[2024] FWC 2376 [Note: An appeal pursuant to s.604 (C2024/6258) was lodged against this decision - refer to Full Bench decision dated 17 September 2024 [[2024] FWCFB 378] for result of appeal.]

DECISION

Fair Work Act 2009
s.437—Protected action

Australian Workers' Union, The
v
Kuiper Australia Pty Ltd
(B2024/1087)

DEPUTY PRESIDENT O'KEEFFE PERTH, 3 SEPTEMBER 2024

Application for protected action ballot order for employees of Kuiper Australia Pty Ltd – application granted.

[1] This is an application by the Australian Workers' Union (**AWU**) made under s.437 of the *Fair Work Act 2009* (**Act**) for a protected action ballot order (PABO) in relation to certain employees of Kuiper Australia Pty Ltd (**Kuiper**).

[2] I note that the AWU made a previous application[1] for a PABO in relation to the same proposed enterprise agreement, which was dismissed.[2]

[3] Kuiper advised the Fair Work Commission (**FWC**) that it objected to the making of the order sought in this application on the grounds that the AWU had not been and was not genuinely trying to reach an agreement. Kuiper also sought an order that the notice period required under s.414(2)(a) by extended to seven working days pursuant to s.443(5) if it were to be the case that the FWC granted the PABO.

[4] The parties were directed to provide submissions to my Chambers, and I held a hearing on Thursday 29 August 2024, being the first date that counsel for the parties were available.

Submissions and Evidence – Genuinely Trying to Reach an Agreement

[5] The relevant section of the Act regarding the granting of a PABO is s.443. Section 443(1) sets out the requirements for the making of a PABO:

> ***"443 When the FWC must make a protected action ballot order***
>
> ***(1) [When FWC must make a protected action ballot order]*** *The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:*
>
> *(a) an application has been made under section 437; and*

(b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted."

[6] Consistent with previous findings, the words genuinely trying are to be given their natural and ordinary meaning. The Respondent submitted that the Applicant had not met the standard required for the FWC to be satisfied that it had been, and was, genuinely trying to reach an agreement. The Applicant submitted that its actions demonstrated that it had been and was genuinely trying to reach an agreement. Both parties agreed that the case law in this area was such that there was no hard and fast rule to which the FWC must adhere in determining the issue of genuine and that each case needed to be carefully assessed on its individual facts.

[7] As there was no apparent dispute between the parties regarding the history of their interactions over the proposed agreement – and indeed the various items of correspondence were in evidence – I regard it as useful to set out a timeline of those interactions, which is as follows:

10 May 2024	Mr Duncalfe of the AWU writes to Kuiper requesting that bargaining for a replacement agreement for the *Kuiper Australia Pty Ltd Western Australia and Northern Territory Offshore Construction Projects Greenfields Agreement 2020-2024* (the Construction Agreement)
22 May 2024	Mr Follett of Kuiper responds to Mr Duncalfe declining the request on the basis that Kuiper was not ready to commence bargaining as it wanted to consult with employees and other stakeholders before commencing bargaining.
29 May 2024	Mr Duncalfe responds to Mr Follett and reiterates the AWU's request for bargaining to commence.
30 May 2024	Mr Follett responds to Mr Duncalfe advising that Kuiper's position remained as per his 22 May 2024 response. I note that the AWU claimed that it did not receive this correspondence however Mr Follett's email was in evidence.
9 July 2024	Mr Duncalfe writes to Mr Follett attaching a log of claims using another of Kuiper's agreements as a template. In that correspondence the AWU states that it remained ready to attend bargaining meetings with Kuiper and urged the Company to issue a Notice of Employee Representational Rights (NERR). It also claimed that it did not receive Mr Follett's email dated 30 May.
9 July 2024	Mr Follett emails Mr Duncalfe attaching a copy of his 30 May email.
9 July 2024	Mr Duncalfe emails Mr Follett thanking him for re-sending the 30 May email and extending an invitation to contact him if any explanation was needed regarding the AWU's claims.

