

TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

26002-1

**COMMISSIONER ASBURY**

**DR2010/193**

**s.709 - Application to Commission to have a dispute resolution process conducted (Div 5)**

**Australian Rail, Tram and Bus Industry Union  
and**

**QR Limited T/A QR National Coal  
(DR2010/193)**

**QR Limited Traincrew Union Collective Workplace Agreement 2009**

**[AC327905 Print ]]**

**Brisbane**

**TUESDAY, 27 APRIL 2010**

**Continued from 19/04/2010**

PN744

THE COMMISSIONER: Good morning, please be seated. We have got Mr Moffitt on the line and he has been affirmed, as I understand. Were there any additional matters arising from the other evidence Mr Tiley?

PN745

MR TILEY: Thank you, Commissioner. We propose to do this morning is to have Mr Moffitt cross-examined and then discuss that material in brief submissions following his cross-examination or his evidence. If it pleases the Commission.

PN746

THE COMMISSIONER: Thank you.

PN747

**<MR MOFFITT, AFFIRMED** [8.16AM]

**<EXAMINATION-IN-CHIEF BY MR TILEY** [8.16AM]

PN748

MR TILEY: Good morning, Mr Moffitt?---Good morning.

PN749

You are the deponent of an affidavit which is four pages in length you prepared for the purposes of this proceeding, is that correct?---Yes.

PN750

The contents of that affidavit are true and correct?---Yes, that is right.

PN751

The matters in that affidavit are your - are the views set out there your own?  
---Yes.

PN752

It's 23 paragraphs that affidavit?---Yes.

PN753

Just a couple of additional questions for you, Mr Moffitt. You say in you affidavit that there were to be - in Paragraph 22 of your affidavit you say that the master diagram should only contain three different operational shift lengths, is that the thrust of your evidence?---Yes, that was the intent of the day when we negotiated it.

PN754

It was in evidence before this Tribunal, Mr Moffitt, that at the (indistinct) Depot there are five operational shift lengths; are you aware of this?---No, I wasn't aware of it. I don't get that close to it, I get involved with nominating people that do these diagrams and that but I don't physically generally sit down and go through it after they do them, unless they raise issues with me.

PN755

It is in evidence that there are four operational shift lengths at the (indistinct) Depot, are you aware of that?---No, no, and if that is the case that was certainly not ever the intent when we negotiated the agreement.

PN756

Can you tell the Commission, Mr Moffitt, whether you are aware of any depots in the Coal North region which have more than three operational shift lengths?---No, I'm not aware of that at all. If it has occurred it would be because of the naivety of the people that we put on these diagrams. A lot of them are not union activists, they are just people with special skills within the driver's rank that enjoy doing diagrams and do a good job of it and they rely on management to really set the guidelines when they sit down and do these diagrams.

\*\*\*\* MR MOFFITT

XN MR TILEY

\*\*\*\*

MR MOFFITT XN MR TILEY

PN757

So, Mr Moffitt, the view as you set out in your affidavit at paragraph 22 that it was the intent that there be three operational shift lengths, that view is not changed by the evidence that is before the Commission regarding (indistinct) and (indistinct), is that correct?---Yes, that is correct.

PN758

Thank you, I have nothing further for Mr Moffitt, Commissioner.

PN759

THE COMMISSIONER: Thank you. Mr Heenan, cross-examination?

PN760

**<CROSS-EXAMINATION BY MR HEENAN**

**[8.19AM]**

PN761

MR HEENAN: Thank you, Commissioner. Good morning, Mr Moffitt?---Good morning.

PN762

I will take you to paragraph 20 to 22 of your agreement, Mr Moffitt?---Yes.

PN763

Now, Mr Moffitt, it's the case, isn't it that available shifts are set by the daily roster?---I missed that one.

PN764

Sorry, it's the case isn't it that available shifts are set by the daily roster?---For sure, that's what they're there, to cover absenteeism and all of that, yes.

