DECISION

Fair Work (Registered Organisations) Act 2009
s.137A RO Act - Orders about representation rights of organisations of employees

Elecnor Australia Pty Ltd

(C2023/6590)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER MCKINNON

MELBOURNE, 3 MAY 2024

Application under s 137A of the Fair Work (Registered Organisations) Act 2009 (Cth)

[1] The applicant, Elecnor Australia Pty Ltd, is the principal contractor on an infrastructure project called EnergyConnect (Project EnergyConnect). Project EnergyConnect is currently Australia's largest energy transmission project involving building a new 900km 330kV transmission line to connect the energy grids in New South Wales, Victoria and South Australia.

[2] By its amended application dated 20 November 2023, the applicant applies for orders under s 137A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act). The Australian Workers' Union (AWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) are both registered organisations under the RO Act and are affected by the orders sought. Relevantly, the orders sought are that:

> "(a) The AWU has the right, to the exclusion of the CEPU to represent the industrial interests of employees currently engaged, or who will be engaged in the future, to work in or in connection with the Construction of 'Project Energy Connect', other than licensed electricians.
>
> (b) That CEPU is not to have the right to represent employees currently engaged, or employees who will be engaged, to work in or in connection with the Construction of 'Project Energy Connect', other than licensed electricians.
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> For the purposes of this order, 'Construction' means surveying; clearing of vegetation; building access roads and tracks; excavation of footings for the transmission towers, monopoles and guy wire anchors; installation of reinforcing steel to ensure adequate tensile strength in the footings; placement of concrete to form the footings; assembly of lattice steel structures (at ground level and at height) and the monopoles which comprise the transmission towers; installation of insulators ; the stringing of conductors between the transmission towers ; installation of conductor spacers to maintain requisite

separation; and operation of mobile plant incidental to the foregoing activities prior to the energisation of the conductors by the asset owner."

[3] Assuming the CEPU has the right to represent the industrial interests of some of the employees (other than licensed electricians about which there is no dispute) engaged on Project EnergyConnect, the effect of the orders would be to displace the rights of any such employees to be represented by the CEPU and to displace the rights of the CEPU to represent these employees.

[4] On 23 November 2023, the CEPU applied for an order pursuant to s 587(1)(c) of the *Fair Work Act 2009* (Cth) (FW Act) that the applicant's amended application be dismissed on the ground that it has no reasonable prospect of success. The contention that the application has no reasonable prospect of success is underpinned by two independent pillars. *First*, the CEPU says there is no dispute as to the representation of employees of the applicant. It says to the extent there is a dispute about the representation of workers, the applicant is not the employer of the relevant workers. Accordingly, the applicant does not have standing to bring the application because it is not an employer of the employees in respect of whom the order is sought. *Second*, the CEPU contends the grounds for the application, taken at their highest, would be an insufficient basis for the making of an order under s 137A of the RO Act.

[5] The standing issue is to be resolved in part by the proper construction and application of s 137A of the RO Act. The principles of statutory construction are not in dispute. Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, whilst, at the same time, regard is had to its context and legislative purpose. Context includes the language of the RO Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.[1]

[6] Section 137A of the RO Act relevantly provides that the Commission may, on the application of an organisation, an employer or the Minister, make the following orders in relation to a dispute (including a threatened, impending or probable dispute) about the entitlement of an organisation of employees to represent, under the RO Act or the FW Act, the industrial interests of employees:

(a) an order that an organisation of employees is to have the right, to the exclusion of another organisation or other organisations, to represent under the RO Act or the FW Act the industrial interests of the employees in a particular workplace group who are eligible for membership of the organisation;

(b) an order that an organisation of employees is not to have the right to represent under the RO Act or the FW Act the industrial interests of the employees in a particular workplace group.

[7] Relevantly, "employer" has its ordinary meaning, and includes "a person who is usually such an employer" and "an unincorporated club".[2]

[8] "Workplace group" means a class or group of employees, all of whom perform work for the same employer or at the same premises or workplace, or for the same employer and at the same premises or workplace.[3]

[9] Section 137A of the RO Act is concerned with orders "in relation to" a dispute (including a threatened, impending or probable dispute) about the entitlement of an organisation of employees to represent, under the RO Act or the FW Act, the industrial interests of employees.

[10] The evident purpose of the provision is to enable the Commission to deal with disputes about representation of employee interests by making orders that have the effect of removing competition between employee organisations, taking into account a range of mandatory considerations directed to the history of representation, the wishes of affected employees, and the consequences of not making an order for any employer, employees or organisation concerned.

