



DECISION

Fair Work Act 2009

s.229 - Application for a bargaining order

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

v

NSW Electricity Networks Operations Pty Limited As Trustee For Nsw Electricity Networks Operations Trust T/A Transgrid (B2024/447)

DEPUTY PRESIDENT SLEVIN

SYDNEY, 19 AUGUST 2024

Application for good faith bargaining orders

[1] The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) is a bargaining representative of employees of NSW Electricity Networks Operations Pty Limited as trustee for NSW Electricity Networks Operations Trust - trading as Transgrid (Transgrid). The CEPU applies for bargaining orders pursuant to s.229 of the *Fair Work Act 2009* (the Act). The application is opposed.

[2] Transgrid sought and was given permission to be legally represented in the matter. There was no opposition to the application, and I considered that the complexity of the matter justified legal representation so that it might be dealt with efficiently.

[3] The orders sought in the application filed were for Transgrid to provide the CEPU with information that it claims is relevant in bargaining. At the hearing the CEPU made oral application to amend the application to include orders that Transgrid meet. Transgrid resisted the amendment on the basis that it was not prepared to meet that case. I granted the amendment but declined to deal with the matter at the hearing. A recommendation was subsequently published recommending that Transgrid meet with the CEPU twice in the week commencing 12 August 2024. I was advised that the parties would follow the recommendation.

[4] This decision deals with the application that for orders that Transgrid provide information relevant to the bargaining to the CEPU.

Background

[5] In support of its application the CEPU relied upon three statements of Allen Hicks and Branch Secretary of the NSW/ACT Branch of the CEPU and a witness statement of Matthew Murphy, National Coordinator for the CEPU – Electrical and Energy Division. Transgrid relied upon a witness statement of Scott Berryman Senior Manager ER & IR. Mr Hicks and Mr Berryman were cross examined.

[6] The CEPU is a bargaining representative for its members employed by Transgrid who are currently covered by the *Transgrid Enterprise Agreement 2020*. The Agreement has a nominal expiry date of 1 December 2023. Since July 2023 the parties have been negotiating for an enterprise agreement to replace the 2020 agreement. In April 2024 the CEPU wrote to Transgrid seeking specified information relevant to bargaining. Transgrid refused to provide all of the information requested. That was the impetus for the current application. During the course of the bargaining the CEPU has also sought, and been granted, a protected action ballot order under s437 of the Act. The ballot was successful and protected industrial action has been taken by members of the CEPU in support of the claims. That action was suspended by the Commission for a three week period on application by Transgrid in a decision 2 August 2024¹. Transgrid has also put a proposed replacement agreement to a vote of employees under s181. The vote was unsuccessful.

[7] The CEPU initially sought two categories of information, the details of Transgrid's bargaining parameters and financial information. As to the first the CEPU contended that Transgrid claimed in negotiations that it could not accede to some CEPU claims because the claims were outside its bargaining parameters. This matter was resolved at the hearing by Transgrid confirming that its last offer to employees, the offer that was rejected in the recent vote, reflected the outer limits of its bargaining parameters. On that basis the CEPU withdraw this part of its case. The request for orders is confined to financial information claimed to be relevant to bargaining.

Consideration

[8] Pursuant to s.230 the Commission may make a bargaining order where an application is made under s.229, if it is satisfied that one of the circumstances in subsection 230(2) applies, the requirements in subsection 230(3) have been met, and it is reasonable in the circumstances to do so.

[9] Section 229 provides that an application may be made by a bargaining representative for a proposed enterprise agreement if they have concerns that another bargaining representative has not met the good faith bargaining requirements set out in s.228(1), they have given written notice setting out those concerns to the other bargaining representative, given them a reasonable time to respond to those concerns, and consider the bargaining representative has not adequately responded to those concerns.