PN765

It's the case, isn't it, that when the agreement was drafted your contention here about the three different operational shift lengths didn't survive into the words of the agreement?---Well, that was the general intent when we went through, you can't cover every scenario when you write, otherwise we'd end up with an agreement hundreds and hundreds of pages, there's got to be some good faith bargaining in all this and that was certainly the intent and what we thought should have gone into the agreement.

\*\*\*\* MR MOFFITT

XXN MR HEENAN

PN766

Let's just go to that, because in clause 66 the paragraph that you are referring to, which is different to the paragraph that went into the agreement, they're roughly the same length aren't they?---At the end of the day with the available shifts they're supposed to be aligned to the CTP because of the fatigue management one is probably the most important issue there and those shift lengths and available are the worst case scenario for that depot.

PN767

Yes, but what you're saying is that the reason you didn't go in is for reasons of length that the injunction to only have three different operational shift lengths in paragraph 22 of your affidavit didn't go into the agreement because it would have been too long. Well, I'm telling you that the clause in paragraph 66.4.1 is no longer than what's in your paragraph 22?---Yes, but I'm not just talking about in this case, you know, just about every - - -

PN768

But we are, we are only talking about this case?---When I made that statement just about every clause in this agreement, there's different interpretations and there should have been extra words. This comes up all the time, but at the end of the day like it says there it's got a fair bit of good faith when we put all the agreement together, and in hindsight, yes, we probably should have put more words in there but the reason we didn't because I didn't believe we were going to end up in this sort of situation because we never had these sort of problems with the last agreement, not to this extent anyhow.

PN769

Mr Moffitt, you say that all shifts are to be aligned to the coal trade planners, is that what you're saying?---The CTP, yes.

PN770

If you look at clause 67.2 of the agreement it says only 80 per cent of known workings are to be incorporated into the master diagrams, that's the case, isn't it?--  
-That's right.

\*\*\*\* MR MOFFITT

XXN MR HEENAN

PN771

So when the daily roster is formulated then the daily roster doesn't have to completely align to the coal trade plan, that's the case isn't it?---Well, it does, the reason you only put 80 per cent in there is to give flexibility for the rostering people.

PN772

But there's only 80 per cent of known workings to be put into the master diagram, that's the case isn't it?---That is the case, but in most depots we put 100 per cent in anyhow.

PN773

So the rest of the master diagram doesn't have to have an alliance with the coal trade plan, that's the case isn't it?---I'm afraid it does. Just because you only put 80 per cent of the shifts into the actual diagram, that's for flexibility and that for the rostering people. For flexibility, that is right, isn't it, that's what available

shifts are for, for flexibility?---Flexibility up to the agreed shift lengths, yes.

PN774

I put it to you that there are no agreed shift lengths for available shifts, Mr Moffitt?---Well, there's got to be because that's what you do your fatigue management (indistinct) on your diagrams on.

PN775

You are aware that the daily roster is fatigue managed, aren't you, Mr Moffitt? ---Yes, they are but they also change from time to time too when people get moved around, they don't have to leave their fatigue to the actual workings.

PN776

Sorry, you are aware that the daily roster is fatigue managed?---Yes.

PN777

That's the case isn't it, so after available shifts are set they are fatigue managed?---Yes, then you can't take into account what happens on the day of operation either.

PN778

Sorry, what happens on the day of operation is taken into account on the next daily roster fatigue management scenario, isn't it?---To the best of my knowledge it is, but I beg to differ when we still have cases in depots where we have a large proportion of people who are exceeding the fatigue management levels.

\*\*\*\* MR MOFFITT

XXN MR HEENAN

PN779

Thank you, Mr Moffitt, that will be all.

PN780

THE COMMISSIONER: Re-examination, Mr Tiley?

PN781

MR TILEY: Very briefly, Commissioner.

PN782

**<RE-EXAMINATION BY MR SLEVIN**

**[8.24AM]**

PN783

MR TILEY: Mr Moffitt, you mentioned that - you gave evidence that the purpose of available shifts is to give flexibility up to the agreed shift lengths, is that correct?---Yes, that's correct.