[11] A dispute about the entitlement of an organisation of employees to represent, under the RO Act or the FW Act, the industrial interests of employees may arise in several ways. For example, there may be a demarcation dispute[4] as between two employee organisations about representation rights. A dispute may arise when a right of entry permit holder under Part 3-4 of the FW Act asserts a right of entry to a workplace because the employee organisation of which the permit holder is an official purports to be entitled to represent the industrial interests of one or more employees at the workplace to which entry is sought.[5]

[12] Section 137A(1) of the RO Act provides that orders may be made, *inter alia*, on the application of "an employer". The CEPU contends that, although the section does not in terms state that the relevant employer must be the employer of employees in the relevant workplace group so that any employer has standing to bring an application, such a reading would confer standing by reference to an arbitrary criterion. It says such a reading of the provision is not correct. It contends that, when read in that context, there is no rational justification for an approach whereby standing attaches to a criterion unconnected to the mischief which may be remedied by s 137A orders. It says that standing is not pegged to the mere fact of employment of workers. With that we can agree. But it does not follow that the applicant does not have standing.

[13] Orders that might be made under s 137A(1) of the RO Act are concerned with representational rights of employees in a particular "workplace group". As earlier noted, a workplace group may be constituted by a class or group of employees all of whom perform work at the same premises or workplace. Plainly, such a workplace group may include employees of several different employers. It may also include employees about whom there is no dispute that an employee organisation does not have the right to represent their industrial interests.

[14] Understood in this context it seems to us that an employer with employees in a "workplace group" has standing to apply for orders in relation to a dispute about the entitlement of an organisation of employees to represent, under the RO Act or the FW Act, the industrial interests of employees in the workplace group. The employer need not be the

employer of employees about whom the dispute is concerned. It is enough that the employer is an employer of one or more employees in the workplace group concerned.

[15] Plainly, a jurisdictional prerequisite for the making of an order under s 137A of the RO Act is that there be an actual, threatened, impending or probable dispute about the entitlement of an organisation of employees to represent, under the RO Act or the FW Act, the industrial interests of employees. A dispute about the CEPU's entitlement to represent, under the RO Act or the FW Act, the industrial interests of employees appears to have emerged when CEPU officials gave the applicant, in its capacity as occupier of Project EnergyConnect, numerous right of entry notices in the period between May and August 2023. Specifically, there appears to be a dispute about the CEPU's entitlement to represent a class of employee described as "linesmen". Briefly, the CEPU's rules permit it to enrol as members a category of worker described as "linesmen" but the applicant contends that the classification or description of a "linesman" takes its meaning from the industry in which the person is employed. The applicant says for a linesman to be eligible for membership of the CEPU, the linesman must be "peculiar to the electrical industry". It maintains that persons engaged as linesmen on the Project EnergyConnect in its construction phase are not peculiar to the electrical industry.

[16] The applicant currently employs a number of employees on Project EnergyConnect and began employing staff members there on 4 July 2023.[6] We accept the applicant has employees directly employed on Project EnergyConnect. There may be an issue about whether the whole of Project EnergyConnect can properly be described as a workplace group. It is not likely apt to describe the whole of Project EnergyConnect as a premises and so we are left with "workplace".

[17] The evidence filed by the applicant shows that the work on Project EnergyConnect covers a number of locations over a wide area. The term "workplace group" as defined in s 6 of the RO Act may not be apt to capture all of the employees engaged on such work in that they may not be performing work "at the same premises or workplace". The applicant has not described the workplace group or groups in respect of which it is seeking orders other than by reference to the whole Project EnergyConnect infrastructure project. Whether the applicant can rely on Project EnergyConnect as falling within the definition of "workplace group" is not, contrary to the CEPU's contention, a matter that affects standing now. It is a matter that may affect the capacity to make an order or the form of order that might ultimately be made. Although the applicant seeks orders for the whole of Project EnergyConnect, if it ultimately succeeds in its application, it may be that several orders are necessary such that various workplace groups within the Project EnergyConnect are the object of the orders. As s 599 of the FW Act makes clear, the Commission "is not required to make a decision in relation to an application in the terms applied for".

