

IR Bulletin

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Editorial

Not many aspects of the amended *Workplace Relations Act 1996* have yet been the subject of consideration by courts and tribunals. One area, however, that has had some consideration is industrial action.

The fundamental concepts associated with industrial action remain, on the whole, unchanged, but the procedures which must be followed if protected industrial action is to be taken are new and complex.

Continuing our theme of concentrating on particular aspects of the amended *Workplace Relations Act 1996*, in this edition we answer essential questions about industrial action and review key recent decisions of the Australian Industrial Relations Commission and Federal Court of Australia about industrial action.

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Industrial action

Q. What is industrial action?

The *Workplace Relations Act 1996* includes a definition of industrial action.

Industrial action by employees includes:

- attending work but performing work in a manner which is different from usual and which will restrict, limit or delay the performance of work;

- attending work but refusing to perform work;
- failing or refusing to attend work; or
- observing a ban or restriction on performing work or accepting an offer of work.

It covers action such as strikes, work stoppages, bans and other restrictions on the performance of work.

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Industrial action does not cover action which is agreed to by the employer or action related to genuine occupational health and safety concerns.

Industrial action by an employer occurs when the employer locks employees out of the workplace or otherwise prevents the employees from performing work under their contracts of employment without terminating those contracts.

Q. When is industrial action protected action?

Industrial action by an employee or a union may be protected if it is aimed at securing a new workplace agreement. Where a person takes part in protected industrial action, there is generally no legal action that can be taken against that person in respect of that industrial action. An employer must not, and must not threaten to, dismiss, injure in his or her employment, or alter the position of an employee to the employee's detriment wholly or partly because the employee is proposing to engage, is engaging, or has engaged, in protected action.

Subject to certain exclusions, protected action can be taken by a union, employee or employer for the purpose of supporting or advancing claims made in respect of a proposed collective agreement or in response to industrial action by or against employees whose employment will be subject to the proposed collective agreement.

Industrial action will *not* be protected if:

- it is taken while the bargaining period is suspended;
- it is taken to support or advance claims to include prohibited content in the agreement;
- it is taken or organised in concert with parties who are not protected persons; that is, persons who are not negotiating parties or members of a union which is a negotiating party;
- it is taken in support of pattern bargaining claims;

- it is taken before the nominal expiry date of an applicable workplace agreement (including a preserved State agreement or, in limited circumstances, a notional agreement preserving a State award);
- the required written notice of intention to take the action has not been given;
- where the action is to be taken by a union or employees, the action is either not in response to industrial action by an employer or has not been authorised by a protected action ballot; or
- the industrial action did not occur within 30 days of the results of the secret ballot being declared.

Q. What should an employer do upon receiving an application for a secret ballot order?

The Australian Industrial Relations Commission must not determine an application for a secret ballot order until certain parties, including the employer, have had a reasonable opportunity to make submissions in relation to the application.

Upon receipt of an application for a secret ballot order, an employer should consider whether or not to make submissions in relation to the application itself or any aspect of the conduct of a protected action ballot. In particular, the employer may wish to make submissions in relation to whether the necessary conditions for the granting of an application have been satisfied (see below).

The employer must comply with all directions and orders of the Commission in relation to the ballot order.

Q. What conditions must be met before the Australian Industrial Relations Commission will issue a protected action ballot order?

The Commission will only grant an application for a ballot order if it is satisfied that:

- during the bargaining period, the applicant genuinely tried to reach agreement with the employer of the relevant employees;
- the applicant is genuinely trying to reach agreement with the employer; and
- the applicant is not engaged in pattern bargaining.

The application may be refused if the Commission is satisfied that:

- the applicant or a relevant employee has contravened a provision of the *Workplace Relations Act 2006* relating to secret ballots or an order of the Commission under one of those provisions; or
- granting the application would be inconsistent with the creation of a transparent process enabling employees to choose by way of secret ballot whether to authorise protected industrial action.

Q. What is pattern bargaining?

Pattern bargaining occurs where a person, such as a union, is a negotiating party in relation to two or more proposed collective agreements and seeks to obtain common wages or conditions for two or more of those proposed agreements. To constitute pattern bargaining, the person's conduct must extend beyond a single business.

Pattern bargaining will not result just because a union is seeking to include common terms or conditions which have been determined as national standards.

Q. What action can an employer take if employees are engaging in, or threatening to engage in, industrial action which is not, or would not be, protected action?