PN784

You also mentioned, if I'm not mistaken, that available shifts are set by the daily roster to cover - and you gave as an example absenteeism, is that correct?---Yes.

PN785

Are available shifts intended to cater for known delays such as truck delays?---No, no, no way.

PN786

Thank you, Mr Moffitt, I have no further questions, Commissioner.

PN787

THE COMMISSIONER: Thank you for giving your evidence, Mr Moffitt, you are excused?---Thank you very much.

PN788

<THE WITNESS WITHDREW

[8.25AM]

PN789

MR TILEY: If it pleases the Commission, I propose to make some additional submissions that go above and beyond the matters that were put to you in submission last week. They are brief in nature and are primarily oriented to our supplementary material which was tendered to you late last week.

PN790

THE COMMISSIONER: Yes.

PN791

MR TILEY: What we say - the first point that we would like to bring to your attention, Commissioner, and mainly for the purposes of the record really is that there were two shifts that were rostered as 11 hours, I am instructed, for this week. They have subsequently been removed from the roster. They were available shifts to go to (indistinct). Now, obviously there is no evidence before you of that per se, however, I am instructed to record our discontent with that situation and that it is the view of the RTBU, the first applicant in this matter, that to do so prior to a determination concluding the dispute process and permitting that to occur would be a breach of the agreement.

PN792

THE COMMISSIONER: Well, they have been removed from the roster, Mr Tiley, you just said.

PN793

MR TILEY: They have, Commissioner, but it obviously is of concern that they arrived there in the first place and we seek to record our view - - -

PN794

THE COMMISSIONER: Noted, Mr Tiley, but they haven't gone ahead and as I understand none have gone ahead, so can we move on and just stick to the interpretation of the agreement.

PN795

MR TILEY: We can, Commissioner, the disputes clause, Commissioner, is part of this matter.

PN796

THE COMMISSIONER: Yes.

PN797

MR TILEY: The second point I wish to make, Commissioner, is that some instructions that I have been given primarily from Mr Williams upon the first affidavit of Mr O'Brien, which as you will recall from last week's matter, I haven't yet had the benefit of obtaining instructions upon. Specifically I am instructed to point out by our submissions that where drivers are signed off early and do not complete their full shift length, i.e. they're under-achieving on their rostered time,

the agreement states that if they are signed off early then that time is placed into the fatigue box on the time sheet and that is used for fatigue only and not for the calculation of foot plate time. So that impacts on their annualised hours and it is slightly different from what was discussed last week. The second point that I am instructed to bring to your attention by submissions in relation to Mr O'Brien's affidavit - sorry, in relation to this matter, is of course the one I have already made in relation to the 11 hour shifts that were put on for this week, so I have covered that. In relation to the material of Mr O'Brien, the supplementary material by Mr O'Brien, we say that there is no evidence of there being more than three operational shift lengths in the Coal South region, certainly Mr Moffitt's evidence you have heard today stands that the intent was there only be three operational shift lengths and that in his opinion for something other than that to be occurring would be erroneous and that is the extent of our submissions on that point, Commissioner. The evidence of the first applicant remains that available shifts are to align to these operational shift lengths and that there are only three and that that should remain the case. In relation to the supplementary submissions that have been put in by the respondent, I would just like to raise a couple of matters briefly. In paragraph 1 of the supplementary submissions provided by QR, they point out that in their opinion or in their submission, sorry, at one stage of the negotiations there was a limit of three operational shift lengths. They also go on in paragraph 3 to point out that that final proposal was some three months prior to the final agreement. Now, Commissioner, yes, those points in isolation are correct. However, the final proposal is the final proposal. Whether it's three months, six months or 10 months before the drafting is concluded, certainly you should still be guided, in our submission, by what was the parties' intent at the time that they left the negotiations and commenced the drafting process.