[10] The CEPU wrote to Transgrid on 12 April 2024 repeating earlier requests for information and asserting that it had concerns that by failing to provide the information Transgrid was not complying with its obligations under s.228 of the Act. The financial information sought went to the remuneration of Transgrid executives, the financial performance of Transgrid, and the company's expenditure on contractors. The good faith bargaining requirements in s.228 include at s.228(1)(b) disclosing relevant information, other than confidential or commercially sensitive information, in a timely manner. The information sought by the CEPU was financial information relevant to assertions made by Transgrid negotiators in responding to the CEPU's claims made in bargaining. The letter gave Transgrid until 15 April

¹ Application by NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust
T/A Transgrid [2024] FWC 1914

2024 to reply. Transgrid replied to the letter on 15 April 2024 directing the CEPU to publicly available material about its financial situation and claimed that other information was confidential and commercially sensitive.

[11] I consider this correspondence meets the requirements in s.229(4) of the Act. It comprises written notice setting out the CEPU's concerns that Transgrid was not meeting the good faith bargaining obligations and it gave Transgrid a reasonable time to respond to those concerns. Transgrid responded and the CEPU considers Transgrid has not adequately responded to those concerns.

[12] As to the requirements in s.230, there is no contest, and I am satisfied that s 230(2) is met as Transgrid has agreed to bargaining for the agreement. I am also satisfied for the purposes of s230(3)(b), for the reasons already stated, that the CEPU has complied with the requirements of s.229(4).

[13] There are two contested matters. The first is whether Transgrid has met or is meeting the good faith bargaining requirements. The second is whether it is reasonable in the circumstances to make an order s.230(1)(c).

[14] In submissions in support of its contention that Transgrid is not meeting its the good faith bargaining requirement in s.228(1) the CEPU points to three requirements. First, the requirement in s.228(1)(b) about providing information. Second, the requirement in s.228(1)(c) to give genuine consideration to the proposals of other parties. Third, the requirement in s.228(1)(e) to refrain from capricious and unfair conduct that undermines freedom of association or collective bargaining.

[15] The gravamen of the dispute between the parties is whether Transgrid has met the requirement in s228(1)(b) to disclose relevant information (other than confidential or commercially sensitive information) in a timely manner. That was the focus of the CEPU correspondence of 12 April 2024 and was the obligation identified in the CEPU's originating application. I propose to deal with the application on the basis that this is the relevant complaint about the good faith bargaining obligations.

[16] The information sought by the CEPU is reflected in the orders sought. The proposed orders are:

- a. the wages and wage increases (including any bonuses) paid to the Executive General Managers and General managers of the business for FY23, FY 22, FY 21.
- b. the revenue, operating expenses, net profit achieved, and dividends paid by the business for FY23, FY22, FY21; and
- c. the expenses associated with the engagement of contractors paid by the business for FY23, FY22, FY21.

[17] The CEPU contends that the information is relevant information because Transgrid has repeatedly stated in bargaining that it could not afford to meet the CEPU's claims. Mr Hicks explained that he sought the financial information to better understand Transgrid's position in bargaining and its rejection of the CEPU's proposal. He stated that he sought the executive salary information because Transgrid claimed that the wage increases for employees covered by the proposed agreement came from the same budget as the executive salaries. The financial

information sought was sought to assist in assessing the company's capacity to fund wage increases. The information about funds allocated to contractors was sought because the Ausgrid negotiators stated that the wages of the employees to be covered by the agreement came from the same budget used for engaging contractors.

[18] There were 28 bargaining meetings from 27 July 2023 to 18 June 2023. I was taken to the minutes of the meetings on held on 4 April 2024, 9 April 2024, and 21 May 2024 which were provided by Mr Berryman. Those minutes confirm that Transgrid negotiators said words to the effect that offers made in bargaining were constrained by the financial performance of the company. Statements were also made confirming that there were annual budgets set for each financial year. Negotiators for Transgrid stated that its offers were in accordance with budgets it was required to provide to the regulator and those budgets required the business to work efficiently. When tested by the union negotiators Transgrid were willing to provide guidelines as to what wage increases might be accommodated within budget but not provide details. For example, the following exchange occurred at the 21 May 2024 negotiations.

Ian: You can do a number based on 1,300 employees that would give you around \$ mm per annum.

Allen: we don't want a rough estimate – we want actual numbers.

Ian We shared some information at our depot visits that this is currently before the FWC and we sent through public information – as the matter is before the courts, we will honour that process.