An employer (or another person who is, or who is likely to be, directly or indirectly affected by the industrial action) may make application to the Australian Industrial Relations Commission for the industrial action to stop, not occur or not be organised.

The Commission must make an order to stop or prevent industrial action if it appears that industrial action that is not, or would not be, protected action is happening, threatened, impending, probable or being organised.

As far as practicable, the Commission must hear an application for an order to stop or prevent unprotected industrial action within 48 hours. If the application cannot be heard and determined within 48 hours, the Commission must make an interim order to stop or prevent the industrial action.

If the Commission makes an order to stop or prevent industrial action, that order must be complied with by anyone to whom the order is expressed to apply. Non-compliance with the order may attract a penalty of up to \$33,000 for a body corporate or \$6,600 for an individual.

If the employer is engaged in the construction industry, there are additional remedies available under the *Building and Construction Industry Improvement Act 2005* in respect of "unlawful industrial action", which is broadly equivalent to the concept of unprotected industrial action. Remedies for unlawful industrial action include:

- fines of up to \$110,000 for a body corporate or \$22,000 for an individual;
- unlimited compensation for damage flowing from the unlawful industrial action; or
- an injunction against the action.

Q. If employees take industrial action, does the employer have to pay them for the period of the industrial action?

No. An employer is prohibited from paying an employee for any period of industrial action, whether that industrial action is protected or not, and employees are prohibited from accepting such payment. Contravention of these prohibitions may attract a penalty of up to \$33,000 for a body corporate or \$6,600 for an individual or an injunction or other order to stop the contravention.

A union or a member of a union must not make a claim for an employer to pay an employee for any period of industrial action or to threaten further industrial action with an intent to coerce the employer into making such a payment. Contravention of this prohibition may result in one of the following:

- an order imposing a penalty of up to \$33,000 for a body corporate or \$6,600 for an individual;
- an order requiring the relevant person or organisation to pay compensation to the employer concerned; or
- an injunction or other order to stop the contravention.

Q. When can a bargaining period be suspended or terminated?

A bargaining period can be suspended or terminated by the Commission in circumstances where:

- a negotiating party is not genuinely trying to reach agreement;
- a negotiating party has failed to comply with Commission orders or directions in relation to the making of the proposed collective agreement;
- industrial action is being taken which would adversely affect the employer or its employees and endanger the personal safety or welfare of part of the population or to cause significant damage to part of the Australian economy;
- a negotiating party is engaged in pattern bargaining in relation to the proposed collective agreement;
- the Commission considers that suspending the bargaining period would assist the parties in resolving the matters at issue; or
- industrial action is being taken which would adversely affect the employer or its employees and cause significant harm to a third party.

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Full Bench finds broad construction and application of industrial orders

A Full Bench of the Australian Industrial Relations Commission has given a broad interpretation to the operation of section 496 of the *Workplace Relations Act 1996: TWU of NSW and TNT Australia Pty Ltd, Riteway Transport Pty Ltd* (31 July 2006, PR 973479).

Prior to the recent amendments to the *Workplace Relations Act 1996*, drivers employed by TNT and its subsidiary Riteway Transport Pty Ltd (together TNT) in NSW had been subject to the State industrial jurisdiction and represented by the Transport Workers Union of New South Wales (TWU NSW), a State registered union.

TNT and TWU NSW had been in negotiations about arrangements to apply after the recent amendments to the *Workplace Relations Act 1996* came into effect. TWU NSW had not sought transitional registration under the amended Act. On 7 April 2006, the employees took industrial action over the issue.

On application by TNT, Senior Deputy President Hamberger issued orders that the industrial action stop. He did this under section 496 of the Act. Both the TWU NSW and the federally registered Transport Workers Union of Australia (TWUA) were the subject of the orders.

Appeal

The TWU NSW and TWUA filed separate appeals against the orders. The appeal by the TWUA was upheld by consent. However, the TWU NSW appeal proceeded to hearing.

The primary argument of the TWU NSW was that SDP Hamberger had made a number of errors of law over the construction and application of section 496. This argument included that the Australian Industrial Relations Commission must make a finding about industrial action and who is involved, and that only those in respect of whom a finding is made can be subject to an order. The TWU NSW maintained there had been no finding of its involvement in the

industrial action. It maintained that the wording of section 496(1) of the Act permits only an order that a union not organise industrial action.