PN798

THE COMMISSIONER: But when they left the negotiations with a proposal on the table and then they didn't put the proposal into the agreement and everybody agreed to that why should I draw that conclusion?

PN799

MR TILEY: Because, Commissioner, there are no direct words in the agreement that support the position that is being maintained by either party. There are no words in the agreement which says available shifts are not to align.

PN800

THE COMMISSIONER: So therefore there is no ambiguity is there to go to extrinsic - no, the ambiguity is created by the extrinsic material. Surely, Mr Tiley, the ambiguity has to be in the agreement itself before you go to the extrinsic material, you can't create ambiguity with the extrinsic material.

PN801

MR TILEY: Respectfully, Commissioner, we disagree on the authority of the AWU v. Visy case which we provided you last week, they are alternatives. If there is ambiguity in the agreement you can have regard to extrinsic material but equally - - -

PN802

THE COMMISSIONER: If there is ambiguity in the agreement.

PN803

MR TILEY: Well, Commissioner, in circumstances where an agreement describes - the only place in which an agreement describes available shifts is in the glossary and the rostering clause is entirely silent as to how those shifts are to be rostered, then we submit that it is ambiguous as to how they are to be rostered. How the definition of available that sits only in the glossary interacts with the clause 66 provisions regarding rostered management. In the alternative, if there is no ambiguity on the face of the agreement then equally we say the extrinsic material can be had regard to in accordance with the final of the criteria outlined in the AWU v. Visy.

PN804

Either way, Commissioner, we say you get to the extrinsic material and we submit that the extrinsic material is indicative of what was the parties' intent. You have heard Mr Moffitt's evidence that quite simply you can't fit everything in the agreement and that this is not the only clause that the core points that were discussed during the negotiations weren't codified in the agreement for that reason. I can take the matter no further, Commissioner, to simply say that at the time that the parties closed the book on the negotiations and went away to start drafting, that was the position and there has been no evidence led from either party that that negotiated outcome was resiled from between the time of the final proposal and the drafting of the agreement. It is obviously a glaring omission but not a deliberate one on the part of the first applicant is Mr Moffitt's evidence.

PN805

The second submission I wish to make about the supplementary submissions provided by the respondent is to reiterate and to directly contradict the submission in paragraph 2, to reiterate that in the view of the first applicant that available shifts are not exempt from the requirement to align as is put out in that second paragraph and that it's perhaps tried to observe, Commissioner, but the evidence which has been led by the applicant from Mr Williams and from Mr Moffitt directly contradicts that submission. In paragraph 3A it is said that the words of the agreement contain no such restriction. We reiterate again that the words of the agreement contain no permission of the kind that QR seeks which would entitle it to treat available shifts differently. There is silence there as opposed to - it doesn't say one way or the other as opposed to - it contains words which support the position being maintained by the respondent.

PN806

The final couple of points that I would like to make in reply to the submissions, Commissioner, arises out of paragraph 6 and 7 of the agreement. You will read there that in QRs submission - - -

PN807

THE COMMISSIONER: So paragraph 6 and 7 of QRs submission?

PN808

MR TILEY: The supplementary submission which is in the final two paragraphs.

PN809

THE COMMISSIONER: Yes.

PN810

MR TILEY: I will be very brief, Commissioner.

PN811

THE COMMISSIONER: No, it's just that you said paragraph 6 and 7 of the agreement and you mean the supplementary submission.

PN812

MR TILEY: My apologies, Commissioner, that's my misnomer. It is said that the (indistinct) contains 100 per cent of known workings, that is not in dispute, and it is said that that represents a significant concession on the part of QR. That may be the case, Commissioner, but that does not entitle a so-called concession that was put in there voluntarily was not bargained for or traded off by the relevant workers under their enterprise agreement nor could it be in return for having available shifts that did not align to the CTP and master diagram, so it's really irrelevant in our submission. Similarly paragraph 7 appeals to some kind of holistic consideration of the greater context of the agreement in light of the wage increases which are contained in the agreement and were bargained for.

