



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 Jolly
(D2023/1)**

Melbourne

9.08 AM, FRIDAY, 14 APRIL 2023

Continued from 24/02/2023

PN1

JUSTICE HATCHER: Mr Borenstein and Mr Bakri, you continue appearance for the applicant?

PN2

MR H BORENSTEIN: Yes, thank you, your Honour.

PN3

JUSTICE HATCHER: Mr Dowling and Mr Massy, you continue appearance for the RTBU?

PN4

MR C DOWLING: Yes, thank you, your Honour. I'm instructed by Mr Clayton and Ms Lakina(?), who are behind me.

PN5

JUSTICE HATCHER: All right, thank you. Mr Dowling, this is effectively your motion. I have read the correspondence and the parts of the applicant's material to which the correspondence refers.

PN6

MR DOWLING: Thank you, your Honour. Can I just add this. Firstly, if it's not obvious, we are grateful for the listing. We sought the listing because of the relevance of those portions that you have read and because there's a direction for us to comply with them, and what we want to avoid is wasting the members' money and the Commission's time responding to that material when we say there are no circumstances in which it can be relevant, but can we explain that in a little more detail.

PN7

Our friends, in their application, say that this material is relevant to 94A(2)(b), and can we just remind you that 94A(2)(b) describes as a relevant matter the likely capacity of the organisation that the constituent part is to be registered as when the withdrawal from the amalgamation takes effect. So, it is aimed at that organisation or that part of the organisation.

PN8

Consistent with that, in our friends' application, that is the application dated 2 February, at paragraph 6, where first appearing, they rely on, as the primary ground for their application, the record of non-compliance, but then, at paragraph 6, where second appearing, their alternative case is the RTBU's record of not complying and the likely capacity of the proposed new organisation to promote and protect the economic and social interests of its members. So, correctly, they refer to the proposed new organisation consistent with 94A(2)(b). Can we then
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PN9

JUSTICE HATCHER: Before you go on, Mr Dowling, am I right in recalling that an issue arose in the Kelly litigation, which didn't have to be resolved, as to

whether subsection (2) of the section was exhaustive as to the matters that were to be taken into account?

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MR DOWLING: It did, yes.

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JUSTICE HATCHER: And that was never resolved, so that may be an underlying issue of construction which goes to the matters you raise?

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MR DOWLING: Well, there's two issues. Firstly, what we are endeavouring to do initially and now is identify the way that our friends put their case.

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JUSTICE HATCHER: Yes.

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MR DOWLING: Undoubtedly, the way they put their case is what is relevant to 'appropriate' are the matters in (2)(a) and (2)(b), and that's so for their application dated 2 February and that's so for the submissions.

PN15

Can I just make that second proposition good. In their submissions dated 3 April of this year, you will see at D1 that's the heading D1 - paragraphs 32 through to 49, they address the record of non-compliance, and then, at D2, paragraphs 50 through to 59, they address why the Locomotive Division didn't contribute to that record of non-compliance, and then, consistent with what we have seen so far, at E1, 62 to 66, they deal with the capacity of the new organisation, and they there call it the Victorian Tram Drivers Union, to promote the economic and social interests of the members. They do that by reference to its finances, assets and resources.

PN16

So, up to that point, everything is consistent with the way they put their application, that is, the only things that are relevant to 'appropriate' are the matters in (2)(a) and (2)(b), and (2)(b) is directed at the new organisation, not anything that's happened to this part of the organisation in its past.

PN17

But, what we then see in the material is reference to the dysfunction of the Victorian Branch, followed by what we say are serious and vague allegations, and those vague allegations are said to be in some way relevant under 94A(2)(b), the capacity of the - - -

PN18

JUSTICE HATCHER: Paragraph 72 seems to raise the constructional issue which we have just referred to.