The TWU NSW also claimed that as a State registered union which had not sought transitional registration under the Act, it was not amenable to a section 496 order. Finally, the TWU NSW contended that, if the orders were otherwise valid, their terms were unduly onerous.

Full Bench Decision

The Full Bench of the Commission dismissed the appeal. The Full Bench held that the Commission's jurisdiction to make an order does not require a finding about industrial action. Rather, the jurisdiction is invoked if it appears to the Commission that unprotected industrial action is "happening, threatened, impending or probable or being organised". In this case there was no dispute that industrial action was happening. The Commission said that the argument of the TWU NSW was based on too narrow a view of the operation of section 496.

The Commission rejected the contention that the only order that could be made against a union was that it not organise industrial action. Where the jurisdiction of the Commission is invoked, it may make an order "which has a rational or logical tendency" to stop or prevent the action. Such an order may be in broad terms and in cases where "a union has been representing employees in negotiations and otherwise active in representing their interests, and unprotected action is occurring or threatened, there is no good reason why an order that industrial action stop or not occur

should not be buttressed by an order against that union". The Full Bench rejected the contention that a State registered union could not be subject to an order under section 496. That "would leave a significant gap in the protective scheme" of the Act.

More generally the Full Bench observed that orders should be framed in a practical way to provide effective relief from industrial action. This requires "a degree of tailoring" to particular circumstances, rather than relying on the one set of orders for all situations.

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Lessons

- **The ability of the Australian Industrial Relations Commission to issue section 496 orders to stop or prevent industrial action arises where it appears to the Commission that unprotected industrial action is "happening, threatened, impending or probable or being organised." The Commission does not need to make an express finding about the industrial action, or who is involved.**
- **Section 496 orders may be in broad terms, but should be tailored to the particular circumstances. This involves careful consideration about who should be subject to the orders, and what steps may be necessary to effectively stop or prevent the industrial action.**
- **Unions, including State registered unions which have not sought transitional registration under the *Workplace Relations Act 1996*, may be subject to section 496 orders in circumstances where they have been representing their members.**

Unions lose strike ballot application in test case of genuine bargaining provisions

Under the *Workplace Relations Act 1996*, the conduct of a secret ballot is a pre-requisite for a union and its members taking protected industrial action. A secret ballot cannot be conducted until the Commission issues a ballot order. The scope of the secret ballot provisions were recently tested in *CEPU v Cadbury Schweppes Australia Limited; AMWU v Cadbury Schweppes Australia Pty Ltd* (11 July 2006, PR973290).

Facts

Senior Deputy President Acton considered whether to grant applications for ballot orders where the unions concerned were pursuing both a collective agreement under the Act and a side deed which included content that would have been prohibited content (ie not able to be included in the collective agreement).

Cadbury Schweppes argued that the Commission should refuse the applications for ballot orders because:

- granting the applications would be inconsistent with the object of the relevant division of the Act which is to establish a transparent process for employees to choose by secret ballot whether to authorise protected industrial action to occur. Cadbury Schweppes said that it was inconsistent with the objects of the division for a secret ballot to be conducted while the unions were pursuing "side deeds"; and
- the unions had not genuinely tried to reach agreement, and were not genuinely trying to reach agreement, with Cadbury Schweppes as required by the Act. Cadbury Schweppes said that the unions would not consider the terms of the collective agreement without Cadbury Schweppes first agreeing to the side deed.

Decision

Senior Deputy President Acton held that the unions' pursuit of a deed containing otherwise prohibited content was not necessarily inconsistent with the objects of the Act.

Union members were simply being asked to authorise industrial action in support of claims for the proposed collective agreement. The employees were not being asked to authorise industrial action to advance claims in respect of the proposed deed.

However, Senior Deputy President Acton did indicate that the unions may have needed to withdraw their claims in relation to the deed before giving written notice of intention to take protected action. Otherwise, it may be inferred that the protected industrial action was being taken to support claims in respect of matters which could not be included in the proposed collective agreement contrary to the requirements of the Act.

On the second aspect of the claim, Senior Deputy President Acton found that the unions were not prepared seriously to consider offers by Cadbury Schweppes independently of resolving the terms of the side deed. The deed was a prerequisite to settlement. Therefore, the unions were not genuinely trying to reach agreement on the collective agreement alone. Accordingly, she decided that she should not issue the ballot order.

