



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

D2023/1

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

**Application/Notification by Australian Rail, Tram and Bus Industry Union-Victorian
Branch - Locomotive Division**

(D2023/1)

Melbourne

9.00 AM, FRIDAY, 24 FEBRUARY 2023

PN1

PRESIDENT HATCHER: I will take appearances. Mr Borenstein and Mr Bakri, you appear for Mr Jolly, the applicant; correct?

PN2

MR H BORENSTEIN: Thank you, your Honour.

PN3

PRESIDENT HATCHER: Yes. Mr Dowling and Mr Matsi, you appear for the RTBU?

PN4

MR J DOWLING: Yes, good morning, your Honour.

PN5

PRESIDENT HATCHER: I understand there's two slightly competing sets of directions, but, Mr Borenstein, can I just ask you in respect of the application, in particular the particulars, paragraph 6, that is the alleged record of non-compliance and alleged non-contribution, should there be any particulars of that contention as part of any program for directions?

PN6

MR BORENSTEIN: I believe that we have provided particulars to Mr Dowling's client. There was a request made for those particulars and they have been provided. We can file a copy of that with the Commission if that's required.

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PRESIDENT HATCHER: Yes, I think I would be assisted by some information about that contention. Do you want to say anything about this, Mr Dowling?

PN8

MR DOWLING: Yes, your Honour. We can confirm that we did write making a request on 13 February and, on 16 February, we received correspondence setting out three matters that are said to constitute the record of non-compliance. We want to tell you something about that because it's relevant to why we say the section 94A application is all that you need to timetable.

PN9

PRESIDENT HATCHER: All right. You go ahead, Mr Borenstein, as to what we should do, but just bear that in mind that I think I would need at some stage, or the Full Bench will need at some stage, (indistinct), a particularisation of that contention. You go ahead, Mr Borenstein.

PN10

MR BORENSTEIN: It may be, your Honour, that while we are speaking, my instructor can email that correspondence to the Commission, so you might receive it shortly. As Mr Dowling indicates, it isn't extensive in terms of numbers. There are three items that we rely on. Other than that, your Honour, you will see that this is a very straight forward application. It doesn't have the sort of complexities which we saw in the CFMMEU matters.

PN11

The constituent part in this application is the Victorian Branch of the Locomotive Division of the union. The Locomotive Division, as your Honour may be aware, reflects the old AFULE, which amalgamated with the RTBU on 1 March 1993, and so, for the purposes of the application, the constituent part relies on paragraph (b) of the pre-amendment definitions of separately identifiable constituent part. Your Honour will remember that they originally dealt with the situation of a union or a part of a union that had been deregistered as part of the amalgamation, and then the amendments introduced paragraph (c), which moved away from that concept. We don't need to rely on paragraph (c). As a branch of the old AFULE, the constituent part here relies on paragraph (b).

PN12

In our submission, the only contestable issue, potentially contestable issue, in the application is the issue of an extension of time under section 94A. Mr Dowling is going to explain to you why that will be a contested issue, and that's not surprising that it is.

PN13

The constituent part relies on both parts of subsection (2) of section 94A and, in the alternative, relies on subsection (3). Our reliance on subsection (3) when we filed this application was drafted before the Commission handed down its decision in the Kelly matter a few days ago and, in that decision, you will recall the Full Bench indicated that it didn't regard decisions under section 418 against the registered organisation as falling within the parameters of the record of contraventions that are referred to in section 94(2)(a). We obviously are mindful of that and it may be that at the hearing, we will make a formal submission to that effect in the knowledge that the Commission has already ruled on it in the other matter.

PN14

That then will focus attention on paragraph (b) of subsection (2) and there will be a debate about whether we satisfy that requirement and whether, in the circumstances, having regard to the evidence about that, the Commission will be satisfied that it is appropriate to grant the extension of time. That will be an argument that will have to be had.

PN15

We, in our version of the directions which we provided to the Commission, called for the RTBU to file a list of all their objections and then to have the matter relisted for a mention once we know the parameters of the dispute between the parties, and we did that on the basis that apart from the extension application, we did not anticipate that there would be any contest in relation to the balance of the application. If we are wrong about that, then we would wish to know at an early stage because that would inform the decision about what is the best and most efficient way of processing the application as expeditiously as possible.

PN16

The union, for its part, has submitted directions which seek to fragment the case in the sense of calling for jurisdictional objections only to be identified in the first instance and nothing to be said about whether there are any other objections.

