



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER

D2022/10

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

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

Sydney

10.00 AM, THURSDAY, 17 NOVEMBER 2022

Continued from 25/10/2022

PN531

THE VICE PRESIDENT: I will take appearances. Mr Borenstein and Mr Bakri, you appear for the applicant in the matter?

PN532

MR H BORENSTEIN: Yes, we do.

PN533

THE VICE PRESIDENT: And, Mr Dowling and Mr Massy, you appear for the CFMMEU?

PN534

MR C DOWLING: We do, Vice President, thank you.

PN535

THE VICE PRESIDENT: I have read as much as I can of the material. So in respect of the amended application for production of documents do I understand that paragraphs 1 to 8 can be dealt with consensually, that is we don't need to make any order; is that correct, Mr Dowell?

PN536

MR DOWLING: Yes, as I understand it, Vice President, those categories fall into this description; there are no documents in categories 1, 2, 4 and 5 according to the applicant and his lawyers. Categories 3 and 6 are we are told annexed to Mr Kelly's statement filed in the proceeding, and categories 7 and 8 and the additional category 11, Vice President, the applicant and his lawyers have undertaken to voluntarily provide those categories. So that only leaves categories 9 and 10.

PN537

THE VICE PRESIDENT: All right. So I don't need to make any order with respect to any of those paragraphs?

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MR DOWLING: That's correct.

PN539

THE VICE PRESIDENT: All right, thank you. In respect of 9 and 10 I have read your most recent submissions, Mr Dowling, so I just want to ascertain how these documents would be of apparent relevance.

PN540

MR DOWLING: Yes.

PN541

THE VICE PRESIDENT: Having regard, and I really want to identify the matters that are could seriously be in dispute, is it really in contest that irrespective of the precise number that the large majority of members of the Mining and Energy Division would be mining workers, that is persons who would have been eligible to join the UMFA if it still existed?

PN542

MR DOWLING: If your Honour means by that the submission made by the applicant at 55A that the UMFA is substantially identifiable as the Mining and Energy Division because 18 of the 21,000 would have been eligible to join UMFA, then the precise numbers we simply cannot test without seeing the material. We simply do not.

PN543

THE VICE PRESIDENT: Does that contention stand or fall on the precise number? I mean if as I speaking for myself have always assumed to be the case, the large majority of Mining and Energy Division members would be mine workers - I mean obviously there will be debate about whether that's sufficient to establish some sort of identity between former UMFA and the Mining and Energy Division Branch, but is there a need to test the precise number in that circumstance?

PN544

MR DOWLING: Well, the proportion might be important, given the way the applicant puts it, Vice President, because if it suggests that there's a continuity of character, and already we know that there's a significant number that don't fall into that category, but the proportion indeed might be important.

PN545

THE VICE PRESIDENT: I see. I mean realistically, Mr Dowling, you're representing the national office of this one union.

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MR DOWLING: Yes.

PN547

THE VICE PRESIDENT: We can't just proceed on the basis that the national offices of this currently one union have no knowledge about these matters; that is as if they're entirely ignorant of what makes up the membership of the Mining and Energy Divisions.

PN548

MR DOWLING: Well, we certainly don't have access, and this is set out in Ms Dawson-Field's statement, we certainly don't have access to the membership rolls to test the proposition put at 55A of the submissions.

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THE VICE PRESIDENT: But does that answer my question?

PN550

MR DOWLING: Yes, Vice President. We do not know these numbers.

PN551

THE VICE PRESIDENT: Right. The number 21,146, that presumably is a known number because presumably it's a number derived from the annual returns made by the various divisions and branches of the union?

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MR DOWLING: Yes, Vice President.

PN553

THE VICE PRESIDENT: So you say the only question is to determine how many of the Mining and Energy Division would have been eligible to join the UMFA?