9 August 2024	Mr Follett emails Mr Duncalfe and officials of the Australian Manufacturing Workers' Union (AMWU) and the Electrical Trades Union (ETU) inviting all three unions to attend a meeting on 16 August 2024 to discuss the process and timing for a replacement for the Construction Agreement.
16 August 2024	The meeting of officials from the AWU, AMWU and ETU and Kuiper goes ahead. It is decided at that meeting that the first bargaining meeting will take place on 28 August 2024 with a second meeting scheduled for 11 September 2024. I note that the meeting scheduled for 28 August 2024 was re-scheduled and held on 29 August 2024.
17 August 2024	Mr Duncalfe writes to Kuiper formally advising that the AWU was requesting in writing to bargain for a proposed agreement – pursuant to s.173(2A) of the Act – and thereby establishing 17 August 2024 as the notification time for the proposed agreement.
18 August 2024	The AWU lodges an application for a PABO.
19 August 2024	Kuiper advises the FWC that it opposes the PABO application on the basis that it sought to include employees who were covered by an agreement other than the Construction Agreement – being the *Kuiper Australia Pty Ltd Maintenance Work (Western Australia and Northern Territory) Agreement 2021-2025* (the Maintenance Agreement) and the application was made more than 30 days prior to the nominal expiry date of the Maintenance Agreement.
19 August 2024	Mr Duncalfe writes to Kuiper advising that while scope was a potential negotiation subject, it only intended to ballot members covered by the Construction Agreement.
23 August 2024	Commissioner Simpson delivers his decision in 2024 FWC 2265 wherein he agreed with Kuiper's objection and dismissed the AWU's PABO application.
24 August 2024	The AWU lodges the PABO application that is the subject of this decision.
29 August 2024	The AWU, AMWU and ETU meet with Kuiper to conduct negotiations for the proposed agreement.

[8] In its written submissions Kuiper drew upon the findings of the Full Bench in *Total Marine Services Pty Ltd v Maritime Union of Australia*[3] (Total Marine) in conceding that there are no rigid rules established to determine whether a party is genuinely trying to reach agreement and that each case must be determined on its facts. However, it submitted that there are certain thresholds or steps that would ordinarily be expected to be seen if a party was genuinely trying to reach agreement. While it did not unequivocally specify what those steps

or thresholds might be, I have taken it that examples of them are to be found in paragraph 11 of Kuiper's submissions, drawn from the evidence of Mr Follett and set out as follows:

> *"On any view of the facts here, the Second PABO Application is decidedly premature. There have been no bargaining meetings at all, nor a single discussion on the merits of a single claim contained in the Second AWU Proposed Agreement. Kuiper has not made known its position on a single claim contained in the Second AWU Proposed Agreement. Kuiper has not yet advanced any log of claims of its own. The Second PABO Application was lodged the day after the AWU first provided Kuiper with a draft of the Second AWU Proposed Agreement, and before there was even an opportunity for the parties to discuss that document (particularly in circumstances where the draft of the Second AWU Proposed Agreement was provided on a Saturday). Wherever the line might be drawn on prematurity in the circumstances of this bargaining process, the AWU is nowhere near it at present."*[4]

[9] Kuiper further submitted that based on the evidence of Mr Follett, many of the claims pursued by the AWU were operationally and commercially unviable and this suggested that the AWU was not trying to reach agreement.

[10] At hearing, Kuiper expanded upon these submissions, drawing from various precedent cases. In the first instance, Kuiper directed my attention to *JJ Richards & Sons Pty Ltd v Fair Work Australia*[5]*(JJ Richards).* Kuiper submitted that the findings of Flick J in paragraphs 58 and 59 supported its argument with respect to prematurity as seen above. In particular, it noted the comments found in paragraph 59 as follows:

> *"The addition of the word "genuine" — on one approach to construction — perhaps adds little. But the addition of that term serves to emphasise the importance of a person actually trying to solicit agreement. Until a proposed agreement has been disclosed to the prospective parties, and a response solicited, an applicant has not even tried to reach agreement — let alone genuinely tried to reach agreement."*

Kuiper further submitted that this notion was important as it supported its proposition that there was a distinction to be drawn between trying to get an agreement – being the ultimate outcome – versus trying to progress the bargaining process itself. Kuiper also noted that the legislation surrounding bargaining – albeit not s.443(1)(b) - had been amended since the *JJ Richards* decision which left some question as to how that case should be viewed in light of those changes.