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Lessons for employers

- There are several requirements under the *Workplace Relations Act 1996* which must be met before the Commission will grant an application for a ballot order on proposed protected industrial action.
- A union must be genuinely trying to reach agreement with the employer on the terms of the collective agreement (without more). If a union is pursuing other claims in addition to those to be contained in a proposed collective agreement, it may not be genuinely trying to reach agreement in the requisite sense. It may therefore fail to get a ballot order which is a necessary precursor to taking protected industrial action.

Unions lose strike action ballot – Claim for prohibited content to be contained in union collective agreement

A term of a workplace agreement is void to the extent that it contains prohibited content. Regulation 8.5 of Chapter 2 of the *Workplace Relations Regulations 2006* provides, among other things, that a term of workplace agreement is prohibited content to the extent that it directly or indirectly restricts the ability of a person bound by the agreement to enter into a Australian workplace agreement (AWA).

Facts

In the recent case of *AMWU v Kempe Engineering Services Pty Ltd* (8 August 2006, PR 973592), the Australian Industrial Relations Commission refused to grant an application for a ballot order (a prerequisite to a union and its members taking protected industrial action) because the AMWU was seeking to negotiate a union collective agreement which contained prohibited content.

The AMWU had required Kempe to agree to terms in the collective agreement which prohibited Kempe from entering into other industrial instruments or any agreement with employees which were less advantageous than the proposed union collective agreement.

Decision

Senior Deputy President Acton held that while the proposed term of the union collective agreement would not altogether prohibit AWAs, it would restrict Kempe and any of its employees from having an AWA which was overall less advantageous than the terms of the collective agreement. This would directly or indirectly restrict the ability of Kempe and the employee to enter into at least some forms of AWA. It was therefore ruled to be prohibited content.

Senior Deputy President Acton held that the AMWU could not have been genuinely trying to reach agreement with Kempe because, under the

Workplace Relations Act 1996, Kempe was not permitted to agree to the terms proposed by the AMWU.

Senior Deputy President Acton also dealt with negotiations for a collective agreement at another Kempe site and refused to issue a ballot order. She held that the AMWU had failed genuinely to try to reach agreement before applying for a ballot order for that site. While the AMWU had conscientiously engaged in negotiations *prior to* initiating a bargaining period, it had failed to hold further discussions/negotiations with the employer *during* the period between initiating a bargaining period and applying for a ballot order. Senior Deputy President Acton held that the Act required the union genuinely to try to reach agreement during *that* period.

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Lessons for employers

- Unions must meet a number of quite technical requirements before applying for a secret ballot and then taking protected action.
- Employers can ensure that unions are held to the strict statutory requirements when seeking to commence protected action.



Secret ballot orders – When is industrial action protected?

The Workplace Relations Act 1996 now requires that, to be protected, industrial action which takes place during a bargaining period must be authorised by a secret ballot. A recent decision of the Federal Court of Australia has held that, to be authorised, each different type of industrial action that the employees may wish to take must be authorised, and that each type of industrial action must commence within 30 days of the results of the protected action ballot being declared: *United Collieries v Construction, Forestry, Mining and Energy Union* [2006] FCA 904.

Facts

The Construction, Forestry, Mining and Energy Union had initiated a bargaining period and applied for a protected ballot action to be held. The order sought was made on 5 May 2006 and included the questions which were to be put before the employees in the ballot.

Relevantly (and excluding formalities) the questions to be put to the employees on the ballot were:

1. Do you authorise industrial action in the form of 24 hour stoppages of work?
2. Do you authorise industrial action in the form of bans on the working of non-rostered overtime?
3. Do you authorise industrial action in the form of a seven day stoppage of work?
4. Do you authorise industrial action in the form of two hour duration stop work meetings?