[19] The context surrounding the exchange is that Ian Davidson, Transgrid's General Manager – Maintenance and of the Transgrid negotiating team was responding to a suggestion that the company's position was that its wage offer was an increase in wages that would cost about \$15 million over three years. I take the reference to the matter being before the courts as these proceedings before the Commission.

[20] What followed were exchanges in which Mr Davidson offered to provide various hypothetical examples of costing the claims and Mr Hicks, along with other union bargaining representatives, disputing the utility of hypothetical examples. Discussion then returned to the budgetary constraints associated with what were referred to as the Opex and Capex budgets determined by the Australian Energy Regulator. The unions took the position that if there were constraints associated with those budgets that affected wage offers then it may be that Transgrid could approach the regulator and seek to have those budgets varied.

[21] Transgrid provided submissions explaining that the AER determines the revenue which Transgrid can recover from consumers for the purposes of its operational and capital expenditure. This is determined every five years. Transgrid is currently in the second year of the five year determination period.

[22] On the question of whether Transgrid has breached the good faith bargaining requirements, the first point to be made is that the financial information sought by the union is relevant to bargaining. So much is clear from the extracts from the minutes from the bargaining meetings. Transgrid bargaining representatives have repeatedly resisted the unions' claims by reference to budgetary constraints. The relevance of the material appears to be conceded in Transgrid's written response to the union's correspondence. In the company's written response

to the requests for information, while refuting the suggestion that it has acted contrary to its obligations, the company directed the union to publicly available material for the financial years 2021 and 2022. The company negotiators also relied on budgetary constraints in negotiations and were also willing to respond in a hypothetical way to claims that related to the financial situation of the company.

[23] Further, during oral submissions in these proceedings it was raised that if the company's claim that bargaining has reached an impasse, a claim made in the contention that it was not reasonable to order the production of material because bargaining had ceased and so the information was of no use, the bargaining dispute may at some stage become subject to arbitral proceedings leading to a workplace determination. Counsel for Transgrid accepted that should in those circumstances the kind of information sought may well be subject to evidence in support of positions taken in the arbitration. A distinction was drawn between providing evidence to support a position in arbitration and informing another party in negotiations. I do not accept the distinction. If the information is relevant to an arbitration about wages and conditions, then it is similarly relevant in bargaining over the same thing.

[24] The information sought is in three categories; the wages paid to managerial staff in FY23, FY 22, FY 21; the revenue, operating expenses, net profit achieved, and dividends paid by the business for FY23, FY22, FY21; and expenses associated with the engagement of contractors for FY23, FY22, FY21.

[25] The provision of information in the first category is resisted on the basis that the salary of individuals who are not subject to the proposed agreement is not relevant to the bargaining and in any event confidential. The problem with that approach is that negotiators for Transgrid have made salaries of management employees relevant to bargaining by stating that the wage increases under the agreement would be funded from the same budget used to fund managerial pay increases. Disclosure of information about what increases have been allocated to management employees are consequently relevant to bargaining for increases for other employees. The information will assist the unions in understanding how the funds otherwise available to meet their claims are being allocated. A second issue raised by Transgrid is the confidentiality of individual salary information. Transgrid submits that it maintains the confidentiality of individual salary information. It suggests the union may approach individual managers if it seeks the information. I note the issue of confidentiality and consider that it goes to the reasonableness of any order made and might be addressed in the way such order is framed. I agree with Transgrid that the union should not be provided with individual salary details. The information could however be provided in aggregate.

[26] Transgrid also contends that the provision of salary information in any manner would invite speculation about who is paid what as it may be possible to deduce what the CEO and other Executive General Managers are paid. These matters go to the reasonableness of making an order. I am not convinced that this is the case and in any event, I do not consider it a factor that makes it unreasonable to issue an order. The speculation referred to no doubt occurs and will continue to occur whether the information is provided or not. Given the approach taken in bargaining of including executive pay in the budget for other employees' pay, making the information about executive pay relevant to bargaining, I consider it reasonable to make an order that the information be provided. The question is in what form it is provided. Transgrid have indicated that the information can be compiled and readily provided. The order will be to

compile and provide aggregate information that reflects the remuneration of the relevant managerial staff on aggregate basis which totals being provided for each of FY21, FY22 and FY23.