[11] My attention was also drawn to further findings of the Full Bench *Total Marine.* Kuiper submitted that the findings of the Full Bench at paragraph 31 and 32 confirmed the notion that there is no objective test available to be applied in deciding if a party is genuinely trying to reach agreement but rather the decision is fact specific. However, as per paragraph 32:

> *"All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. (my emphasis)"*

Kuiper noted then factual circumstances of the current case, which it submitted were very different in that the AWU had simply sent some correspondence seeking to commence bargaining and had been rebuffed.

[12] Again drawing on paragraph 32, Kuiper noted that the Full Bench expressed a view as follows:

> *"At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side."*

Kuiper conceded that the Full Bench was not proposing that this be a hard and fast rule nor was it suggesting that it would apply in every – or indeed any - case. However, it would be normal to see those things taking place before an applicant approached the FWC.

[13] Kuiper also directed me to the findings of the Full Bench in paragraphs 35 and 36, where the Full Bench determined that the Commissioner in the original matter had fallen into error by taking the view that the MUA seeking to "park" certain issues pending an industry wide outcome was not relevant to the matter of genuinely trying to reach agreement. The Full Bench took the view that the steps taken by the MUA were preparatory steps. They would not be sufficient to meet the test of genuinely trying. Further, the paragraph was in Kuiper's submission support for the proposition that the FWC could not simply accept statements of intent or motive as demonstrating that a party was genuinely trying to reach agreement. Rather, the FWC needs to examine whether the party is engaged in preparatory actions, or instead actions that will secure an outcome being the actions necessary to demonstrate they are genuinely trying to reach agreement.

[14] Turning to some of the observations from the cases, Kuiper noted that there had only been one face to face bargaining meeting and that had been on the morning of the hearing and that claims had not been articulated by the AWU until that meeting. Given this, Kuiper proposed that the AWU could not establish "has been" trying.

[15] Kuiper further noted the observations of the Full Bench in *JJ Richards & Sons Pty Ltd v TWUA*[6] *(TWUA)* in paragraph 54 to the effect that the "agreement" that the applicant must be trying to reach is an enterprise agreement capable of approval by the FWC. Kuiper further suggested that the notion in paragraph 58 about genuineness being linked to motivation, intent, object or purpose was - given the findings in *Total Marine* - not strictly correct.

[16] Kuiper then moved on to suggest that the AWU's assertions regarding its efforts to secure bargaining ought be looked at in terms of the timeline of interactions between the parties with respect to bargaining. That timeline suggested large gaps between activity on the AWU's behalf and in Kuiper's submission this ought call into question any notion that the AWU had been continually and assiduously pursuing bargaining. Kuiper also pointed out the letter from the AWU to Mr Follett dated 9 July 2024 wherein the AWU states in part:

> *"In preparation for the commencement of negotiations…"*

It submitted that this indicated, consistent with the principles in *Total Marine* about preparatory steps, that the AWU was in the preparatory stage and had not progressed to the point of genuinely trying to reach agreement. In addition, given that there had only been one bargaining meeting between the parties, it could not then be said that the AWU is trying to reach agreement for the purposes of s.443(1)(b) of the Act. Kuiper submitted that the words in that section must mean something, and that simply sending a small number of items of correspondence could not meet the test once those words were given effect. In summary, Kuiper says that no matter what the AWU may think it is doing, it cannot be genuinely trying to reach agreement because it is – at the point of the application – too early in the process.

[17] In its written submissions the AWU also relied on the findings in *JJ Richards* albeit that it drew different conclusions. An addressing the issue of prematurity, the AWU proposed that it:

> *"…would be directly contrary to the Full Court's decision in JJ Richards to imply some sort of arbitrary threshold or introduce questions of whether the application is 'premature' into s.443(1)(b)."*[7]

[18] The AWU submitted that the true purpose of s.443(1)(b) was to:

> *"…guard against ulterior motive; that is, persons seeking to take industrial action for reasons other than in the ultimate pursuit of an agreement with the employer."*[8]

[19] It then drew upon the findings of the majority in *TWUA* to support the proposition that s.443(1)(b) requires the motivation of an applicant party to be examined:

> *"It is directed at the authenticity of the applicant's efforts to reach that goal. The genuineness or authenticity of an applicant's efforts to reach that goal will turn on its motivation - the intention, object or purpose."*[9]

[20] The AWU also drew on the finding of the majority in *TWUA* as follows:

> *"In circumstances where an applicant for a protected ballot order calls (acceptable) evidence that their intention, object or purpose is to reach an enterprise agreement under the FW Act a finding that the applicant was not "genuinely trying to reach an [enterprise] agreement" within the meaning of s 443(1)(b) will necessarily involve accepting evidence establishing that the applicant had some other, extraneous purpose in seeking the ballot. Indeed, when there is evidence from an applicant for a protected action ballot order that they have been and are "genuinely trying to reach an [enterprise] agreement" under the FW Act, it is difficult to conceive of circumstances where it could properly be found they were not, unless there is cross-examination or other evidence establishing that the applicant in truth has some other, extraneous intention, object or purpose or is seeking something other than an enterprise agreement under the FW Act. For example, the evidence may demonstrate that the applicant is pursuing an agreement that it knows or ought reasonably knows (sic) would not be an enterprise agreement within the meaning of the FW Act because it contains non-permitted matters contrary to s 172(1) or that the true motivation is to apply pressure in pursuit of political or environmental goals or simply to punish the employer for some perceived wrong doing."*[10]

It submitted that this supports the proposition that where an applicant has established evidence that it is genuinely trying requirement to reach agreement there is a need to adduce contrary evidence to demonstrate an intention other than reaching an agreement.

[21] The AWU submitted that Kuiper's proposition about the application being premature was not supported by the wording of the Act and required the FWC to read words into the Act that are not there. It submitted further that if Kuiper wanted to submit that the AWU was doing something other than trying to reach an agreement it would need to identify what that extraneous purpose was, and Kuiper had not done this.

[22] At hearing, the AWU contended that the binding case on the relevant issue was *JJ Richards* and referred me to the statement of Tracey J as follows:

> *"I have had the benefit of reading in draft the reasons prepared by Jessup and Flick JJ. I agree with their Honours that, on its proper construction, s 443(1) of the Fair Work Act 2009 (Cth) cannot, consistently with orthodox principles of statutory construction, be construed in the manner for which the applicants contend. There is simply no warrant to read into the subsection words of limitation which do not appear. The legislature has required that FWA must make a protected action ballot order if the two conditions prescribed by s 443(1) are satisfied even if bargaining between an employer and employees has not commenced."*[11]

The AWU submitted that this concurrence by Tracey J made it clear that the position for which Kuiper advocated – which the AWU submits requires the addition of words to the Act – simply cannot happen. Again drawing on *JJ Richards* the AWU directed my attention to paragraph 59, which had been traversed by Kuiper, but sought to contextualise the final line of that paragraph by reference to paragraph 60 where it is made that clear soliciting a response was sufficient to enable s.443(1)(b) even where the response was in the negative.

[23] The AWU also made submissions with respect to the value of *Total Marine* and in essence those submissions were that the case was no longer good law and had been overtaken by *JJ Richards.* Kuiper disagreed with this proposition and noted that there was no suggestion that *Total Marine* had been overturned by *JJ Richards* or otherwise.

Consideration

[24] It is clear from the Act that the task of the FWC is to reach a state of satisfaction that the applicant party is and has been genuinely trying to reach agreement, where agreement takes the form of an enterprise agreement capable of being approved by the FWC. The parties were in a state of disagreement over the value of various cases, and how the findings in *JJ Richards* ought be regarded in light of the changes to the Act since that case was decided.

[25] It is nonetheless clear from the language of all of the cases that there is not one single hard and fast approach that must be universally applied, but that what is important are the facts and circumstances of each case. It is further clear - and consistent with what I understand are the views of the parties - that the role of the FWC in this case is not to attempt to create such a hard and fast approach or solve the question of where exactly the line between not genuinely

trying to reach agreement and genuinely trying is to be set. Given this, I have approached the decision as follows.