PN554

MR DOWLING: Yes. In respect of the first way we put the question of relevance that's right; testing the employer and the location and the occupation of the 21,000 to be able to determine whether they would have been eligible to join the UMFA, that's right. There are other ways we put the relevance of this material though.

PN555

THE VICE PRESIDENT: Right, okay. Now, in respect of paragraph 20 of your submission the 5 per cent - I think the number, just remind me, it's 2,000 plus who signed the alternative application.

PN556

MR DOWLING: Yes, it's 5 per cent.

PN557

THE VICE PRESIDENT: On any view as a mere number that's more than 5 per cent of whatever could be the maximum number of mine workers in the branch?

PN558

MR DOWLING: Yes. But again of course we're entitled to test whether those people were properly eligible and have properly executed it. Two things in fact Vice President; (1) whether it's a correct proportion of the total, and (2) whether those that signed were correctly eligible.

PN559

THE VICE PRESIDENT: I will come back to the second, but the first is established as a matter of mathematics, isn't it?

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MR DOWLING: Well, that depends on the second in the sense that if some of them are not properly eligible to sign it might drop below the number.

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THE VICE PRESIDENT: Wouldn't the best way to test that second proposition to be to ask for the membership records to the extent they exist of the 2,000-odd who signed the application?

PN562

MR DOWLING: Yes, that would certainly be one way. It might not be the entire solution, but certainly if the applicant were prepared to provide the information in respect of the 2,000-odd that signed, the confirmation that they are current members, their employer and location and occupation, we could certainly test then

whether each of those was properly eligible. We would still need to be able to test whether they are the right proportion of the 18,000.

PN563

THE VICE PRESIDENT: Once you work out how many are mine workers, but let's say it turns out to be around 2,000, and we know that's more than 5 per cent of the 21,000 in the whole division, so ergo it's more than 5 per cent of those who are mine workers.

PN564

MR DOWLING: No, Vice President, it needs to be 5 per cent of those that would have been eligible to join UMFA.

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THE VICE PRESIDENT: I understand that, but that's by definition a smaller number, the 21,000.

PN566

MR DOWLING: Yes.

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THE VICE PRESIDENT: So once you establish, once you validate the number of applicants who are mine workers in effect then - - -

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MR DOWLING: Yes, the total number.

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THE VICE PRESIDENT: - - - then it can be assessed whether there's any issue about the 5 per cent, because if it's 2,000 plus it's clearly 10 per cent rather than 5 per cent of the whole division.

PN570

MR DOWLING: That's right, Vice President, provided you can establish the total number that are eligible.

PN571

THE VICE PRESIDENT: Right. Mr Borenstein, just on that last point would not the union be entitled to test whether the applicants would have been eligible to join UMFA?

PN572

MR BORENSTEIN: Whether the person signing the - - -

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THE VICE PRESIDENT: Yes. I'm sorry, the person signing the alternative application.

PN574

MR BORENSTEIN: The union was entitled to satisfy itself, but one of the things that seems to be overlooked here by Mr Dowling is that if you look at the actual authorisations each of the individuals identifies in the application the place where

they work and how they're employed. I'm looking at one page at one of the authorisations and these people are members of the Mandalong Underground Mine employed by Centennial Mandalong Pty Ltd performing production and engineering work at the Mandalong Underground Mine, and they all signed that, and the local official endorses that, and we say that that's an attestation from the individuals themselves as to where they work, which indicates the nature of their work and that they are members.

PN575

Now, insofar as Mr Dowling might say, well we want to be satisfied that they are members, what we had proposed and haven't had a substantive answer to is that rather than disclosing all the details in the whole of the roll we had proposed that we would engage an external person at our expense to cross check the roll against these individuals to confirm what they say is correct, and to provide a report as to that to the union. We understand that's a process that's not dissimilar to what sometimes happen in majority support determinations where an employer might be concerned about the people who are voting actually being in the union. And we thought rather than seeking to go through and individually extract the members of 2,000 individuals, which I'm told might be a significant logistical task with some burdens attached to it, that we had proposed was a much more effective and efficient way of doing it while protecting the privacy of the various individuals.