[27] The provision of information in the second category is resisted on the basis that publicly information material has been provided. It also resisted on the basis the parties' positions in bargaining have become entrenched and so the information is of little use in bargaining. I have dealt with the second aspect of the argument above. I accept the evidence of Mr Hicks and Mr Murphy and do not consider the union's position to be entrenched. Consequently, provision of information relevant to the 23 FY seems reasonable.

[28] As to the form of information to be provided, I was provided with the publicly available information which is contained in annual reviews published by Transgrid for FY21 and FY 22. The first of these documents, the Annual Review for FY 21 includes the following data, described as key financial indicators:

| | FY21 \$m | FY20 \$m |
|---|-----------------|-----------------|
| Prescribed revenue | 784.8 | 755.9 |
| Non-prescribed revenue | 132.7 | 109.1 |
| Total revenue | 917.5 | 865.0 |
| Operational Expenditure (opex) | (223.4) | (198.8) |
| Underlying EBITDA | 694.2 | 666.2 |
| Net Profit | 4.8 | 2.4 |
| Prescribed capex | 199.8 | 229.6 |
| Non-Prescribed capex | 159.3 | 238.3 |
| Major Projects | 587.7 | 95.3 |
| Total Capex | 946.8 | 563.2 |
| Total PPE | 8,396.9 | 7,800.6 |
| Intangible Assets, Investment Property & Other assets | 3,151.5 | 3,422.3 |
| Total Assets | 11,548.5 | 11,222.9 |
| External debt | (6,363.6) | (5,954.8) |
| Other liabilities | (843.6) | (1,214.9) |
| Net Assets | 4,341.2 | 4,053.3 |

[29] The second document, the Annual Review for FY 22, includes a table with the same data for FY22:

| | FY22 \$m | FY21 \$m |
|--------------------------------|-----------------|-----------------|
| Prescribed revenue | 805 | 784.8 |
| Non-prescribed revenue | 140.3 | 132.7 |
| Total revenue | 945.3 | 917.5 |
| Operational Expenditure (opex) | (229.3) | (223.4) |
| Underlying EBITDA | 715.4 | 694.2 |
| Net Profit | 104.3 | 4.8 |
| Prescribed capex | 339.8 | 517.0 |
| Non-Prescribed capex | 152.3 | 159.3 |
| Major Projects | 174.1 | 270.6 |
| Total Capex | 666.2 | 946.8 |
| Total PPE | 8,718.5 | 8,396.9 |

| | | |
|---|-----------------|-----------------|
| Intangible Assets, Investment Property & Other assets | 3,687.5 | 3,151.5 |
| Total Assets | 12,406.0 | 11,548.5 |
| External debt | (6,663.4) | (6,363.6) |
| Other liabilities | (484.5) | (843.6) |
| Net Assets | 5,288.22 | 4,341.2 |
| Prescribed asset base | 7,614.1 | 7,185.7 |

[30] I note there are different figures in the tables for prescribed capex and major projects in FY21. The latter report states the difference arises because three projects were moved from “major projects capex” to the “prescribed capex”.

[31] No information was provided for FY23. Mr Berryman explains that Transgrid has not published an annual review for FY23. His evidence does not suggest that the figures for FY23 are not otherwise available to Transgrid. Transgrid submitted that the information can be readily compiled.

[32] As to the submission that it is not reasonable to make orders that information be provided because bargaining is at an impasse, I was provided with detail of the course of bargaining. Of particular relevance is the state of the wages claim. The CEPU’s wages claim at the commencement of bargaining was for 8% wage increases each year for the three year term of the proposed agreement along with 0.5% increases in superannuation contributions in the second and third years. That claim became 6%, 5% and 5% with 0.5% increases in superannuation in the second and third years. Transgrid’s offer, which was rejected by employees, was 5%, 4% and 4% with 0.5% increase in superannuation in the second and third years.