PN813

Commissioner, we say that submission is again irrelevant and does not take the matter anywhere because the agreement that was struck was a bargain between the parties and it represented a compromise on a number of issues, and in our submission based upon the clear evidence from Mr Moffitt and Mr Williams and AFULE witnesses, the intent was that there would be three and that the available shifts would align. So for QRs submission in paragraph 7 to be given any weight, it would need to be premised on evidence in our submission that says the significant wage increases were part of a bargain which gave QR the ability to have available shifts aligned to other than the three operational shift lengths. There has been no such evidence led, indeed, Commissioner, in our submission there has been no evidence led from anybody on behalf of the respondent that the intent was other than that which is being argued by the applicants. The respondent has only been able to say in submissions what the intent was. There is no evidence from anybody who participated in the negotiations to contradict the evidence of I believe four now representatives from the negotiating team, the two applicants. So whilst the agreement did contain wage increases, Commissioner, they were not an exercise by the respondent of a discretionary generosity, they were bargained for in relation to certain matters and in our submission the available shifts not aligning, if you like, was not one.

PN814

My final point, Commissioner, relates to the last sentence of the supplementary submissions from QR. It is submitted there that, "QR should not be denied the flexibility to roster available shifts at lengths of its choosing." Commissioner, what I simply say in relation to that is that QR has not been denied all flexibility. It does have some flexibility under the agreement which is bargained for, that's set out in clause 56.2.2 with which you are familiar. The applicants do not seek to deprive QR of flexibility but the flexibility that they are able to be afforded under the agreement is in our submission finite and the proposed change goes too far in light of the clauses of the agreement as bargained for by the parties. Unless I can assist you further, Commissioner, those are my submissions.

PN815

THE COMMISSIONER: Thank you.

PN816

MS AITKEN: I have nothing further.

PN817

THE COMMISSIONER: Thank you, Ms Aitken. Mr Heenan.

PN818

MR HEENAN: Thank you, Commissioner. Perhaps the first thing I should do is read the supplementary affidavit of Mr O'Brien. I understand that neither of my colleagues here wish to cross-examine Mr O'Brien.

PN819

THE COMMISSIONER: Given Mr Moffitt has given some evidence about that, the contents of that affidavit, I don't have any difficulty with admitting that.

PN820

### **EXHIBIT #8 AFFIDAVIT OF MR MOFFITT**

PN821

THE COMMISSIONER: Thank you.

PN822

MR HEENAN: Thank you, Commissioner. As you have read my supplementary submissions I don't intend to go through those in detail, however, I do have some comments to make on Mr Tiley's submissions. Just perhaps to correct, as we see it, some of Mr Tiley's submissions, and one is that Mr Tiley made a submission that, as I understand it, the (indistinct) depot wasn't part of Coles South. I must confess, Commissioner, we have been proceeding on the assumption that that was well known as Coal South. (Indistinct) in fact is the major depot within Coal South. It is the nerve centre of Coal South if you like.

PN823

MR TILEY: I have got no problem with that, Commissioner.

PN824

MR HEENAN: Mr Tiley has made some comments about paragraph 6 of our supplementary submissions. The point of that, Commissioner, was simply that QR has gone above and beyond the requirements of the agreement in relation to the construction of the master diagram, and that was the point we sought to be made in clause 6.

Mr Tiley has also made some submissions about the effect of the revised proposal put forward by QR. However, neither Mr Williams nor Mr Moffitt gave any evidence that that was the agreement and they gave evidence that that was put forward by QR as a proposal. They didn't give evidence that that was the agreed outcome of the negotiations. In fact in clause 16 of Mr Moffitt's agreement it says, "The respondent provided on 27 March 2009 a first draft of the agreement." That is over a month after this proposal was put forward. Presumably we don't have any evidence of what that draft agreement contained, but presumably it was very close to what clause 66.4.1, what we needed up with in clause 66.4.1 in the agreement, and our submission is that the only evidence of any agreement is actually what was balloted for. Now, Commissioner, the applicants have placed great store in these proposals of QR, they have placed great store in there being a supposed intention of only three operational shifts. Well, the reality is that