[18] For present purposes, it is enough that the applicant identified Project EnergyConnect as the relevant workplace group in relation to which it seeks orders and has shown that it has employees employed in the workplace group it identified. It is an employer. Whether it succeeds in persuading us that Project EnergyConnect as a whole is a workplace group is a matter for final hearing. We do not accept that the dispute about representation rights must concern the representation of the applicant's employees. The applicant has employees who are in the workplace group it has identified, and it wants orders in relation to a dispute about the entitlement to represent some employees, who are not the applicant's employees, but who are

members of the workplace group identified. In this respect, the applicant is an employer concerned in the dispute. Had a more narrow standing requirement been intended, s 137A(1) of the RO Act might readily have provided that the Commission may "on application by . . . an employer . . . make the following orders in relation to a dispute (including a threatened, impending or probable dispute) between the employer and an organisation of employees about the entitlement of the organisation to represent, under the [RO Act] or the [FW Act], the industrial interests of employees of the employer . . .".

[19] We are therefore satisfied the applicant has standing to bring the application.

[20] Turning then to the second basis, the CEPUU contends the application has no reasonable prospect of success. As we earlier observed, the CEPU contends that the stated grounds for the application, taken at their highest, would be an insufficient basis for the making of an order under s 137A of the RO Act.

[21] In *Spencer v The Commonwealth of Australia*,[7] the majority (Hayne, Crennan, Kiefel and Bell JJ) of the High Court of Australia considered the phrase, "no reasonable prospect," in the context of s 31A of the *Federal Court of Australia Act 1976* (Cth). That section relevantly provides:

> "(1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is prosecuting the proceeding or that part of the proceeding; and
>
> (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding."

[22] In that case, their Honours said:

> "In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like "clearly", "manifestly" or "obviously") as "frivolous", "untenable", "groundless" or "faulty". But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by s 31A. Nor can the content of the word "reasonable", in the phrase "no reasonable prospect", be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a "frivolous", "untenable", "groundless" or "faulty" claim.
>
> Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect" of success. Of course, it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly. But the elucidation of what amounts to "no reasonable prospect" can best proceed in the same way as content has been given, through a succession of decided cases, to other generally expressed statutory phrases, such as the phrase "just and equitable" when it is used to identify a ground for winding up a company. At this point in the development of the understanding of the expression and its application, it is sufficient, but important, to emphasise that the evident legislative purpose revealed by the text of the provision will be defeated if its application

is read as confined to cases of a kind which fell within earlier, different, procedural regimes."[8]

[23] The observations in *Spencer* are apt to apply to the exercise of power under s 587(1)(c) of the FW Act.

[24] As part of the case the applicant wants to advance in support of the orders it seeks, it will contend, *inter alia*, that CEPU's conduct in their attempt to represent employees of the workplace group has been inimical to good industrial practices necessary in a project of the nature and importance of Project EnergyConnect. It will seek to establish that the CEPU's conduct has caused or resulted in:

- the issue of an extraordinary number of right of entry permits causing lost time to employees required to deal with CEPU seeking access;
- an administrative burden of dealing with the right of entry permits;
- confrontation with employees and workers when refusing to cooperate with safety procedures such as inductions and breath test for sobriety;
- improper entry to the PEC site by farmers' gates rather than going through appropriate entry points;
- interference with construction workers demanding that they stop work on the grounds of serious safety issues, at the same time causing safety hazards for about an hour by leaving a crane driver stranded in his cabin while the crane was under load;
- improperly taking safety forms from workers;
- improper demands that work sites be shut down for purported safety reasons;
- confrontations with employees over the exercise of right of entry by its conduct on 27 and 29 November 2023;
- lost wages of $200,000. This estimate of costs does not include the cost of subcontractors who were stopped from working;
- the cost of payment to subcontractors who were stopped from working on those days;
- the loss of productivity arising as a result of the stoppages on 27 to 29 November requiring works to be performed on the following days, impacting the momentum of the job;
- the need to carry out an investigation into the effects on employees of CEPU's conduct in November resulting in the drafting of a behavioural code of conduct for all visitors to the site, including those exercising statutory rights of entry;
- interference in the safety of the operation on 27 November by limiting the access of paramedics to other sites if required;

- an increased risk to employee welfare, work health and safety increasing the risk of employee turnover and related costs as a result of employees being bullied or harassed at work; and
- public interest issues arising from the manufacture of disputes by CEPU involved with the potential delay of National and State critical infrastructure.[9]

[25] The applicant will also seek to establish that CEPU's conduct constitutes guerilla tactics designed to cause delay and damage to Project EnergyConnect in an effort by CEPU to secure representational rights which it does not "legally" have by means of bullying and coercion.[10]

[26] To this, the CEPU says:

- its exercise of statutory rights, including statutory rights of entry, is unlikely to ever form a proper basis for the grant of an order under s 137A of the RO Act– even more so where the FW Act provides a specific and far less drastic mechanism of resolution of disputes regarding frequency of entry and similar matters;
- certain matters on which the applicant relies are consequently irrelevant or marginally relevant;
- the mere fact that CEPU may have enrolled persons not eligible to be its members does not justify orders of the kind sought in this case. Although seriously disruptive demarcation disputes associated with conduct of that kind may provide a basis for making orders under s 137A, it has not been suggested that there has been any demarcation dispute in this case and still less any associated disruption;
- the fact that the CEPU has expressed a desire to unionise the renewable energy sector is irrelevant;
- the applicant does not contend that the CEPU's representation of employees of the applicant's subcontractors has caused delays to Project EnergyConnect;
- to simply assert that its representation could conceivably cause delays, and that such delays would be harmful to the applicant or the community, takes the matter nowhere;
- orders of the kind sought are not apt to be made based on hypothetical concerns.

[27] It seems to us that the applicant is contending that the CEPU officials exercising entry rights have misconducted themselves and are, or have been, abusing their right of entry powers. We accept that a "strong case" would be needed to justify the making of an order under s 137A of the RO Act. As the Full Bench in *Australian Manufacturing Workers' Union v ResMed Limited; ResMed Limited v Australian Manufacturing Workers' Union*[11] observed:

> ". . . The FW Act and the RO Act establish and protect the right of employees to join or not join organisations of which they are eligible to be members. Sections 346, 347 and 348 of the FW Act in particular entrench this right by establishing significant protections against adverse action. It would be a serious matter, by the making of an order under s.137A, to deprive an employee of the right to be represented by an organisation which he or she is eligible to join. That is particularly the case here where the evidence demonstrates that, for the overwhelming majority of employees, the AMWU has been the only union which has endeavoured to provide them with industrial representation if they desire it. In short, the AMWU is really the only union in the field."[12]

[28] Although some of the issues the applicant seeks to agitate in support of its application may appear weak, it is at least arguable that certain types of disentitling conduct it wishes to prove may, if proven and depending on the circumstances, justify the making of an order under s 137A of the RO Act. Again, by reference to *ResMed*, such disentitling conduct may include "disruptive demarcation disputes, repeated engagement in unlawful industrial action, systematic abuse of rights of entry and other repeated instances of unlawful conduct which cause significant damage to the legitimate interests of the employer and/or employees".[13]

[29] In these circumstances, while aspects of the applicant's case to be advanced might be weak, that does not mean the application has no reasonable prospects. The test for dismissal under s 587(1)(c) of the FW Act is not whether an application will succeed, rather, the question is whether it has no reasonable prospect of doing so. If the applicant succeeds in showing systematic abuse of rights of entry or other repeated instances of unlawful conduct which cause significant damage to its legitimate interests or that of its or other employees in the workplace group, then the application or part of it might succeed. The application cannot be said to have no reasonable prospect of success for the reasons stated.

Order

[30] We order that the application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia made on 23 November 2023, for an order pursuant to s 587(1)(c) of FW Act is dismissed.

Directions

[31] We direct:

1. The applicant, CEPU and AWU (together "the parties") are to confer and attempt to agree on a timetable for the filing of such further material as is necessary to ready the application for hearing.
2. By Friday, 10 May 2024, the parties are to file in the Chambers of the presiding Member:
   a. agreed draft directions necessary to prepare the application for hearing; or
   b. if the parties are unable to agree, then each party's proposal for directions and serve a copy on the other parties.

DEPUTY PRESIDENT

Appearances:
KG Bennett and *T Robertson* of counsel for Elecnor Australia Pty Ltd
S Doumit and *T Callinan* for the AWU
W Friend KC and *O Fagir* of counsel for the CEPU

Hearing details:
Sydney
2024
3 April

Written submissions:
CEPU, 21 December 2023 and 8 April 2024
Elecnor Australia Pty Ltd, 11 March 2024 and 8 April 2024
AWU, 22 March 2024

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[1] See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [2017] HCA 34 at [14] (per Kiefel CJ, Nettle and Gordon JJ) and at [37]-[39] (per Gageler J); see also s 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of an enactment is to be preferred to one that would not promote that purpose or object

[2] *Fair Work (Registered Organisations) Act 2009* (Cth), s 6

[3] Ibid

[4] See definition in *Fair Work (Registered Organisations) Act 2009* (Cth), s 6

[5] See *Fair Work Act 2009* (Cth), ss 481 and 484

[6] Court book (CB) 1715

[7] (2010) 241 CLR 118, [2010] HCA 28

[8] Ibid at [59]-[60]

[9] CB30-CB31

[10] CB31

[11] [2016] FWCFB 22 at [161]

[12] Ibid

[13] Ibid at [162]