PN17

We say that given the simplicity of the case from our point of view, apart from this question of extension, the proper course and the most effective and efficient course for the Commission to adopt is to ask the union and any other objector to identify all their objections and then, if the only objection is the extension of time, to list the whole of the application to be heard in one hearing so that the other matters can be resolved at the same time as the extension of time, and if the applicant is successful on the extension of time, the matter will all be disposed of in one hearing rather than having to have two hearings at various dates and having to incur the cost and expense of having two hearings rather than dealing with the matter in one straight forward hearing.

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That is our position, your Honour, and we say that that's the position that the Commission should follow.

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PRESIDENT HATCHER: An alternative might be that there is no application before the Commission until such time as it is formally accepted under 94A. Why isn't the appropriate course to do a full program for hearing of the 94A point before proceeding any further and it may be, as you say, if the application is accepted, the balance of it can be dealt with on the papers?

PN20

MR BORENSTEIN: Your Honour, that might be an option that your Honour would follow, but it would be assisted if the union indicated whether this is their only objection or whether they then propose to take any other objection as well. If this is the only objection then the course your Honour suggests about doing it on the papers might well be appropriate, but if they then say, 'Well, here's our first card and then, if we lose on that card, we've got this other bunch of cards that we want to deal with as well', that's the situation that we are trying to avoid. Your Honour would be better placed to decide what's the most effective way of dealing with it if you know what all of the objections are that the union proposes to take.

PN21

PRESIDENT HATCHER: All right. Over to you, Mr Dowling. What do you say?

PN22

MR DOWLING: Thank you, your Honour. We broadly accept what our learned friend has said about the difference between us. Really the only difference is that the applicant wants all objectors to notify all objections prior to establishing that he is entitled to an order under 94A. For our part, we approached it the way your Honour indicated a moment ago, that unless and until there is an order made under section 94A, there's no valid application before the Commission and, accordingly, in our submission, my client and any other objectors should not be put to the significant cost and expense of identifying all of the objections to what is a lengthy application, which would require a detailed analysis of the rules and of the outline. For that reason, we say that the appropriate course is just to determine the 94A and not to put the objectors to that expense.

PN23

I said I would tell you something about the 94A. Can we tell you that of the three matters relied upon, as Mr Borenstein indicated, two of them are section 418 applications. From what we understood from the decision in Kelly on Tuesday of this week, they should not be considered as part of the record of compliance under 94A(2)(a). That only leaves one matter, which is alleged to be a contempt of a Federal Court order, and putting aside whether what was determined amounts to a record of non-compliance or, indeed, whether the applicant contributed to it, we will say that is not non-compliance with a workplace or safety law as defined by the Fair Work (Registered Organisations) Act, which clearly - - -

PN24

PRESIDENT HATCHER: I understand that point, but, leaving that issue aside, is there any issue about what the word 'record' in 94A(2)(a) means, that is, is a single contravention which might be quite old sufficient to constitute a record for the purposes of the provision or does it have some flavour of an extensive or contumacious record?

PN25

MR DOWLING: That will be one of the things we submit, amongst others, your Honour, that if we are left with one, and we say, for the reasons I have already explained, we won't be because it's not a workplace or safety law, but if we are left with one, there will also be a submission about whether that properly constitutes a record in the context of section 94A.

PN26

Ultimately, we say, having regard to those matters, that the application under 94A is a weak one and it is especially in those circumstances that the objectors - all of them - should not be put to the expense of detailing and investigating the outline and the rules.

PN27

I should make clear, your Honour, that would require at least assessing whether the outline is fair and accurate under section 100(1)(b); it would require assessing whether the identification and the apportionment of assets has properly been done under the outline; it would require assessing whether regulation 83 has been complied with; it would require assessing whether the rules comply with 95A, and perhaps 141 and 142 of the RO Act, and whether the proposed eligibility rules comply with 95A(4) and (5). They are the sorts of things that the objectors would need to assess and determine if they were to set out all of their objections, and in circumstances where, as we indicated, we say the application for an order under 94A is a weak one, we should take one step at a time - there is no prejudice to the applicant taking one step at a time - so as to avoid putting the parties to expense that might ultimately be wasted.

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PRESIDENT HATCHER: On that approach, why shouldn't we simply proceed to have a full program of directions for the hearing of the section 94A step?

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MR DOWLING: Yes, that's what we propose. Well, only that one caveat then, your Honour, is we don't presently know - accepting that it is only the RTBU that are before you today - but we don't presently know whether there are any other objectors and what they might want to say, and that was why we took the step of identifying having any objectors identify the objections they make under 94A or any other jurisdictional objection and then returning to you in a week's time so you can perhaps more accurately timetable the 94A knowing all of the participants and all of the objections they make.

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PRESIDENT HATCHER: We can simply have a direction which says the RTBU and any other objectors to file their material on a given date, can't we?