PN19

MR DOWLING: What it doesn't do, we say, clearly enough is say that the matters that they include in those 38 pages are relevant to anything other than 94A(2)(b), and our primary submission is those matters can in no way be relevant to 94A(2)(b). Can we take two examples.

PN20

JUSTICE HATCHER: Before you go on, I read 72 - and Mr Borenstein will come to this, no doubt - but I read 72 as saying that the impugned matters go to some, perhaps if you call it residual discretion, pertaining to what is appropriate under subsection (1).

PN21

MR DOWLING: Mr Borenstein can tell us, but the paragraph that sets out these allegations, which is paragraph 67, your Honour, if you go back to 67, there is the summary of the airing of grievances that we find in the 38 pages, and at the end of that summary, at paragraph 68, you find:

PN22

It is submitted that these matters can be taken into account under 94A(2)(b) and should be given considerable weight by the Commission.

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JUSTICE HATCHER: Yes, all right.

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MR DOWLING: The way we read it on paragraphs 67 and 68 is, 'Here they are and they are relevant under 94A(2)(b).' In our submission, they simply can't be. I just wanted to take you to two very brief examples.

PN25

There is a section that addresses the alleged misuse of the funds of the Victorian Tram and Bus Division. In the statement of Mr Jolly - now you know, of course, the Tram and Bus Division is a different division to the division that seeks to withdraw and we say that that can in no way inform the exercise under 94A(2)(b) as to the likely capacity of the proposed new organisation. Worse, of course, we are not told exactly what the misuse is or what obligations under the Rules or the Act were not met or how they were breached or how that breach is relevant to 94A(2)(b), as is contended in paragraph 68.

PN26

We then, from there, in respect of that same division, a different division that seeks the withdrawal, have an allegation in paragraph 161 of Mr Jolly's statement of something akin to assault, people being pushed and tripped in the hallway, based on what is undoubtedly a hearsay account and, what is more likely, a double hearsay account, and we are to accept, if Mr Borenstein and Mr Bakri are right, that a hearsay account of an official from a different division being assaulted in the hallway of the division is in some way relevant to the capacity of the new organisation to promote and protect the economic and social interests of their members.

PN27

In our submission, that could never be the case and that material - and those examples are consistent with the balance of the material in those 38 pages from page 22 to page 60 - in our submission, they could never be relevant and the order that we seek today is that that material from paragraphs 86 through to 222 be ruled irrelevant so that the members of the RTBU, their money not be wasted in having to respond to it, but, of course, also that the Commission's time not be wasted in a hearing dealing with all of those allegations and, of course, what we seek to avoid is us having to respond to it and then, at some point during the hearing, it be determined to be irrelevant. That's why we want an order of that sort today.

PN28

Can we just propose an alternative to that, your Honour, in the event that you were against us on that. So, that is our primary position. If you are against us on that, can we put this alternative for your consideration, and that is that the present directions be vacated, the applicant be required to replead and set out in his application how this material is relevant, firstly, but then precisely what the allegations are: if there is an allegation of breach of a Rule, which Rule, how was it breached, and how is it relevant to 94A(2)(b); if there is an allegation of assault, who assaulted who, what is the allegation and how is it relevant to 94A(2)(b).

PN29

Once that is done, then we say we should be given an opportunity to strike that part of the application out. That could be heard by the Full Bench. Once that is heard, then the balance of the matter can be timetabled, so we don't end up in an eight-day hearing having to canvass all of this material that we say could never be relevant.

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We appreciate there are listings on 5 and 6 June. If our friends were to replead in that way, if your Honour is against us on our primary position of striking the material out, the strike-out of the repleaded application could be heard on 5 or 6 June.

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

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MR BORENSTEIN: May I please go back to a little bit of history which Mr Dowling hasn't mentioned. When this matter was programmed, the Commission made directions for the respondent to file a notice of its objections and the directions were made by the Commission on, I think, 6 March, and the second direction was that the RTBU file any objection to the grant of an extension of time under section 94A, including in brief form the reasons for each objection, and then the respondent filed a notice of objection and you will see in that notice that there are three grounds of objection raised.