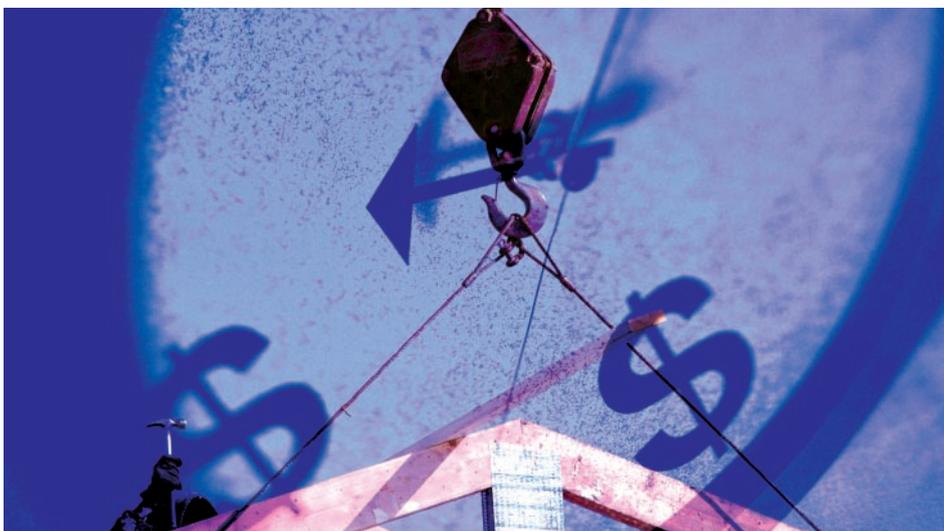
5. Do you authorise industrial action in the form of stoppages of work of a shift length in duration?

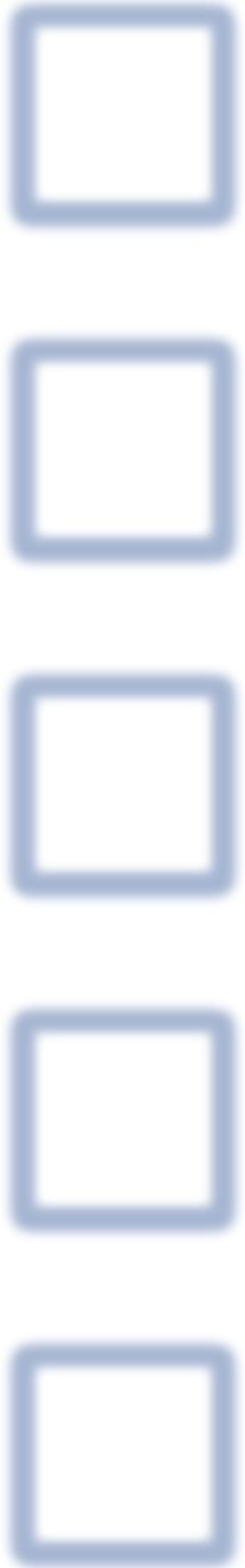
The Act states that industrial action is only protected action if the industrial action commences during the 30 day period following the declaration of the results of the secret ballot. Here, the ballot agent declared the results of the ballot on 15 May 2006.

Within 30 days of the ballot results being declared, several instances of industrial action, as authorised in questions 1 (24 hour stoppages), 2 (bans on the working of non-rostered overtime) and 5 (stoppages of work of a shift length in duration) commenced to occur. By way of notice dated 2 June 2006, the Union threatened another 24 hour stoppage which was to take place commencing 15 June 2006 – that is, outside the 30 day period in which the Act says industrial action must commence. *United Collieries* argued that any 24 hour stoppage could not occur outside the 30 day period.

Lessons for employers

- To be protected action, industrial action must be authorised by a secret ballot and commence to occur within 30 days of the results of the secret ballot being declared.
- Unions can describe industrial action in a general way when making an application for a secret ballot. Where a question in the ballot describes a type of industrial action in the plural, or a series of individual actions, that industrial action will be commenced by the occurrence of the first instance of it. For example, if the question is: "Do you authorise industrial action in the form of 24 hour stoppages?", and at least one 24 hour stoppage commences to occur within the 30 day period following the declaration of the ballot order results, all 24 hour stoppages that take place during the bargaining period will be protected industrial action.
- The form of question put to employees in an application for a secret ballot should be considered carefully by employers. How the questions are drafted, and whether each type of industrial action has commenced to occur within 30 days of the ballot results being declared, will determine whether industrial action later taken is or is not protected under the Act.





Decision

Justice Gyles held that the 30 day time limit by which the industrial action had to commence was only a time limit on the *commencement* of industrial action, not the *completion* of industrial action. United Collieries's argument that each type of industrial action had to be completed within the 30 days was incorrect.

Each type of industrial action that had been authorised in the secret ballot and commenced to occur within 30 days of the ballot results being declared could continue as long as a bargaining period was in place.

