REASONS FOR DECISION

Fair Work Act 2009
s.437—Protected action

Australian Rail, Tram and Bus Industry Union
v
Sydney Trains & NSW Trains
(B2024/1615)

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union
v
Sydney Trains & NSW Trains
(B2024/1617)

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
Sydney Trains & NSW Trains
(B2024/1622)

Australian Municipal, Administrative, Clerical and Services Union
v
Sydney Trains & NSW Trains
(B2024/1623)

Association of Professional Engineers, Scientists and Managers Australia
v
Sydney Trains & NSW Trains
(B2024/1624)

Nerida Mullally
v
Sydney Trains & NSW Trains
(B2024/1625)

COMMISSIONER CRAWFORD — SYDNEY, 11 DECEMBER 2024

Proposed protected action ballots of employees of employees of Sydney Trains and NSW Trains – previous protected action ballots – single interest employer authorisation – ballot periods contested – exceptional circumstances justifying longer written notice periods – orders made.

BACKGROUND

[1] This decision concerns the following applications under s.437 of the *Fair Work Act 2009* (**FW Act**) for protected action ballot orders in relation to certain employees of Sydney Trains and NSW Trains:

(i) Matter B2024/1615: Application by the Australian Rail, Tram and Bus Industry Union (**RTBU**). The application was filed on 9 December 2024.

(ii) Matter B2024/1617: Application by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**). The application was filed on 9 December 2024.

(iii) Matter B2024/1622: Application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**). The application was filed on 9 December 2024.

(iv) Matter B2024/1623: Application by the Australian Municipal, Administrative, Clerical and Services Union (**ASU**). The application was filed on 9 December 2024.

(v) Matter B2024/1624: Application by the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**). The application was filed on 9 December 2024.

(vi) Matter B2024/1625: Application by Nerida Mullally. Sydney Trains is the only respondent to this application. The application was filed on 9 December 2024.

[2] The unions identified above, and The Australian Workers' Union (**AWU**) and the Construction, Forestry and Maritime Union (**CFMEU**), are commonly referred to as the Combined Rail Unions (**CRUs**).[1]

[3] The *Sydney Trains and NSW Trainlink Enterprise Agreement 2022* (**Agreement**) currently applies and covers Sydney Trains, NSW Trains, the CRUs, and the employees that are affected by these applications. The Agreement nominally expired on 1 May 2024. There have been negotiations for an industrial instrument to replace the Agreement since around April 2024. Members of the CRUs have taken a range of protected industrial action during 2024. Ms Mullally has also been organising protected industrial action by employees she has been appointed to represent in bargaining.

[4] On 6 December 2024, I issued a single interest employer authorisation in relation to the proposed enterprise agreement being bargained for by Sydney Trains, NSW Trains, the CRUs, and various individual bargaining representatives, such as Ms Mullally.[2] The issuing of that authorisation triggered an urgent Federal Court application by Sydney Trains and NSW Trains relating to proposed protected industrial action notified by the CRUs for the week commencing 9 December 2024. Sydney Trains and NSW Trains argued that the issuing of the authorisation

created a new "notification time" for bargaining and that protected action ballot orders (**PABO/s**) issued prior to the making of the authorisation could no longer be relied upon for the taking of protected industrial action. The Federal Court issued an interim injunction on 8 December 2024 which effectively prevents the CRUs from organising, and taking, protected industrial action until the substantive application made by Sydney Trains and NSW Trains is determined.[3] This led to the CRUs and Ms Mullally urgently making new PABO applications on 9 December 2024.

[5] On 10 December 2024, Sydney Trains and NSW Trains advised the Fair Work Commission that they objected to the applications on the following grounds:

a. The proposed end date for the ballots, being 4pm on Monday, 16 December 2024 is inadequate.

b. There are exceptional circumstances justifying an extended written notice period of seven working days for the protected industrial action.

c. The proposed ballot orders did not provide Sydney Trains and NSW Trains with sufficient time to provide the required lists of employees to the ballot agents.

d. The applications and supporting materials contained erroneous references to the issuing of a Notice of Employee Representational Rights and a notification time that related to bargaining for a single enterprise agreement, as opposed to a multi-enterprise agreement.

[6] Given these objections and the requirement in s.441 of the FW Act for PABO applications to be determined within two working days as far as practicable, I decided to deal with the applications jointly pursuant to s.442 of the FW Act and listed a hearing via video at 4:00pm on 10 December 2024. I granted permission for the CRUs to be represented by Leo Saunders (Counsel) and for Sydney Trains and NSW Trains to be represented by Alice DeBoos from Kingston Reid. I was satisfied granting permission would enable the matters to be dealt with more efficiently. Ms Mullally represented herself at the hearing.

[7] At the conclusion of the hearing, I advised the parties that I had decided to issue orders in relation to each application. I also informed the parties I had decided to extend the period of written notice for protected industrial action to seven working days for each application and that the closing date for each ballot would be 16 December 2024. The following are my reasons for those decisions.