PN33

The first ground complied with the Commission's direction. It took issue with the complaint or the ground that we relied on, being the record of non-compliance, and if you have that before you, your Honour, you will see that it does detail the

basis on which that ground is raised. There are four paragraphs and then a number of subparagraphs which detail the position which the respondent takes.

PN34

In stark contrast to that, the second and third grounds of objection are just simply headlines. The second ground is simply an assertion that the new organisation will likely not have the capacity to promote and protect the economic and social interests of its members. No indication is given, no particulars are given in compliance with the Commission's direction as to the basis on which that objection is going to be conducted.

PN35

Thirdly, and your Honour referred to this in relation to the grounds that were raised in Kelly about the residual discretion, in the third ground it's put that the RTBU objects on the basis that it's not appropriate within the meaning of section 94A(1) for an order to be made for a ballot. Now, again, absolutely no particulars, no material facts, if you like - we're talking about pleadings - no indication of how that argument is going to be put.

PN36

Now, that's the context in which we submit your Honour should approach this complaint which is now made by the union. It's against that background that the applicant prepared his material and his submissions, and it's in support both to the way in which the applicant wishes to put his primary case and also in relation to anticipated arguments that might be raised under these two grounds of objection.

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JUSTICE HATCHER: Mr Borenstein, if you go to the first matter, I think it would be reasonable to accept, would it not, that the evidentiary material and submissions go well beyond the way your client pleaded its application?

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MR BORENSTEIN: In relation to the reliance on 94A(2)(b), we say, as we explain in our submissions, that, to the extent that the Commission is making an assessment of the likely ability of the constituent part to function as a new organisation after withdrawal and in circumstances where that's an issue that is in contest under the objection, we have filed material which establishes the present structure and also establishes the difficulties under which the constituent part has been operating so that we can make a submission that this is the constituent part, this is how it operated. To the extent that it is going to be challenged that it will be able to operate effectively after withdrawal, we say these are the handicaps under which it operated within the organisation, they will be free of those handicaps after withdrawal and, on that basis, the Commission can be more comfortable about finding that it will be likely to function effectively.

PN39

JUSTICE HATCHER: But (2)(b) is not a comparative exercise of will it have greater capacity or better capacity, it either has capacity or not.

PN40

MR BORENSTEIN: We accept that, your Honour, but, at the same time, we have an opponent who says, 'You're not likely to be able to function.' They don't say how or why they say that, they just say, 'You're not likely to be able to function', so we have put on material which indicates that we will be able to function, have a look at what we've been doing up until now, which is at least a point of reference, and have a look at the circumstances in which we've done it, and we say we will be likely to be able to function because, going forward, we will be free of those adverse circumstances. We say that, on a proper construction of that paragraph, that's a permissible line of reasoning.

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JUSTICE HATCHER: So the - I'll call it the impugned material - finds its relevance under (2)(b); is that the way it's advanced?

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MR BORENSTEIN: That's how we say we wish to use it. Now, once Mr Dowling tells us what his objection is to the (2)(b) part of the case, it may be that we won't need to rely on that, but, presently, we are uninformed about that and we have put that in both because we want to support our argument and also to anticipate the arguments that are going to be raised against us.

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JUSTICE HATCHER: All right. If I have understood this correctly, you say the impugned material is relevant to 94A(2)(b)?

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MR BORENSTEIN: Yes.

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JUSTICE HATCHER: And arises because you are attempting to meet an unparticularised contention that the division won't have the capacity to represent its members if there was a disamalgamation?

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MR BORENSTEIN: Yes. We say it's relevant for two reasons. As your Honour says, it's relevant on our case on our construction of how you approach (2)(b) and it's also relevant in response to the notice of objection.

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We also say - I'm sorry, I was going to move on to 94 - - -

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JUSTICE HATCHER: Go on.