[26] In the first instance I note that bargaining is taking place in a particular context. Specifically, the unchallenged evidence of Mr Doug Heath is that the work being performed under the *Construction Agreement* will soon come to an end. Mr Heath's prediction was that the work would end some two to three months after the nominal expiry date of the *Construction Agreement.*[12] Again drawing on Mr Heaths evidence it is clear that once the project ends the AWU's ability to influence bargaining outcomes will be significantly decreased.[13] Both the AWU and its members want to be able to apply pressure to improve terms and conditions and establish an industry standard while there is a large cohort of AWU members who can use their collective power to achieve that outcome.[14]

[27] Secondly, I have noted already that Mr Heath's evidence was unchallenged. However, it is also credible in that the strategy he claims to be employing would appear to be both logical and sensible from the perspective of the AWU and its members. From one view Mr Heath has been very forthcoming in outlining the AWU's industrial strategy in full view of Kuiper. A major part of that strategy is to use the AWU's bargaining power when it is at its highest to achieve the best outcome in respect of terms and conditions. That outcome will only be guaranteed by an approved enterprise agreement. Given this, it is not difficult to accept that the AWU is trying to reach an agreement and do so within a short window of time. If it misses the window then it is likely that it will not achieve its stated goal and miss an opportunity that may not reappear for some time.[15]

[28] I now turn to what the AWU has been doing. It began its attempts to get Kuiper to bargain on 10 May 2024 by way of letter requesting bargaining. It is not unusual for an industrial organisation to seek to commence bargaining prior to the expiry of an enterprise agreement. The AWU was rebuffed by Kuiper who provided some reasons, to which I will return. The AWU wrote to Kuiper and repeated its request within a week of receiving the rebuttal. Although it appears the Kuiper response to the second request was not received, the response was in any case in the negative. The AWU then wrote to Kuiper again in July requesting that bargaining commence. In this correspondence the AWU also included a log of claims that in essence sought to align the conditions in a replacement for the *Construction Agreement* with the terms of another of Kuiper's agreements that operates in Victoria. The AWU invited Kuiper to contact it if it had any queries about its claim.

[29] Following this, the AWU has attended a meeting with other bargaining representatives to discuss the process of bargaining. Notwithstanding that this meeting agreed that two future negotiation meetings would be held, the AWU then exercises its right under s.173(2A) to write to Kuiper requesting bargaining and in doing so set the notification time as per s.173(2)(aa). I note that as per s.173(2A)(a) this was the first opportunity for the AWU to undertake this action. The AWU then attended the first negotiation meeting held on 29 August 2024 and engaged in discussions regarding its claims.

[30] Given the above outline of the context in which bargaining is taking place and the actions of the AWU, I have am satisfied that the AWU meets the second temporal requirement in s.443(1)(b) in that it is genuinely trying to reach agreement. While I note Kuiper's view – drawn from case precedent – that the AWU is only engaged in preparatory steps, I do not accept that this is the case. I accept that in bargaining there will be preparatory steps – such as a union

surveying its members – that could not of themselves properly be regarded as genuinely trying to reach an agreement. I also accept that the finding in *Total Marine* suggests that a union can be engaged in a process of sitting down with an employer and discussing claims and still be regarded as in a preparatory stage.

[31] However, I draw a distinction between the circumstances of *Total Marine* and the current case. In *Total Marine* the MUA had "parked" claims and was waiting on outcomes of other actions it was taking that were independent of its bargaining with the company. Clearly, given the parked matters the MUA could not have finalised an agreement – being an agreement that could be approved by the FWC - at that point in discussions. As such it could be said that it was still preparing to negotiate. It was not suggested to me that the AWU could not or would not have agreed to all terms for an agreement at any point. Given the unchallenged evidence of Mr Heath about the strategy of the AWU and the time constraints it faces, I am satisfied the concept of preparatory stages as contemplated by *Total Marine* is not relevant to this case.

[32] I am also of the view that the notion found in *TWUA* about the link between genuineness and motivation must be taken into account. Clearly, on its plain English meaning, the notion of genuineness in the context of s.443(1)(b) goes to the motive of the applicant. I accept the submission of Kuiper that in assessing motivation and intent the FWC cannot simply rely on a statement of such intent. It is easy to conceive of cases where the actual intent of an applicant may be not to reach agreement but rather to prolong the bargaining process. It may be that the applicant wants another of the employer's agreements to expire such that it will have two separate groups of employees who can take industrial action simultaneously to increase pressure on the employer. In such circumstances, the union might engage in a form of surface bargaining.