PN576

THE VICE PRESIDENT: But does the membership roll disclose employment location and/or occupation?

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MR BORENSTEIN: I am told that it varies from district to district, Vice President. In some districts where there's a mix of mine workers and energy workers I am told that sometimes the energy workers are designated with an 'E' in the roll. The rolls are kept at different locations as you might know. Some of them are kept at the lodge level, some of them are kept at the district level and maintained at those levels, and often times the location where they're kept gives an insight into what work the people are doing and therefore where they fall in terms of eligibility. But it would be a significant task I am instructed to go through and check the records individually of the 2,000 people, and it may be more efficient to have someone just tick them off against a (indistinct) roll while protecting the privacy of the individuals.

PN578

THE VICE PRESIDENT: All right. I will come back to that. In respect of Mr Dowling's earlier proposition that the CFMMEU is entitled to test the contention that a certain proportion of the division members would have been eligible to join UMFA what do you say about that? Is there some easier way to establish that proposition?

PN579

MR BORENSTEIN: Well, there's no easy way, because as I am instructed the roll doesn't universally identify what the occupations of individuals are. The best you get is an indication or an inference that you can draw from where the people

work. So I just read from this Mandalong Underground Mine location, and the district - or the roll is kept at the district level or the lodge level may give rise to a necessary inference about where people work and what they do, but my instructions are that there isn't universally a column in the roll which identifies the occupation of individuals.

PN580

THE VICE PRESIDENT: All right. Just returning to you, Mr Dowling, so the alternative proposal, and this is referred to in Mr Pasfield's affidavit, why would that not be a fairly straightforward way for these issues to be tested?

PN581

MR DOWLING: Thank you, Vice President. There's a number of issues with it. Firstly, as we understand the submission that Mr Pasfield makes, or sorry the statement that he makes, is that the only objection to the production of the material in categories 9 and 10, which I should say, Vice President, is referred to in Mr Kelly's statement, is the privacy of the names and addresses in workplaces, and he says he should not be given to a third party.

PN582

Now, what you have to remember, Vice President, is that when he says third party that must be understood to be saying the third party is the organisation that these members joined. It is a rather breathtaking proposition we say that privacy should operate to prevent the organisation that these members joined from accessing the information. They are our members as the organisation, and we say there is no legal basis for privacy to operate in such a way. But secondly even if there was, which we emphatically refute, it's addressed by the undertaking that we give, and we give the implied undertaking.

PN583

But additionally we say the dissemination of the material would be limited to the external or internal lawyers of the organisation, who are all officers of the court, whereas the proposal put by the applicant seems to be inconsistent with the concern about privacy, that it should go to an actual third party, a former Commissioner and former union official, but not the lawyers of the organisation of which the members, or that the members joined. But can we say this also; nextly it is just not fair to suggest that we are not entitled to test the material ourselves, and that in fact it should be outsourced to a third party to test.

PN584

Now, if Mr Rowe were to make a mistake that would be visited upon us and we would never know about it. If we test the material ourselves and a mistake is made it is on us. But to suggest we are not entitled to test it ourselves and it should be outsourced to someone we say is an entirely unfair proposition. But also in circumstances where the issues are put in contest it is inevitably so that the Commission needs to make a finding on the evidence, and to act on what Mr Pasfield describes as a report undertaken through a process that would not be agreed by us in circumstances where we couldn't test the report, we say would simply invite jurisdictional error of the Commission if it was to rely on that in reaching a conclusion about contested matters.

PN585

THE VICE PRESIDENT: Right. Mr Borenstein, just one last thing; so in respect of the alleged privacy concerns why aren't they answered by the undertaking proposed by the union?