supposed intention didn't survive into the agreement and the clear practice of the parties since then has been that there are greater than three operational shifts in at least two depots within the coal business. That argument then must fail, Commissioner. It is specious. The RTBU submissions at least are almost solely concerned with that argument. If that argument fails then the applicant's case must fail. The other arguments advanced by the applicants are around the supposed maximum of 320 hours in each eight week cycle and I don't propose to traverse that ground again, other than to say that the whole scheme of the agreement opposes that construction and the third plank of the applicant's arguments is around safety. There has been uncontested evidence that each daily roster is safety managed and that if any available shifts were to contravene the fatigue management guidelines they would simply not proceed.

PN825

THE COMMISSIONER: Mr Heenan, on the proposition that the whole scheme of the agreement is against the proposition that there's 320 hours in an eight week cycle.

PN826

MR HEENAN: Sorry, but the whole scheme of the agreement is against the proposition that here is a maximum of 320 hours.

PN827

THE COMMISSIONER: A maximum of 320 hours, well if that's the case then why do you need the special provisions about seasonal depots. I mean if you can roster people more than 320 ordinary hours in an eight week cycle, what purpose does the - - -

PN828

MR HEENAN: Presumably because seasons depots, and this hasn't been in evidence, but presumably - - -

PN829

THE COMMISSIONER: No, but there's a secret provision that gives them a higher maximum, why do you need it if 320 hours isn't the maximum?

PN830

MR HEENAN: Well, presumably because seasonal depots can have a greater variance above and below 320 hours and there's seen to be some need for a limit.

PN831

THE COMMISSIONER: But if your argument is correct then the limit is 2,080 hours per annum.

PN832

MR HEENAN: That's right.

PN833

THE COMMISSIONER: There's no need for a limit at all. So why do you need one in the seasonal depots if you can just - I mean the proposition is you have to read every clause of an agreement as having some work to do and I can't see what work at all - - -

PN834

MR HEENAN: Seasonal depots presumably have the potential for greater

variance above and below 320 hours.

PN835

THE COMMISSIONER: There doesn't have to be evidence about it, I have got an agreement and I have to interpret it according to the principles of interpretation which are that every clause has to have something to do and I just can't - if you have the ability to roster people so that the only criteria is that their hours have to be no more than 2,080 per annum, then you don't need a special provision to deal with seasonal depots, do you?

PN836

MR HEENAN: Presumably the makers of the agreement thought that there needed to be some special protection for seasonal depots because of the potential for greater variance above and below 320 hours.

PN837

THE COMMISSIONER: Then there is no protection for non-seasonal depots.

PN838

MR HEENAN: Because there isn't the potential necessarily for people to need to go so far above and below 320 regularly.

PN839

THE COMMISSIONER: In the clause that sets out the hours.

PN840

MR HEENAN: Yes.

PN841

THE COMMISSIONER: In clause 55.1 and clause 56.2, is it the case that the coal - because the general shift length for two driver operations is 12 hours and then you see that for the exemption you look at clause 56.2 for coal, is the exemption meant to provide greater or lesser flexibility, because on one view of it the general shift length - - -

PN842

MR HEENAN: Well, the exemption is meant to provide that in coal they have what is called set shifts, so the shift length is the limitation of hours for coal.

PN843

THE COMMISSIONER: So in the general area you can move shift lengths around to a greater degree than you can in coal, can't you?

PN844

MR HEENAN: Once the shift length is set in coal, then yes perhaps there is a greater flexibility.

PN845

THE COMMISSIONER: Or a lesser flexibility because in the general - - -

PN846

MR HEENAN: Sorry, a lesser flexibility, yes, once the shift length is set. Sorry, yes, Commissioner, once - sorry, Mr Bourke has just assisted me, within the freight business you can roster a shift length and then work up to the limitation of hours. The difference in coal is once you're rostered - - -

PN847

THE COMMISSIONER: The limitation of hours is 12 hours.