[33] Given this, the FWC needs to be wary of statements of intent that do not appear to align with actions. However, in this instance the statements of intent – motivation - made by the AWU are credible given the background circumstances upon which I have previously commented. I am satisfied that they are also supported by the AWU's actions thus far in the bargaining process. It was suggested by Kuiper that notwithstanding that the parties were sitting around the bargaining table, that the AWU had not at this time reached a point where it was genuinely trying to reach agreement. I cannot accept that this is the case.

[34] Such a submission logically suggests that at some point in the ongoing process the AWU will be genuinely trying to reach agreement but gives no indication as to what the catalyst for the change in mindset might be. I find this difficult to accept given what I have already said I accept about the background circumstances.

[35] Further, I accept the proposition - found in paragraph 63 of *TWUA* and shown at paragraph 19 above – that a respondent seeking to challenge an applicant's motivation should try to provide some evidence of an extraneous motive to explain why the applicant is seeking a bargaining order. I think in this instance, if Kuiper wanted to claim that the AWU was doing something other than genuinely trying to reach an agreement given its actions and the background circumstances then it should have tried to establish what other motive the AWU had. This also may – although it may not – have given some insight into when the change in mindset might have been expected to occur. By way of illustration, in the *Total Marine* case it may have been found that once the industry-wide issues had been resolved the MUA would then have been in a position to agree to terms for an agreement and thus be genuinely trying to reach agreement.

[36] In summary, I accept that the AWU is genuinely trying to reach an agreement. This then leads to consideration of the other temporal requirement of s.443(1)(b) being whether it had been trying to reach agreement. As I observed earlier, the parties both relied on the *JJ Richards* decision albeit that the conclusion they invited me to draw from that case differed. In essence, Kuiper relied on the judgement of Flick J and submitted that until a party had submitted terms for an agreement and solicited a response then it had not tried to reach agreement let alone genuinely tried. Kuiper also drew upon *Total Marine* for the notion that it was relevant to consider the progress of negotiations and the steps taken to achieve agreement and that this would normally involve being able to demonstrate that the major claims had been made upon the other party and responses made to any counterclaims.

[37] In contrast, the AWU cited Tracey J from *JJ Richards* for the proposition that there was no remit to read words into the provisions of s.443(1)(b) and that it was clear that a party can be genuinely trying to reach agreement even though bargaining may not have commenced. It also noted that when Flick J said that a response should have been solicited there was no suggestion that a positive response needed to have been given to enliven s.443(1)(b).

[38] In considering this issue I am also mindful of Kuiper's observation that there had been legislative changes impacting the bargaining provision of the Act since *JJ Richards*. However, I am not of the view that these changes should be taken as an imprimatur to deviate from that decision. For example, while a union can now trigger the notification time for an agreement, it can only do so in certain circumstances and in the present case, it was only once the existing agreement reached its expiry date. At hearing the notion of other actions was briefly canvassed. Particularly, the possibility that the AWU might have sought a majority support determination as a way of starting a process of compelling Kuiper to the bargaining table. However, there is no requirement in the Act that a party has to have taken this precursor step before seeking a PABO. This can be distinguished from other parts of the Act dealing with bargaining, where applications can only be made if certain other provisions have been used and proved to be unsuccessful. As such, I take the view that the findings in *JJ Richards* are still relevant.

[39] In this instance, the AWU has tried to get Kuiper to bargain. It has been rebuffed. It has tried again and while it was not aware it had been rebuffed, Kuiper's position was that it would still not bargain and clearly, the parties did not commence bargaining. The AWU then serves a log of claims on Kuiper and invites questions. Nothing is received until Kuiper invites the AWU and other bargaining representatives to a meeting, which the AWU attends. I accept that until 29 August 2024 there had been no bargaining meetings held between the AWU and Kuiper and that such efforts as the AWU had made to get bargaining started were limited to various items of correspondence.