CONSIDERATION

Uncontested issues

[8] The CRUs and Ms Mullally relied on the following uncontested evidence to establish they have been, and are, genuinely trying to reach agreement with Sydney Trains and NSW Trains for a proposed enterprise agreement:

- RTBU: Jemimah Cooper (Legal Officer) – declaration dated 9 December 2024.
- AMWU: Robyn Fortescue (Assistant National Secretary) – declaration dated 9 December 2024.
- CEPU: Armen Aghazarian (Legal Officer) – declaration dated 9 December 2024.
- ASU: Jan Primrose (Deputy Secretary NSW/ACT Branch) – declaration dated 9 December 2024.
- APESMA: Adrian Catt (Lead Organiser) – declaration dated 9 December 2024.
- Ms Mullally: Ms Mullally's declaration dated 9 December 2024.

[9] Sydney Trains and NSW Trains did not argue that the CRUs and Ms Mullally have not been, or are not, genuinely trying to reach an agreement with them.

[10] I am satisfied that each applicant has been, and is, genuinely trying to reach an agreement with Sydney Trains and NSW Trains. The applicants were initially bargaining for a single-enterprise agreement. Following the making of a single interest employer authorisation, the parties are bargaining for a multi-employer agreement. Even though the authorisation was only made on 6 December 2024, I am satisfied the CRUs and Ms Mullally have been taking extensive and urgent steps to try and finalise an agreement since 6 December 2024 and are continuing to do so. Given that finding, it is not necessary for me to determine if I can have regard to the bargaining that occurred prior to the issuing of the authorisation on 6 December 2024. However, I consider it would be an odd outcome if steps taken in bargaining prior to the issuing of the authorisation must be completely disregarded. The authorities emphasise that whether the applicant/s have been genuinely trying to reach agreement turns on the specific facts of each case. I am comfortably satisfied in the unique circumstances of this case that the applicants have been, and are, genuinely trying to reach an agreement with Sydney Trains and NSW Trains.[4]

[11] I am satisfied there has been a notification time for the proposed multi-employer agreement and that all of the other requirements in s.443(1) of the FW Act have been met for all six applications.

[12] The CRUs and Ms Mullally ultimately consented to an extended written notice period of seven working days for the protected industrial action. I am satisfied that there are exceptional circumstances that justify this longer written notice period.

Contested issue - closing date for the ballots

[13] Each applicant sought a closing date of 16 December 2024 for the protected action ballots. Sydney Trains and NSW Trains argued this timeframe, which is around four working days or six calendar days, was shorter than the minimum period of 10 working days that was not disturbed on appeal by a Full Bench of the Commission in *Nilsen*[5]. Sydney Trains and NSW Trains also argued a minimum ballot period of 10 working days has been subsequently adopted

in relation to numerous PABOs and can be considered the "standard" or "regular" approach by the Commission.

[14] The Full Bench in *Nilsen* confirmed the Commission has a "discretion to specify the date by which a protected action ballot will close, provided the date will enable the protected action ballot to be conducted as expeditiously as practicable."[6] The decision does not establish a default minimum ballot period. Shorter periods have been ordered in other cases.[7]

[15] I did not consider the practical concerns raised by Sydney Trains and NSW Trains with the ballot period closing on 16 December 2024 to be overly persuasive. The primary concern raised was that the proposed timetable did not allow Sydney Trains and NSW Trains enough time to prepare lists of employees to provide to the ballot agents. That concern largely fell away when the CRUs and Ms Mullally agreed to provide an extra 24 hours for those lists to be provided. Sydney Trains and NSW Trains also referred to concerns about the democratic process being impacted if the "regular" period of 10 working days is not provided for the ballot. I am satisfied a closing date of 16 December 2024 will provide the voting employees with sufficient time to participate in the democratic process of deciding whether they support the taking of the specified protected industrial action. Things have been moving rapidly in this bargaining process, I am satisfied the relevant employees will be able to deal with the reasonably short timeframe.

[16] I am also satisfied that there is sufficient time for me to convene the required s.448A conferences before 16 December 2024. This was a factor that the Full Bench in *Nilsen* considered relevant to determining an appropriate ballot period. This is certainly not a case where the bargaining representatives are having minimal meetings and relying on Commission assistance to resolve their bargaining dispute. The parties have often been in the middle of bargaining meetings when I have convened s.448A conferences for previous PABOs. I am satisfied all parties will be able to meaningfully participate in the s.448A conferences in a short timeframe in the unique circumstances of this bargaining process.

[17] I reject the submission from Sydney Trains and NSW Trains that these applications are completely "standard" and "regular" and that the common minimum ballot period of 10 working days should be adopted for that reason. A complicated legal dispute has arisen between the CRUs, Sydney Trains and NSW Trains about the rights of employees to take protected industrial action following the issuing of a single interest employer authorisation. The parties have differing views about each other's conduct in relation to that dispute. However, protected action ballot processes are ultimately directed at providing employees with a democratic right to express their views about the taking of protected industrial action. Members of the CRUs have previously voted in support of taking protected industrial action. A technical issue has now arisen concerning whether a new vote of employees is required because the authorisation has been made. I consider it is appropriate to allow the relevant employees to express their democratic views as "expeditiously as practicable" in those circumstances and that a closing date of 16 December 2024 for each ballot meets that requirement.