In reaching the decision, Justice Gyles noted that whilst there is a need to specify the industrial action that is to be authorised when an application for a ballot order is made, the industrial action can be described generally (for example, do you authorise industrial action in the form of 24 hour stoppages?) and all 24 hour stoppages that occur during the bargaining period will be authorised, as long as there has been one 24 hour stoppage during the 30 day period.

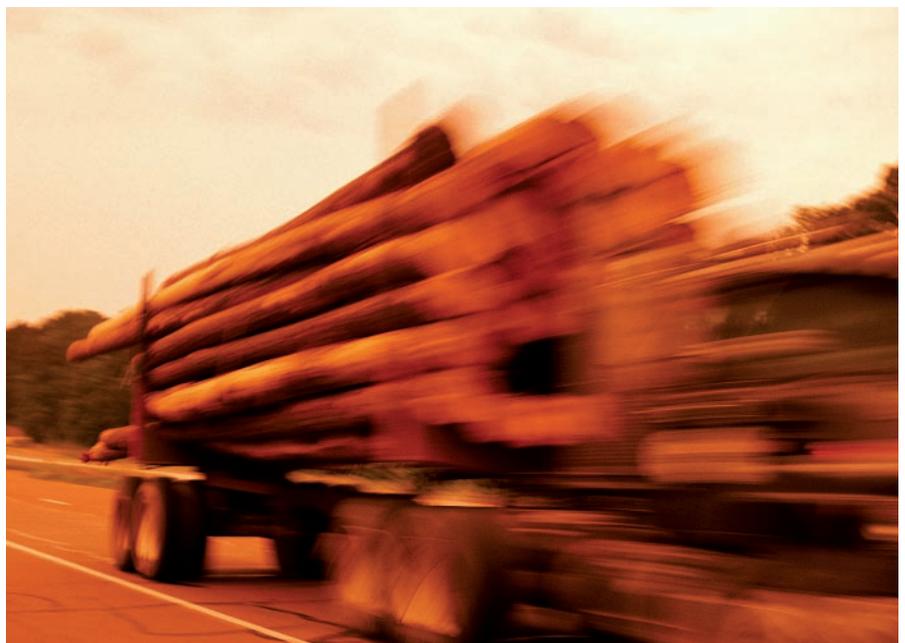
Justice Gyles stated that the content of each question in the ballot must include "the nature of the proposed industrial action" as required by the Act and that, in this case, each question described industrial action at a level of generality above specific instances.

The description could have been more specific, but it was not. As each question described a type of industrial action in the plural, or a series of individual actions, that industrial action was commenced by the occurrence of the first instance of it. If the first instance occurred prior to the expiry of the 30 day period – the whole series of that type of industrial action would be authorised.

It followed from these conclusions that the action described in each of questions 1, 2 and 5 was commenced in the 30 day period beginning on the date of the declaration of the results of the ballot because there had been at least one occurrence of each of these types of industrial action during the 30 day period after the ballot results had been declared. The application was therefore dismissed.

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Pattern bargaining and protected action ballots

In *Australian Nursing Federation v Trinity Garden Aged Care Anzac Lodge Private Nursing Home* (21 August 2006, PR973718) the Full Bench of the Australian Industrial Relations Commission upheld Vice President Lawler's finding (26 July 2006, PR973416) that the Australia Nursing Federation (ANF) was not engaging in pattern bargaining.

Facts

The ANF was seeking a 12% increase in wages by 2008 from all employers. However, in relation to the Trinity Garden Aged Care and Anzac Lodge Nursing Homes, the ANF was prepared to accept six increases of 2%, rather than four increases of 3%.

Section 421 of the *Workplace Relations Act 1996* says that a course of conduct by a person is pattern bargaining if:

- the person is a negotiating party to two or more proposed collective agreements; and
- the course of conduct involves seeking common wages or conditions of employment for two or more of those proposed collective agreements; and
- the course of conduct extends beyond a single business.

Decision

The Full Bench accepted that "common" in section 421(1)(b) of the Act means the "same" or "identical". The Full Bench further found that the word "wages" in section 421(1)(b) of the Act limited consideration of pattern bargaining to common wages and did not include the pursuit of common wage increases.

The employer argued that because the ANF was seeking an increase of no less than 12% over the life of the agreement, it was engaging in pattern bargaining. The Full Bench ruled, however, that the ANF had demonstrated that it was prepared to accept different increments over the life of the agreement and it agreed with Vice President Lawler's conclusion that "if different increments were agreed then the wages payable under the proposed Trinity agreement would, from time to time, be different to those payable under the increment regime that the ANF had insisted upon in the pre-WorkChoices environment".