[40] However, *JJ Richards* does not require bargaining to have commenced. Also, in that case, the TWU was trying to get the Company to bargain with it and it had refused to agree to bargain. In this case, on the evidence before the FWC Kuiper refused to indicate that it would bargain until 9 August. By that time, the AWU had made three attempts to get Kuiper to the bargaining table and had provided, on 9th July, a log of claims. I am satisfied that the AWU has tried to get Kuiper to the bargaining table, and it has done so – again calling upon the background circumstances – because it genuinely wants to secure an approved enterprise agreement.

[41] I should comment on three issues at this point. Firstly, Kuiper submitted that the AWU's claims were not operationally and commercially viable. Given this, the AWU could not be said to be genuinely trying to reach agreement. This is a difficult proposition to reconcile with the realities of bargaining. Unions will frequently make claims that companies will view as uncommercial and unsustainable. While there may be times that a union's claims might be such that if granted they would create significant difficulties, this does not automatically mean that such claims are not genuinely pursued. It will be a matter for the bargaining teams to argue that issue back and forth between them. In any case, I note that the AWU claims are not without some context: they are seeking to replicate terms and conditions of employment that Kuiper has already agreed to provide elsewhere in Australia. As such, I am not persuaded that this submission can be upheld.

[42] Secondly, it was open to Kuiper to commence bargaining earlier than it did. In his evidence, Mr Craig Follett explained that the Company wished to consult stakeholders and also consult its employees. It appears that the consultation of employees took some time. It is perhaps understandable that the AWU did not cease its attempts to get bargaining underway while such consultation was taking place and there was no reason it should have. The AWU has insinuated that there may be some agenda at play with Kuiper and its stakeholders, that favours delay in bargaining. I have given that insinuation no weight. I found Mr Craig Follett to be a credible and forthright witness and I accept that he wanted to know what his employees were thinking when it came renegotiation of their terms and conditions. However, viewed through the prism of the Act, where employees will be represented by their unions and such employees as may be appointed as bargaining agents, Mr Follett's actions would not appear to have any legislative support as a reason for delaying bargaining. However, nothing particularly stands or falls on this issue.

[43] The third issue is that I again note that each of these cases needs careful consideration of all the relevant facts and in this case, had certain circumstances been different I may have reached a different conclusion. By way of example, had the AWU simply attended the meeting on 16 August, written to Kuiper on 17 August and then made its application prior to actual attending the first bargaining meeting I would have had some difficulty in accepting that it had been genuinely trying to reach agreement. However, given its attempts to get Kuiper to the bargaining table, I take a different view. Also important is the background context. Given the AWU's stated – and credible – strategy and the time constraints it is under, I find that these are factors that are somewhat unusual and require careful consideration when examining the motivation of the AWU.

[44] In summary, a proper application has been made by the AWU under s.437 and I find that the AWU has been and is genuinely trying to reach agreement with Kuiper. As a consequence, I am required to make the requested PABO, and an order will issue.

Extension of period of notice

[45] In its submissions, Kuiper sought orders that if the PABO was granted, then pursuant to s.443(5), the notice period as set out in s.414(2)(a) of the Act be extended from three working days to seven working days. This extension was opposed by the AWU albeit with a caveat that if an extension was granted then it should be five working days rather than seven. Section 443(5) of the Act provides as follows:

> ***"(5) [When protected action ballot order may specify extended period]*** *If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days or 120 hours (whichever is applicable), the protected action ballot order may specify a longer period of up to 7 working days."*

From this it can be seen that the threshold issues are that the circumstances must be exceptional, and they must also justify extending the notice period. Even if this is the case, the FWC still has discretion over the making of an order to extend the notice period.

[46] The Respondent provided evidence from Mr Shameer Shroff, project manager for Saipem Australia Pty Ltd who is project manager for the project where the relevant employees of Kuiper are operating. Mr Shroff provided a witness statement that gave details of the processes involved with completing the work and in particular the operations of the pipe-laying vessel the *Castorone.* Of particular relevance is Mr Shroff's evidence regarding "abandonment", being the process where the Company needs to shut down the pipe-laying work due to prediction about adverse sea conditions. For the safety of the crew and to protect the vessel and its equipment, Mr Shroff's evidence is that such abandonment needs to be undertaken in favourable sea conditions.

