conduct (including that relevant to Pt 3-3), it was open to the parties to specifically so agree. The interpretation advanced by the ABCC seeks to import such extraneous qualifications into the language agreed by parties, and subverts the purpose of s 19(2)(a) in allowing the parties to reach their own agreement on what the employer can authorise or agree to. I reiterate the observation of Reeves J in

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[14] [2018] FCA 564

[15] At [38]

Carrara that the Court is not permitted to redraft the terms of an enterprise agreement to achieve the outcome identified by the ABCC. Again, such an interpretation is untenable."

[49] Queensland Rail submitted that the coordinated industrial campaign by the rail crew was not conduct agreed to by Queensland Rail under the Agreement at cl 81.5 which provides for employees to individually nominate to work or not to work on designated BLP's. It sought to distinguish the Federal Court decisions as the relevant enterprise agreement provisions applied to 'meetings' of a collective nature not to the actions of individual employees as is the case in their Agreement.

[50] Queensland Rail further submitted that clause 81.5 has no application to employees declining to commence work at out depots.

[51] In *Australian Workers Union v BlueScope Steel Limited*[16] (BlueScope), a 2008 decision of a Full Bench of the Australian Industrial Relations Commission, the Full Bench determined that under the *Workplace Relations Act 1996* employees choosing not to work a voluntary overtime shift was industrial action, not authorised or agreed to by the employer.[17]

[52] In BlueScope the employer accepted that employees have a right to decline to volunteer to work the overtime shift. However the Full Bench noted that how this right arose was not explained and noted that the applicable award required employees to work reasonable overtime.

[53] In any event the Full Bench held that:

> 'There can be no doubt that the coordinated and collective refusal of employees to volunteer to work their 21st shift was industrial action within the ordinary industrial usage of that expression. A collective refusal to work overtime is a classic example of industrial action in that sense.'[18]

[54] The Full Bench went on to consider whether the action was excluded from the definition of 'industrial action' on the basis that it was action by employees that is authorised or agreed to by the employer of the employees.[19]

[55] The Full Bench adopted the approach to the definition of 'industrial action' taken in an earlier Full Bench case the *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*[20] in stating that context and motive were relevant to determining whether particular conduct amounted to industrial action.[21]

[56] At paragraph [18] of the BlueScope decision the Full Bench concluded:

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[16] (2008) 171 IR 115

[17] The definition of 'industrial action' under the *Workplace Relations Act 1996* is for the purposes of this matter the same as that contained in the *Fair Work Act 2009*

[18] (2008) 171 IR 115 at [8]

[19] As per s.420(1)(e) of the *Workplace Relations Act 1996*

[20] (2004) 133 IR 197

[21] (2008) 171 IR 115 at [10-11]

> 'At the very least, the action in this case was a coordinated and collective limitation on the acceptance of or offering for work by employees, namely voluntary overtime constituted by the 21st shift, and was therefore action of a kind coming within s.420(1)(b). It had the effect that employees who would ordinarily volunteer for overtime did not do so (and, as such, undoubtedly had an industrial character). While the matter is not without some difficulty, we think the better view is that BlueScope could not be said to have authorised or agreed to that action. The action in this case was not merely a case of employees choosing to exercise their "right" to decline to work the 21st shift. Here, an essential feature of the action was that this occurred pursuant to an understanding between the employees and in a way that was coordinated and collective. While BlueScope could be said to have authorised individual employees not to volunteer for overtime it could not be said to have authorised or agreed to a coordinated and collective refusal of voluntary overtime constituted by the 21st shift.
>
> It follows that the exclusion in s 420(1)(e) is not made out …'

[57] I have concluded above, that the industrial action includes a coordinated and collective refusal of employees to make themselves available for work on BLP's for Saturday 29 September 2018. Having regard to the authorities referred to above it is my view that where this action is undertaken on a collective and coordinated basis, it sits outside the purview of cl 81.5 of the Agreement which only provides a right for individual action and therefore cannot be action agreed to by the employer under the terms of the Agreement.

Is the RTBU organising the industrial action?

[58] There must be some cogent basis for a finding that it appears to the Commission that a party is engaged in organising industrial action. It was put by Queensland Rail that the only available inference to draw in the circumstances of its application was that the RTBU was organising the industrial action through its employees and officials.[22]

[59] The RTBU submitted that this conclusion was not demonstrated on the evidence. The RTBU called no evidence in response to that put by Queensland Rail or to oppose the application in the terms sought.