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MR BORENSTEIN: We have also said in our submission, in the paragraph that your Honour referred Mr Dowling to, paragraph 72, that in terms of then having to decide whether the extension of time or the receipt of the application out of time is appropriate, to the extent that that does involve some residual discretion, that material is relevant to support the argument that it is appropriate.

PN50

We are conscious of the argument that Mr Dowling put in Kelly where he said to the Commission - and as your Honour rightly points out, this is unresolved and so we can't make assumptions about how the Commission will deal with it and we expect that Mr Dowling will make the same argument here under objection 3 - he said that the applicant was obliged to articulate clearly why it is appropriate, over and above the matters in subsection (2), to accept the application out of time.

PN51

Now, if that is a view that the Commission comes to or a position that the Commission comes to, then this material is also relevant to that because, clearly, if it's established that the functioning of the registered organisation is deficient, to use a neutral term, in the way in which we have explained it in the material, then that must be a powerful consideration in support of allowing the application for withdrawal to be made. Again, in part, this is a function of the failure of the respondent to indicate on what basis it advances ground 3 of its objections.

PN52

We say we have put this material on, we have sought to be up front about the material, we have put it on early so that the respondent has had time to respond. We can only imagine what sort of reaction we would get if we hadn't put it on now and Mr Dowling put the argument in this case that he put in the Kelly case about having to demonstrate why, as part of the residual discretion, the Commission should extend the time and we put this material on in reply. There would be no end of outrage from Mr Dowling's client in relation to that. We have put it on up front because we are trying to get this thing moving efficiently, we are trying to reasonably anticipate what we will have to meet under the objections, where the respondent has failed to comply with the direction in the first instance, and we've put it on and we say that it's not possible for the Commission, at this point in the process, to make definitive statements about what is or isn't relevant to the matters that the Commission will have to decide.

PN53

When Mr Dowling puts on his material and puts on his submissions and explains how he's going to advance grounds 2 and 3 of the objection, that may be a more opportune time to say, 'Well, okay, these issues haven't arisen in the way you anticipated, therefore this material isn't going to be relevant', but, at this point, where the respondent's position and the matters that they propose to litigate are unknown, we say it's seriously premature to start thinking about what will be relevant at the trial.

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JUSTICE HATCHER: What is the relevance of the material relating to the Tram and Bus Division?

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MR BORENSTEIN: Your Honour, the material relating to the Tram and Bus Division involves examples of financial - I'll try and use a neutral term - inappropriate financial dealings within the branch, which don't only impact on the Tram and Bus Division but also impact on the Locomotive Division. Mr Dowling

has given you one example, which is really not indicative of the examples that are set out in the material.

PN56

Can I just say this: as a result of the dealings between the branch and the Tram and Bus Division, that division, together with the Locomotive Division, commissioned an audit, an independent audit, of the dealings with funds by the branch. That audit identified a series of questionable transactions that prejudiced both the Tram and Bus Division and also the Locomotive Division. That report was provided to the branch - and I'm paraphrasing what's in the material - the branch refused to do anything about it and, ultimately, after some pressure, referred it to its auditors.

PN57

Mr Paris was subsequently informed by those auditors that they had provided the branch with a report, but the branch secretary had failed to disclose that report to the executive, even after being requested to. So, it's this sort of dealing with money without accountability, without transparency that pervades the relationship between the branch, not only with the Tram and Bus Division but also with the Locomotive Division, and we have pointed this out in the material. We have linked the material to the effects on the Locomotive Division.

PN58

Overall, the effect of all of this is that it demonstrates a very - again trying to use a neutral term - a very unsatisfactory environment within the branch, one that impacts on the Locomotive Division and provides a very powerful reason for why the Locomotive Division - and, indeed, Mr Jolly will tell you, when he ultimately gets in the witness box, that this adverse relationship is the prime motivation for why, not only the division but its members, wish to withdraw from the organisation.