[47] In his statement, Mr Shroff details the usual practice for abandonment as follows:

> *"…Saipem seeks to avoid abandoning the pipeline in adverse sea states. Saipem accordingly attempts to identify (through modelling) the most favourable sea state in which to undertake the abandonment work, in order to reduce the safety risks for the vessel and its crew. This modelling is most accurately undertaken by Saipem's engineering team in Italy. Undertaking that modelling can take up to 2 days (depending on the availability of engineers), and it can then take a further 48 hours to communicate the outcome of that modelling to relevant stakeholders, and achieve the requisite sign-offs from, the client, the Marine Warranty Surveyor, and finally the Castorone. The Castorone then requires 12 hours to perform the necessary preparatory steps before it can start the abandonment work."*[16]

Based on this evidence, it could take four and a half days to get to a state where the ship and crew are safely detached from the undersea pipeline.

[48] Mr Shroff was questioned briefly by the AWU at hearing and also by myself about how the process might work if there was a need to shut down due to industrial action rather than adverse sea conditions. In summary, Mr Shroff maintained that the process would continue to take the sort of time frame as he had set out in his evidence. In that evidence, he had also stated as follows:

> *"The Application lists 9 potential forms of action which may be taken by AWU members, which will have the following impacts on the operations of the Castorone. The observations set out below relate to any situation involving stoppages of work for a cumulative duration of 4 hours or more by the employees who I understand will be the subject of the PABO.*

> *Any such stoppages may necessitate a halt in the laying of pipeline. A halt of 4 hours or more may be long enough for the pipeline to accumulate fatigue above the acceptable threshold, in which case, for reasons set out above, the laying of the pipeline would need to be abandoned."*[17]

[49] Given the nature of the operation being undertaken, I am satisfied that there are exceptional circumstances to the case. The operation is a major and complex capital work being undertaken in difficult conditions where there appears to be potential for risks to safety and to equipment if activities such as abandonment are not carried out according to protocols. Again, given the circumstances, I am satisfied that there is justification for an extension of the notice time. As conceded by Kuiper, the mere fact of economic loss for an employer will not justify an extension. Industrial action by its nature involves inconvenience, loss of production and economic impact for the employer. However, caution needs to be exercised where there is also potential for serious safety risks to employees and damage to equipment, which I accept is the case here.

[50] Given this, and given the evidence of Mr Shroff, I will exercise my discretion to order that where industrial action will involve the stoppage of work for four or more hours - be that a single action or a number of consecutive actions – then the AWU must give Kuiper five working days' notice of such action. Such an order takes into account Mr Shroff's evidence as set out in paragraphs 46 and 47 above. Where industrial action will not involve a stoppage of work for four or more hours, then the usual notice period of three working days will apply.

[51] I note that the AWU conceded that if I was to consider an extension of the notice period, where industrial action was to involve a stoppage of more than four hours, it would concede a five-day notice period. To avoid any misunderstanding, I highlight that I have been more restrictive and applied the five-day notice period to periods of four hours or more. Further, the five-day notice period only applies to stoppages of work and not situations where there are bans or restrictions. An order setting out the requirement for additional notice will issue.

DEPUTY PRESIDENT

Appearances:

Leo Saunders of Counsel
Matthew Follet SC
James McLean of Counsel

Hearing details: Thursday, 29 August 2024.

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[1] B2024/1051.

[2] [2024] FWC 2265.

[3] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 at [31]-[32] and [35]-[36].

[4] Respondent Submissions page 3 paragraph 11.

[5] *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297 at [58]-[59].

[6] *JJ Richards & Sons Pty Ltd v TWUA* [2010] FWAFB 9963.

[7] Applicant submissions page 4 paragraph 16.

[8] Ibid at page 4 paragraph 17.

[9] *TWUA* at [58].

[10] *TWUA* at [63].

[11] *JJ Richards* at [33].

[12] Witness statement of Doug Heath page 2 paragraph 11.

[13] Ibid page 3 paragraph 18.

[14] Ibid pages 3-4 paragraphs 21-22.

[15] Ibid page 3 paragraph 15.

[16] Witness statement of Mr S Shroff page 8 paragraph 47.

[17] Ibid page 8 paragraphs 42-43.