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MR DOWLING: Yes, we could do that, your Honour.

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PRESIDENT HATCHER: Do you want to say anything in response, Mr Borenstein?

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MR BORENSTEIN: Yes, your Honour, just this: if we are going to confine our attention to jurisdictional matters and if your Honour is thinking in terms of making directions simply to deal with the 94A - and I'm not sure if I misheard your Honour about that.

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PRESIDENT HATCHER: That's correct.

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MR BORENSTEIN: We would say that all of the jurisdictional matters should be dealt with at one hearing. Your Honour, we don't know what the other jurisdictional objections might be and your Honour will recall that in the Kelly matters, at one point, the Commission decided to simply hear the 94A point and then, halfway through the hearing in that, it was seen that it was inappropriate to do that in the absence of the other jurisdictional points that were being canvassed.

PN36

The safer course, in our submission, would be, if your Honour is minded to just deal with jurisdictional matters, to have a programming of all the jurisdictional matters, if there are any others, and we are not sure there are, but - - -

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PRESIDENT HATCHER: I should ask you, Mr Dowling, is there any issue as to whether the Locomotive Division constitutes a constituent part?

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MR DOWLING: There's one matter on which we are taking instructions and that is the alignment between the eligibility of the membership of the Victorian Branch of the AFULE and the Victorian Locomotive Division of the RTBU, so I am going to have to reserve my position on that, but it may be - and that's one of the

reasons we included other jurisdictional objections in the proposed directions - that, and for the reason that my friend identified, there might be some overlap if there is another jurisdictional objection, but that is a matter that I am confirming instructions on.

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PRESIDENT HATCHER: All right, thank you. Mr Borenstein?

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MR BORENSTEIN: Well, your Honour, I don't want to repeat what we said earlier. If your Honour is minded to do the jurisdictional route first, then the only thing I would add is that we would say that all jurisdictional matters should be dealt with together once they are identified.

PN41

PRESIDENT HATCHER: I think we said - just give me a second, I just want to refresh my memory - in the Kelly decision earlier this week that the question as to whether - I'm just trying to refresh my memory - that section 100 seems to contemplate that the issue of whether it's a constituent part is a final hearing issue rather than a preliminary issue, in which case it seems to me the first step is simply to deal with the 94A issue alone and then - - -

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MR BORENSTEIN: Except - sorry to interrupt.

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PRESIDENT HATCHER: Yes, go on.

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MR BORENSTEIN: I was just going to say that your Honour will recall in the Kelly matters that there was a contest about whether the proposed constituent part was a constituent part and also the 94A point and it was decided along the sort of reasoning that Mr Dowling is advancing today, that the 94A point should be dealt with in advance, and then halfway through the hearing, it was seen that you needed to decide the constituent part point as well, and so the matters were all put together to be dealt with together. It may be that you can't decide the 94A point without being clear what the constituent part is.

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PRESIDENT HATCHER: Yes. I should indicate there were some other issues in the background concerning the - - -

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MR BORENSTEIN: Yes, of course.

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PRESIDENT HATCHER: - - - composition of the Bench, which interfered with that.

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MR BORENSTEIN: Yes.

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PRESIDENT HATCHER: My inclination is to program the matter for hearing initially solely on the section 94A point. What I am going to ask the parties to do is to confer and if they can agree on a program of directions for the filing of materials and the hearing of the section 94A point alone and, in the absence of agreement, the parties can file competing directions and we will issue the directions of the Full Bench and we will list the matter for hearing.

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MR BORENSTEIN: Your Honour, could I just clarify, there's no particular problem about agreeing on directions, but it would be helpful if they were preceded by an identification of the objections that are actually being taken so that the material that's filed can address those objections.

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PRESIDENT HATCHER: Yes, although I must say in respect of 94A, my preliminary view is that it's for the applicant to demonstrate that there's a case for acceptance under that provision, not to simply proceed on the basis of objections made by a respondent.

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MR BORENSTEIN: I don't disagree with that, your Honour, I think that's pretty clear from the legislation, but it would help to target what we say if we knew what it is that we were meeting.

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PRESIDENT HATCHER: All right. The parties can communicate about that, but, you know, in the first instance, the parties will try and develop a program for directions and send it to me, I will determine any outstanding issues in chambers if necessary, and we will list the 94A matter for hearing.

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MR BORENSTEIN: Thank you.

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PRESIDENT HATCHER: Is there anything further we need to deal with at this stage?

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MR DOWLING: Not from me, your Honour, thank you.

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PRESIDENT HATCHER: All right. Thank you for your attendance, we will now adjourn.

ADJOURNED INDEFINITELY

[9.36 AM]