PN59

One of the examples that Mr Paris refers to in his materials, and is referred to in paragraph 67, concerns the dealings that took place in relation to the negotiation of an enterprise agreement with Metro Trains. This is in paragraph 67(h). Mr Paris states in his affidavit that, after those events, some 500 members of the Locomotive Division resigned from the union in protest, so your Honour gets a sense of the unhappiness within the Locomotive Division to the way in which the branch is operating, and has been operating, and the point of this material is to provide specific instances of that sort of behaviour to explain why Mr Jolly will argue the Commission should find that it is appropriate for them to be allowed to make their application outside the limitation period and to answer the sort of arguments that Mr Dowling raised in the Kelly case.

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JUSTICE HATCHER: On any view, this material will change the course of litigation. It can't possibly be thought that opening up an evidentiary case of that nature will allow it to be dealt with in two days, would it?

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MR BORENSTEIN: Your Honour - - -

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JUSTICE HATCHER: You are talking about a major inquiry into the conduct of the union.

PN63

MR BORENSTEIN: We were going to say to your Honour that, at this stage, we are in the dark about how the respondent is going to run its case, what the case is going to be and the extent of the evidence that they are going to call, but let's assume that they will want to call several witnesses or a number of witnesses. We accept readily that if these matters are to be contested, and Mr Dowling indicates that they will, then two days will not be sufficient and we accept that.

PN64

What we also would guess is that the evidentiary case would probably need something of the order of five days, which is one of the figures that is suggested in their correspondence, and what we were going to propose to your Honour was that the two days that are presently fixed for the trial, which are 5 and 6 June, should not be vacated, they should be retained, the respondents should put on whatever material they want to put on, the hearing of the application should commence on 5 and 6 June. We would anticipate that the applicant's material would be completed during that period, and then we would ask the Commission to find another number of days, say three days or so, to allow the respondent to put on its case and then, as is suggested in the letter, that there should be a short break for the parties to then, over a period of two days, make submissions on all the material.

PN65

We accept, your Honour, that if there's going to be a large evidentiary contest, then certainly two days wouldn't be enough. We wouldn't argue against that. It's just simply a matter of how the court then finds the various necessary days to deal with the matter. We would think that there would need to be of the order of five days for the evidence and we think that the respondent's estimate of two days for the submissions is probably not unreasonable and we don't propose there being a gap between the evidence and the submissions - that might be helpful - but we would like, if it's at all possible, to retain 5 and 6 June to at least start the case and get it going.

PN66

JUSTICE HATCHER: JUSTICE HATCHER: Of course, if this material goes in, it also requires a long and complex judgment about a whole range of factual issues. One of the most annoying parts of the legislative scheme is I have to sit personally on this case, but I don't have the flexibility as to how it's assigned. It doesn't sound to me like you are going to proceed very quickly in the balance of this year, quite frankly.

PN67

MR BORENSTEIN: Well, if your Honour means we may not get a decision by the end of this year, your Honour, I have been around long enough to recognise the realities of the system, but, for all of that, if the case can at least be presented, then the time for writing the judgment will finish earlier than if the case has to be presented later.

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JUSTICE HATCHER: All right.

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MR BORENSTEIN: Ultimately, we are in your Honour's hands about how your Honour decides it is most efficient to deal with the case.

PN70

JUSTICE HATCHER: All right. Mr Dowling, do you want to respond to the point about your objection to the application being accepted, that is, it's suggested that the unparticularised objections in relation to (2)(b) and subsection (1) have played a role in what has occurred?

PN71

MR DOWLING: Yes, thank you, your Honour. Firstly, we reject the criticism that we haven't complied with the directions. Your Honour will recall that the directions described us filing a reason for each objection - 'in brief form' were the words expressly used, as they were used in Kelly, firstly.