The Full Bench also accepted Vice President Lawler's finding that the ANF was genuinely trying to reach an agreement.

Another issue which the Full Bench considered was whether the Commission's jurisdiction to order a protected action ballot was restricted to a single bargaining period only. The ANF had filed an application for a protected action ballot order applying to employees at the Trinity Garden Aged Care and Anzac Lodge Nursing Homes (both of which were owned and operated by a single business, Java Dale Pty Ltd).

At first instance, Vice President Lawler made an order which applied to employees of both nursing homes. However, the Full Bench found that because the ANF's application related to employees at two different sites, each of which was the subject of a distinct bargaining period notice, it related to two separate bargaining periods.

The Full Bench said that the Commission's power to order a protected action ballot "is restricted to a single bargaining period in support of claims made in respect of the proposed collective agreement sought and in relation to the particular employees and the single business or part of a single business identified in the particular bargaining period. The orders sought from and made by Vice President Lawler were made in respect of employees relevant to the two separate bargaining periods."

For this reason, the Full Bench found that Vice President Lawler's order was beyond the jurisdiction of the Commission.

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Lessons for employers

- Depending on the circumstances, employers may be able to oppose attempts by unions to obtain a protected action ballot covering more than one site.
- A union's commitment to common percentage increases across an industry is not pattern bargaining if the union is prepared to accept different wage outcomes or increments during the life of the collective agreement.

Protected action ballot orders and genuine bargaining – The Full Bench rules

The rules surrounding protected action ballot orders and the approach to be taken by the Australian Industrial Relations Commission when asked to grant such orders have been clarified in an important decision of a Full Bench of the Australian Industrial Relations Commission in *Country Fire Authority v United Firefighters' Union of Australia* (8 September 2006, PR973841).

Commissioner Foggo had granted an order facilitating a ballot about proposed industrial action believing herself to be bound to issue the order if the prerequisites for the ballot had been satisfied.

Full Bench decision

In deciding this matter on appeal, the Full Bench (Vice President Watson, Senior Deputy President Lacy and Commissioner Hingley) has ruled upon some matters of general importance when confronted by a proposal for a secret ballot order.

Nature of the proposed industrial action

A protected action ballot must include the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action. If industrial action is approved and all other prerequisites for protected action are present, a written notice must be given to the employer stating, amongst other things, the nature of the intended action and the day when it will be given. The Full Bench agreed with the proposition advanced by the Country Fire Authority that the notice of intended industrial action is dealing with the same action that will have been approved by the employees in the secret ballot.

The Full Bench considered it logical that when employees are asked whether to authorise industrial action in a protected action ballot, the nature of the proposed industrial action is expressed clearly enough to enable them to make an informed choice.

The Full Bench said:

In determining whether to engage in protected action it is reasonable to expect, and in our view a requirement of the Act, that the nature of the proposed industrial action is specified. In our view, this requires employees who will be voting on the questions to understand what work would not be undertaken and what work would remain to be done. The description of the nature of the industrial action in the questions they are asked in the ballot should enable the employees to understand the implications for them while at work, and other relevant circumstances.

Clear expression

That led to the question whether, in the circumstances under consideration, the proposed industrial action had been expressed sufficiently clearly. The main argument turned upon a particular formulation of the industrial action which was as follows:

Industrial action in the form of bans on complying with any orders, direction and/or instructions issued by the employer to act in a way that is contrary to the protected industrial action that is taking place.

The Full Bench ruled that this formulation does not specify any particular industrial action, but rather is an attempt to adopt a catch-all category of bans on complying

with directions where the effect of a direction is to act in a way contrary to the protected industrial action. Such a formulation does not meet the statutory requirements. Rather, the description is a general category of unspecified action.

Genuinely trying to reach agreement

The next matter with which the Full Bench dealt was the statutory requirement that the applicant for a secret ballot order must not only have genuinely tried to reach agreement during the bargaining period but must also be genuinely trying to reach agreement at the time the application is brought before the Commission. It considered, in this regard, claims which had been pressed by the applicant for a deed containing provisions which would be prohibited content and therefore unable to be included in a workplace agreement.

The Full Bench said that the pursuit of such claims at the same time as seeking a workplace agreement, whether the prohibited content forms part of the proposed agreement or otherwise, strongly suggests that the union is not genuinely trying to reach a workplace agreement which complies with the requirements of the Act.