[33] Mr Hicks and Mr Murphy both gave evidence that the union’s position is not fixed, giving examples of where it had made compromises on its claims including recent compromises on its overtime claim. Transgrid pointed to statements by Mr Murphy that following vote to approve the company’s proposed agreement, where the vote was unsuccessful, the union had reverted to the initial 8% claims. Mr Murphy’s evidence to the Commission was that he expressed the view that the employees may expect bargaining to recommence. I take this as an observation about the state of bargaining rather than a statement of the union’s negotiating position. I accept the evidence in Mr Murphy’s statement that the union is willing to compromise further. I also accept the evidence of Mr Hicks on this point as reflecting the union’s position in bargaining and its willingness to consider further proposals and modify its claims accordingly.

[34] Having accepted the union’s position that they are willing to compromise further, I reject Transgrid’s submission that the parties are at an impasse in bargaining. I will make an order that Transgrid compile and provide to the union financial information reflecting the up to date figures contained in the tables set out above. I believe that it is reasonable to provide this information. I make that finding on the basis that Transgrid has referred the union to those figures for previous years and it is reasonable to provide the union with up-to-date figures. The figures provide an overview of the company’s financial position, which has been a matter the company has relied upon in resisting claims.

[35] The union seeks more information than provided by the summaries in the Annual Reviews. It also seeks profit and loss statements and the balance sheet for each financial year.

I do not propose to order the production of this material. I note that in its requests to the company for information it did not seek this information. It sought revenue, operating expenses, net profit and dividends. The information in the annual reviews provides that information save for the dividends paid by the business for FY21, FY22 and FY 23. Transgrid resist the request for this information on the basis that it is confidential information and irrelevant to bargaining. On the material before me I am not satisfied that the dividend information is relevant to bargaining and so will not make an order for its production.

[36] The third category of information sought is the expenses associated with the engagement of contractors for FY23, FY22, FY21. The considerations relevant to this request are similar to the considerations over executive salary. Transgrid's negotiators have stated that the funds available for wage increases for the agreement are sourced from the same budget as the funds that are allocated for the engagement of contractors. I consider it reasonable that the information be provided. Transgrid submits that as a large organisation it has many vendors including for example accounting firms, equipment suppliers and the like. Transgrid submits that it cannot readily provide information as it is not apparent how it would compile the information associated with contractors.

[37] The issue of contractors was raised in the negotiations on a number of occasions. Mr Davidson stated in a meeting on 4 April 2024 that the cost of contractors was included in the budget. Mr Murphy's evidence was that the term "contractors" referred to any person not directly employed by Transgrid performing line or substation work on transmission infrastructure being built for or maintained on behalf of Transgrid. The expression is used in meetings as well as correspondence. While Mr Berryman's statement suggested the term contractor was uncertain, when he was asked whether he understood what was meant by the expression during cross examination he confirmed that he did. It appears from this evidence that even if the information is not readily available it is described in a manner which would allow it to be compiled. I will order the provision of the material on the basis that the information to be provided is the costs associated with engaging those contractors that have been the subject of the negotiations as described in the evidence, particularly of Mr Murphy. Should Transgrid still have difficulties in compiling the information and it is unable to resolve those difficulties through discussions with the union I will grant liberty to apply to address those difficulties.

Conclusion

[38] I find that Transgrid has not met its good faith bargaining obligations by failing to provide the CEPU with information relevant to bargaining I am satisfied that each of the requirements in s.230 are met and I am satisfied it is reasonable in all the circumstances to make an order.

[39] For the foregoing reasons, I grant the application and make the following order:

1. Transgrid must, within 14 days of this decision, provide the CEPU the following information:

- a. The remuneration paid to General Managers and Executive General Managers for each of FY21, FY22 and FY23 expressed as a total for all managers along with the number of managers in each category each year.
 - b. The key financial indicators of the business for FY23 expressed in the same manner and including the same data as the information provided in the tables contained in the Annual Review documents for 2021 and 2022.
 - c. The total expenses associated with the use of contractors who are engaged to perform work line or substation work on transmission infrastructure being built for or maintained on behalf of Transgrid for each of the FY21, FY22 and FY23.
1. The parties have liberty to apply should they seek clarification of what is required to be produced in order 1.



DEPUTY PRESIDENT

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<PR778424>