PN72

Secondly, it is no part of our case that any of this material could ever be relevant, no matter how it is put, but, to be clear, the application we meet is that this material is appropriate by reference to (2)(a) and (2)(b). We will say 'appropriate' has regard to (2)(a) and (2)(b) and the structure of the Act more broadly, and that's it, and this material could never be relevant in those circumstances - never.

PN73

There seems to be a concession from Mr Borenstein's efforts to explain how, for example, the material on the Tram and Bus Division is relevant that, obviously and necessarily, this is not the pleaded case, and we say - if your Honour is against us, we still say, on everything we have heard this morning, it is clear that the material is irrelevant and all of those paragraphs should be struck out and that resolves the problem.

PN74

If you are against us on that primary position, what must happen is that Mr Borenstein must plead - he's tried to explain it today - that's what should be in the application - if you're against us on our primary position, he should be required to replead, we can then respond to the repleaded application and then the argument can be had about striking out that repleaded application.

PN75

JUSTICE HATCHER: All right.

PN76

MR DOWLING: Sorry, your Honour, just two things I should say in terms of timetabling. We do not think it's a safe assumption, as Mr Borenstein said, that their evidence would be completed in two days. You have seen the extent of the irrelevant material and the factual inquiries that would have to be made. There is no way, in our submission, that all of that could be dealt with in two days and Mr Borenstein's evidence would be done in two days. Then you have the very

unsatisfactory position of the applicant's evidence not even being concluded in the first tranche of the hearing and having to find a second tranche and then, on Mr Borenstein's submission, a third tranche. Now that is wholly unsatisfactory, not to mention the unsatisfactory outcome of the RTBU having to respond to material that, on its case, could in no way be relevant.

PN77

JUSTICE HATCHER: Can I make this inquiry of both parties - well, let me make this comment: it seems to me that, in its current state, the parties are heading towards a long and costly road of litigation which may end up being very damaging to both parties, regardless of the outcome. Would there be any purpose in directing the parties, that is the applicant and the respondent, into some form of mediation?

PN78

MR BORENSTEIN: I would have to take instructions on that, your Honour.

PN79

JUSTICE HATCHER: All right.

PN80

MR BORENSTEIN: But can I say this: it would greatly assist - Mr Dowling's, in quotes, 'explanation' of the argument under ground 3 in relation to 94A(1) really goes no further than what's in the document. It would be greatly assisted if Mr Dowling and those with him were able to provide us with the particularisation of grounds 2 and 3. That would assist the mediation considerably and it may even allow for the parties to discuss whether all or part of the material that is presently impugned needs to be there.

PN81

If what Mr Dowling is saying, or said a moment ago, about objection 3 is as narrow as it seemed to be, which would be narrower than what he put in Kelly, then that may be a basis on which we can review the material that we need, but we would want to have some clear articulation of that and that might be very helpful.

PN82

MR DOWLING: With respect, your Honour, that is the wrong way around. It's our friends' application. With no explanation in the application itself as to this type of material, they now say it all comes under 94A(2)(b). That's what needs to be explained.

PN83

MR BORENSTEIN: No, we don't.

PN84

MR DOWLING: How it is relevant under 94A(2)(b), not a vague reference to 38 pages and then it all goes under that heading, your Honour. That is, undoubtedly
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MR BORENSTEIN: (Indistinct.)

PN86

MR DOWLING: - - - the wrong way. If I could just finish, Mr Borenstein.

PN87

JUSTICE HATCHER: I think I understand the respective positions on that question.

PN88

Look, I intend to confer with the Full Bench and then issue some form of decision as to how the matter is to go forward. If the parties can have direct discussions as to whether there is some other means by which the issue of this material can be resolved, I would encourage them to do so.

PN89

MR DOWLING: Thank you.

PN90

JUSTICE HATCHER: If there's nothing further today, thank you for your attendance and I'll now adjourn.

ADJOURNED INDEFINITELY

[9.45 AM]