In the circumstances under consideration, claims for prohibited content had been made and at no time prior to or during the proceedings before the Commissioner was there any reliable evidence to show that the claims were no longer being pursued or were otherwise irrelevant to the negotiations for a collective agreement. In those circumstances, the Commissioner should not have been satisfied that the union was genuinely trying to reach an agreement either during the bargaining period or at the time of the application.

Discretion to issue an order

The final matter dealt with by the Full Bench concerned whether the Commissioner had a discretion about the issue of the Order. The Full Bench drew attention to section 461(2) which provides that the Commission may refuse the application if it is satisfied that granting the application would be inconsistent with the object of the Division of the Act dealing with secret ballot orders, or if the applicant or a relevant employee has at any time contravened a provision of that Division or an order made or direction given under that Division. The Commissioner had failed adequately to recognise and apply her statutory discretion in this regard.

The appeal was allowed and the Commissioner's order quashed.

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Lessons for employers

- Whether a secret ballot order should be granted calls for an exercise of discretion taking into account the objects of the Division dealing with secret ballot orders and the conduct of the parties during the negotiations.
- Secret ballot orders can be resisted where the industrial action to be voted on is insufficiently clear to enable an effective vote by employees.
- A secret ballot order may also be resisted where either during the bargaining period or at the time of the application the applicant has not been genuinely seeking to reach an agreement able to be given effect as a workplace agreement. In this regard, a simultaneous pursuit of additional claims containing prohibited content is especially relevant.



Secret ballots, employee lists and the role of the ballot agent

On 9 August 2006, Vice President Lawler ordered that two protected action ballots involving employees of the Australian Broadcasting Corporation be conducted. Applications were made by the Community and Public Sector Union and the Media, Entertainment and Arts Alliance. The Vice President published a decision on 16 August 2006 in *CPSU & MEAA v ABC* (PR 973688) in which he dealt with some procedural issues of concern to the Australian Electoral Commission.

The Australian Electoral Commission was appointed as the authorised ballot agent and ordered to prepare the roll of voters. The ABC was ordered to give the AEC a list of employees eligible for the ballot. The CPSU and the MEAA were to provide the AEC with lists of their members employed by the ABC.

The CPSU and MEAA raised concerns about matching names between the ABC and union lists given the propensity of people in the industry to change employment or to be enrolled under a different name, such as a maiden name or a nickname. Vice President Lawler agreed to make an additional order (Order 7) in the following terms:

“the authorised ballot agent is to use its best endeavours to provide to the Union, before the close of the roll a list of any members on the Union list that it is unable to identify on the Employer list and provide an opportunity to the Union to identify alternative names under which those members might appear on the Employer List.”

On being served with the ballot order, the AEC raised concerns that Order 7 could require the AEC to breach section 486, a civil penalty provision providing for up to 6 months imprisonment. Section 486 makes it an offence to disclose the identity of certain persons including:

- an applicant for a ballot;
- a relevant employee (as defined);
- a person whose name appears on the roll of voters; and
- a person who is party to an AWA.

The AEC argued that the unions might be able to infer from reading the Order 7 list that members who were not on the list were going to appear on the roll of voters, creating a contravention of section 486.

The Commission dismissed the AEC's concerns and drew a distinction between revealing persons whose names appear on the roll of voters (which would contravene the Act) and persons whose names *may* appear on the roll (which is not a contravention). There could be a number of reasons for a name ultimately not appearing on the roll, so that no automatic inference could be drawn in the way the AEC apprehended.

The AEC also applied for a declaration that, given the limited time available, certain CPSU and MEAA members should be excluded from the roll of voters, because as persons not on the ABC's list they may not have been eligible under section 467 of the Act.

In refusing this application, Vice President Lawler noted the “manifest intention” of the Act that eligible employees should be enfranchised to vote in protected action ballots. Vice President Lawler commented that it is the task of the authorised ballot agent to do what is necessary and what he or she can reasonably do, given the constraints of time and resources, to prepare a roll of voters to give effect to this intention.

An appeal to a Full Bench by the AEC is pending but a stay of Order 7 has been refused.

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Lessons for employers

- In considering procedural difficulties arising in connection with secret ballot applications, the Commission is likely to exercise such discretions as it has in favour of achieving the legislative purpose of enfranchising eligible employees to vote on taking or not taking protected action.

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