PN848

MR HEENAN: Yes, once you roster a shift length in coal - - -

PN849

THE COMMISSIONER: You only have one extra hour beyond the shift length, but in no case can you go beyond 12.

PN850

MR HEENAN: That's right, Commissioner. I suspect we will be traversing some of this ground next week.

PN851

THE COMMISSIONER: In the general provision, the 12 hours, is that the outer limit or can it be 13 hours if you add the extra hour?

PN852

MR HEENAN: No, the outer limit is 12 hours.

PN853

THE COMMISSIONER: So the outer limit is always 12 hours.

PN854

MR HEENAN: The outer limit is 12 hours, yes.

PN855

THE COMMISSIONER: Very well. Is it the case, as I understand from the evidence of Mr O'Brien, that what Mr O'Brien is saying is that all of the shifts, including the - that the available shifts are put into the master diagram with a nominal length, simply for the purposes of counting them.

PN856

MR HEENAN: Simply for the purpose of counting up the cycle hours.

PN857

THE COMMISSIONER: But fundamentally they are in the master diagram, aren't they?

PN858

MR HEENAN: They are contained within the master diagram but the shift length is set by the daily roster.

PN859

THE COMMISSIONER: But in the master diagram they are given a nominal length and you say it's only for the purposes of counting them, fatigue management purposes.

PN860

MR HEENAN: Yes.

PN861

THE COMMISSIONER: For just counting the total number of hours in the roster.

PN862

MR HEENAN: Yes, because they can be eight hours. They can be above or beyond the nominal hours.

PN863

THE COMMISSIONER: All right. Thank you.

PN864

MR HEENAN: Thank you, Commissioner. Mr Tiley, anything in reply?

PN865

MR TILEY: Just one final point. Just very briefly, Commissioner. The issue of whether the final proposal, as described in paragraphs 24 and following of our primary submissions, was that which was agreed to, I simply draw your attention to paragraph 25 of those submissions which say, albeit out of submissions rather than as a matter of evidence, that the first draft of clause 66 was construction of the first proposal. It is also set out in Mr Moffitt and Mr Williams' affidavits that the version of that first draft of clause 66 was essentially the same as the final version. Yes, it is strictly speaking correct to say that the paragraphs in oral evidence of Mr Williams and Mr Moffitt or at least the affidavit evidence does not in a strict sense say yes, we agree to the final proposal, Commissioner.

PN866

However, there is no evidence that has been led that the final agreement prior to the last draft was other than that set out in the final proposal and we say, and I can put it no more highly than as a matter of submissions based on my instructions, but certainly the understanding of the intention of the RBTU was that the agreement which was struck and ultimately committed to writing in the agreement was constructed upon the final proposal. The final proposal was what we agree to in our understanding. The only other point I wish to bring to your attention, Commissioner, is that no stock in our submission can be placed in the length of time which elapsed between that final proposal and the agreement both in first draft and in final draft, if you like, form, these things take time to (indistinct) the agreement, furthermore it's set out in the evidence of Mr Williams and Mr Moffitt. We weren't the ones that drafted it, it was the respondent. They were the ones that took that time. So no inference can be drawn against us on that point, Commissioner. Unless I can assist you further I have nothing additional to raise.

PN867

THE COMMISSIONER: Thank you. Ms Aitken, did you have anything?

PN868

MS AITKEN: No.

PN869

THE COMMISSIONER: All right. I will indicate that I will reserve my decision. I will release it as soon as possible. I understand that the parties need it urgently but I haven't got the transcript from the last day yet, so we will chase that down today and I will release it in the next day or so.

PN870

MR TILEY: Thank you, Commissioner.

PN871

**<ADJOURNED INDEFINITELY**

**[8.51AM]**

<b>LIST OF WITNESSES, EXHIBITS AND MFIs</b>
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