PN586

MR BORENSTEIN: The major difficulty we have with the undertaking, Vice President, is that it includes the internal lawyers, that is the employees of the union, and there's a concern about that. Our concern about the undertaking would be significantly diminished if they were excluded from access to documents. And can I just say this; our friend says we want to test the material as though there's a question as to the credibility of the rolls, and we have never understood, and perhaps Mr Dowling can correct us, but we have never understood that it's the actual credibility of the rolls that are in issue.

PN587

What we have been told in the correspondence on the way to this hearing is that the purpose of the access to these documents is to cross check to make sure that the people who signed the authorities are on the roll. Now, that's just a mechanical task, and then secondly to cross check the numbers that are in the documents in category 11 against the numbers that might be able to be extracted from the role.

PN588

They're both just mechanical tasks and it's not really an issue of testing the credibility of the document, and it's classically the sort of thing which in our contexts is often delegated to a Commission officer or an outside expert just to do effectively a calculation. And so the proposal which we had for Commissioner Rowe was simply that, to ask him to do the mechanical task. If our friend now wants to say that there's a question of credibility of the documents that raises a whole new area, but coming back to your question, in terms of the undertaking we say that the greatest difficulty with that is the inclusion of the internal lawyers and
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THE VICE PRESIDENT: Mr Dowling, can you identify now or by note to my chambers with a copy to the applicant who the internal lawyers are who it is proposed would participate in that process and would be subject to the undertaking?

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MR DOWLING: Yes, Vice President. There might be another more efficient way of doing it. I might be able to get instructions as to whether it's just the external lawyers. I'm not sure what the complaint made about the internal lawyers is. There's no material to suggest that they will do something improper, but that seems to be Mr Borenstein's suggestion. He shrugs, but really it's a serious allegation that he makes. But if there's some suggestion about the internal lawyers it should be properly put.

PN591

THE VICE PRESIDENT: I think we are just dealing with the undertaking you have proposed. So can you get those instructions, and if it's not going to be internal lawyers can you put that in a note, or if there are going to be internal lawyers involved can you identify who they might be and who would be subject to the undertaking?

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MR DOWLING: Yes. I can tell you now who the internal lawyers are, they're Josh Lilley, L-i-l-l-e-y - - -

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THE VICE PRESIDENT: L-i-l-l-e-y. Yes.

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MR DOWLING: - - - and Lucy Weber, W-e-b-e-r.

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THE VICE PRESIDENT: Okay. Well, I thank you for your attendance. I will consider what's been put. I will be in a position to determine this issue subject to receipt of any further note from you, Mr Dowling, by tomorrow afternoon.

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MR DOWLING: Thank you, Vice President.

PN597

MR BORENSTEIN: Vice President, just before you adjourn can I just quickly raise one question. In terms of access to these documents if the Commission is minded to make an order about it, particularly if internal lawyers are going to be involved, there is a concern about what is to happen with any document that you might order that we provide, and we would want to have some comfort about the distribution of the document or the retention of the document, particularly if it's going to be in the hands of internal lawyers who are in the union office.

PN598

THE VICE PRESIDENT: So are these documents in electronic form or are they in hard copy?

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MR BORENSTEIN: Well, it would be impossible for our friends to see them if they're in electronic form, because they're in different locations, and so it would mean that we would have to produce a hard copy, which can be done. We had preferred that they would come and inspect the hard copy at our offices. That's something we put, but if you're of the view that they should have the document to take away then the concern I mentioned is one that is a concern - - -

PN600

THE VICE PRESIDENT: This is what I am saying, we are not dealing with the issue of access at this point.

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MR BORENSTEIN: No.

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THE VICE PRESIDENT: What's been invoked is a process to produce these documents to the Commission.

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MR BORENSTEIN: Yes.

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THE VICE PRESIDENT: The issue of access beyond that point we can deal with that then - - -

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MR BORENSTEIN: That's fine.

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THE VICE PRESIDENT: - - - if and when (indistinct) are made.

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MR BORENSTEIN: That's fine.

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THE VICE PRESIDENT: All right, if there's nothing further we will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[10.24 AM]