[60] What was before the Commission is series of events and documents from which the Commission is asked to draw an inference that the RTBU was organising the unprotected industrial action. The Commission allowed the admission of documentary evidence that would not necessarily be admissible on a strict application of the *Evidence Act 1995* (Cth), although it is noted that the Commission is not bound by the rules of evidence.[23] Queensland Rail sought the non-identification of the source of the Facebook message, the telephone callers to the rostering officers and a text message.[24] The documentation was admitted on the basis that the individual employee names associated with the documents could remain confidential.

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[22] Form F14 at [21]

[23] See s.589 of the Act

[24] RB3, RB6, RB2-3, RB2-2

[61] On what was put before the Commission I conclude that the industrial action of employees is linked to the earlier dispute with the RTBU concerning the dismissal of two RTBU members. The dispute was referred to by the RTBU in their 21 September 2018[25] newsletter sent out in the name of the State Secretary under the heading '*Heavy Handed Traincrew Management Sapping Workers'Morale'* and included the comment 'we will be using whatever facilities available to us to advance our sacked member's best interests'. It is noted that the phrase 'heavy handiness' is contained in the Facebook message associated with employee and RTBU delegate Kelvin Steer.

[62] There was no contest from the RTBU that the reference to 'Kelvin' in the Facebook message instructing employees not to relieve in out depots was RTBU delegate Kelvin Steer. The RTBU's State Secretary advised in an email to Queensland Rail on 25 September, that he would issue a further newsletter to clarify the 'miscommunication/misunderstanding' on social media. While the newsletter of 25 September stated that the RTBU strongly discouraged members from not relieving at out depots it was couched in terms that rallied its members against the existing workplace relations legislation and stated that it did not back away from the contents of it previous newsletter which reflected members fury at the behaviour of Queensland Rail.

[63] While the RTBU opposed any order being made and did not give evidence in this matter which is its right, an opportunity to put beyond doubt that it was not organising industrial action existed when an agreed form of words was reached with Queensland Rail on the evening of 27 September to be sent by the RTBU to its members.

[64] For reasons unknown, the RTBU sent out a newsletter that evening that contained the agreed wording plus additional wording which stated that its campaign to reintroduce fairness and respect in the workplace from management will continue and that 'we need to change the rules when it comes to industrial relations.' Queensland Rail submitted that the additional words were inflammatory and ambiguous and that the RTBU had reneged on the agreement reached.

[65] Mr Broad's evidence was that the next morning following the RTBU's newsletter, train crew availability had further declined and that he was informed by his team that there were two further telephone conversations[26] between train crew and rostering officers indicating that there still existed a direction to employees not to make themselves available to work BLP's or to relieve at out depots.

[66] The Commission is not prepared to accept that rail crew employees have taken the industrial action in a coordinated and collective manner independent from the advice/support of RTBU officials or its onsite employee delegates.

[67] In the absence of any evidence to the contrary, the Commission finds that unprotected industrial action is being organised by the RTBU through its officials and delegates employed by Queensland Rail and the order for employees to stop unprotected industrial action should include that the RTBU, its officials and delegates stop organising industrial action.

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[25] RB2

[26] RB2-3, RB2-4

[68] I note the decision of the Full Bench decision in *Transport Workers' Union (NSW) v TNT Australia Pty Ltd*[27] where the following was stated:

> 'If in a particular case a union has been representing employees in negotiations and otherwise active in representing their interests, and unprotected industrial action is occurring or threatened, there is no good reason why an order that industrial action stop or not occur should not be buttressed by an order against that union. It is a matter for the discretion of the member of course, but there is no reason of construction or policy to limit the Commission's discretion in that respect.'

[69] Had I not concluded that the RTBU was organising the industrial action, I would have included the RTBU in the Order made against the employees on the basis of their demonstrated involvement in the circumstance surrounding the industrial action as per the Full Bench comments above.

<u>DEPUTY PRESIDENT</u>

Appearances:

Mr J Murdoch QC for Queensland Rail
Mr T O'Brien of Counsel for the RTBU

Hearing details:

Sydney with video link to Brisbane

2018

September 28, 29

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[27] (2006) 154 IR 256 at [14]