[18] For these reasons, I determine the closing date for the ballots will be 16 December 2024.

Other matters

[19] The ballots are to be conducted by:

i. Matter B2024/1615: RTBU – TrueVote Pty Ltd.

ii. Matter B2024/1617: AMWU – Fair Vote Services Pty Ltd.

iii. Matter B2024/1622: CEPU – Vero Engagement and Voting Solutions Pty Ltd.

iv. Matter B2024/1623: ASU – Democratic Outcomes Pty Ltd.

v. Matter B2024/1624: APESMA – Fair Vote Services Pty Ltd.

vi. Matter B2024/1625: Ms Mullally – TrueVote Pty Ltd.

[20] I am satisfied the ballot agents have all been approved as an eligible protected action ballot agent under s.468A of the FW Act and consequently are authorised to conduct the ballots.[8]

[21] Orders were made in relation to each application on 10 December 2024. However, the orders issued in relation to the CRU's applications covered employees of Sydney Trains and NSW Trains. Given the orders are being issued in relation to a proposed multi-enterprise agreement, separate orders must be made for each employer.[9] The CRUs applied under s.448 of the FW Act to revoke the joint orders in the morning on 11 December 2024. I am required to revoke the orders given these applications.[10] The orders[11] issued on 10 December 2024 concerning the CRU's applications are revoked.

[22] After the CRUs applied to revoke the joint orders, Sydney Trains and NSW Trains wrote to my chambers and indicated the revocations mean that the CRUs need to make fresh applications. Sydney Trains and NSW Trains also raised the same arguments they had made before me at the hearing on 10 December 2024 in relation to the ballot period for any new applications.

[23] The process of revoking the joint orders and reissuing separate orders has arisen due a technical issue that was initially overlooked concerning the relatively new multi-enterprise bargaining stream. Sydney Trains and NSW Trains did not identify the technical issue, despite having ample opportunity to do so. I identified the issue and immediately raised it with the parties. A pragmatic solution was proposed and agreed to by the CRUs. Sydney Trains and NSW Trains waited until after the CRUs had sent email applications to revoke the joint orders to raise the argument that fresh applications were required. I consider the position taken by Sydney Trains and NSW Trains to be completely inconsistent with the requirements in s.577 of the FW Act for the Commission to perform its functions and exercise its powers in a manner that is quick, informal, and avoids unnecessary technicalities. The Commission is expressly not bound by the rules of evidence and procedure.[12] I heard Sydney Trains and NSW Trains regarding the ballot period and other issues on 10 December 2024. I do not consider Sydney Trains and NSW Trains have been denied procedural fairness in relation to the applications. The orders were clearly only revoked on the basis that separate orders would then be issued to resolve the technical issue. I reject the argument that the CRUs need to file fresh applications. That would be a purely technical step that will serve no purpose other than delaying the

determination of matters by the Commission that are clearly intended by the FW Act to be resolved quickly.

[24] If it was strictly necessary for the CRUs to make new applications, I would permit the CRUs to rely on the material filed in relation to the previous applications. I have heard the arguments from Sydney Trains and NSW Trains. I would decide to issue the same orders for the same reasons as recorded here.

[25] Orders separately covering employees of Sydney Trains and NSW Trains will be issued in relation to each application by the CRUs. No issue arose in relation to Ms Mullally because the order in her application only covered Sydney Trains.

[26] I have decided to list s.448A conferences in relation to each application for 4pm on 12 December 2024 via video. An order requiring attendance at the conferences will be separately issued to the bargaining representatives.

COMMISSIONER

Appearances

Mr Saunders of Counsel for the CRUs.

Ms Mullally representing herself.

Ms DeBoos for Sydney Trains and NSW Trains.

Hearing details:

2024.
Sydney (by video via Microsoft Teams).
10 December.

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[1] The abbreviation CRUs in the remainder of this decision does not include the AWU and CFMEU as they have not filed new PABO applications.

[2] PR782180.

[3] *Sydney Trains v Australian Rail, Tram and Bus Industry Union* [2024] FCA 1411.

[4] *Total Marine Services Pty Ltd v Maritime Union of Australia* (2009) 189 IR 407.

[5] *CEPU v Nilsen (NSW) Pty. Ltd.* [2023] FWCFB 134.

[6] Ibid at [54].

[7] See *CEPU v Metal Manufactures Pty Limited* and *CFMEU & AMWU v SIMPEC Pty Ltd* [2024] FWC 506.

[8] Eligible protected action ballot agents | Fair Work Commission.

[9] Section 437A of the FW Act.

[10] Section 448(2) of the FW Act.

[11] PR782282, PR782278, PR782284, PR782281, PR782285.

[12] Section 591 of the FW Act.